Holistic tax and estate planning: a guide for 2026

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The intergenerational wealth transfer in Australia, fuelled by the disproportionate quantum of community capital controlled by "baby boomers", makes holistic tax and estate planning a compulsory discipline for most advisers. To facilitate holistic tax and estate planning solutions, advisers must develop heuristics that proactively identify upper order revenue-related consequences. Additionally, an embracing of the estate planner's "Pareto principle" – that is, understanding that often less than 20% of someone's wealth is regulated by their will – is near compulsory. As the new calendar year approaches, it is timely to again explore key strategies utilised in the holistic tax and estate planning arena over the last 12 months, and to identify risks that all advisers should be aware of.

Introduction

Considering ongoing changes to the taxation regime and the expanding wealth of Australia's ageing baby boomer population, there has for many years been a growing need for holistic estate planning to consider appropriate tax and revenue-related structuring.

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

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

Twelve months on, this article examines the following tax structuring and holistic estate planning-related developments sourced from 2025 (with a particular focus on trust-related issues, and highlighting some important hazards that advisers should actively seek to avoid) as the foundation for the year ahead in 2026, namely:

- trust-to-trust distributions;
- avoiding a trust vesting (for tax reasons);
- failed trust distributions; and
- joint tenancy asset ownership.

Trust-to-trust distributions

Generally, when trust-to-trust distributions are made, the vesting date of both trusts should be considered. Where the recipient has a vesting date which is later than the distributing trust, the risk that the rule against perpetuities is breached is a relevant issue.

Generally, the case of *Nemesis Australia Pty Ltd v FCT*[2] is cited as confirmation that the "wait and see" rule[3] can be relied on in a situation where a trust distributes to another trust with a later perpetuity date, provided the original trust was established after the enabling legislation in the relevant jurisdiction was passed.

This nuance means (perhaps counterintuitively) that older deeds may not be able to rely on the wait and see rule, as confirmed in the decision of *Domazet v Jure Investments Pty Ltd*.[4] In this case, the court observed that the wait and see concession (and other advantages created by the parliament) only applied to trusts established after the commencement date of the legislation.

The rule against perpetuities is generally accepted to have been first developed in the *Duke of Norfolk's* case,[5] with the key driver arguably being a desire to ensure the free alienability of land holdings.

The rule against perpetuities is said to perform a "useful social function" by limiting the power of members of generations past from tying up property in such a form as to prevent it from being freely disposed of in the present or the future (that is, avoiding "control by dead hands").

A further related argument is that the rule against perpetuities helps to avoid an undue concentration of wealth in the hands of a few by forcing transfers out of historical trust structures (often inevitably leading to payment of, sometimes material, government transaction costs (eg tax and stamp duty) and the division of wealth across multiple beneficiaries).

Certainly, in modern Australia, the revenue costs triggered by trust vesting and the inability to transfer the assets of a trust directly to another trust in a manner that exceeds the perpetuity period of the originating trust occupy an ever-increasing amount of adviser attention, as highlighted by the analysis later in this article (in relation to the attempts to avoid premature trust vesting).

As set out in *Air Jamaica Ltd v Charlton*:[6]

> "29. … no interest is valid unless it must vest, if it vest at all, within a period of a life in being the date of the gift plus 21 years. The Rule is applied remorselessly. A gift is defeated if by any possibility, however remote, it may vest outside the perpetuity period. It is not saved by the fact that, in the event, it vests inside the period …
>
> 30. The Rule against Perpetuities also applies to the administrative trusts and powers of the trustees. Such powers must not be capable of being exercised outside

> the perpetuity period, and they may be void even if all the trusts to which they are attached are valid. Where, therefore, there is a trust for A for life with remainder to his widow for life, and the trustees are given a power to sell or lease land comprised in the settlement, the power is void ab initio because it is capable of being exercised at any time during the widow's life, and she may survive A by more than 21 years …"

The wait and see rule is designed to enable a court to look at what actually occurs before the expiry of the perpetuity period, and the circumstances as they have unfolded, in order to determine whether there has been a vesting within the perpetuity period. If, in fact, the interest is vested prior to the expiry of the perpetuity period, notwithstanding that a longer period is provided for in the trust deed, the trust may be valid. The trust would then not infringe the rule against perpetuities.

The legislative-crafted wait and see rule was introduced to remedy what was seen as a deficiency in the common law rule, namely, that the common law was concerned with possible or hypothetical, and not actual, events. That is, at common law, where a disposition might be void on the basis that it might not become vested until too remote a time, it would be void at the moment of the initial distribution.

> "… the trustee of the distributing trust must ensure that the approach is in fact permissible …"

The legislative version of the wait and see rule means, however, that the disposition must be treated as valid until such time as it is actually established that the vesting will in fact occur after the end of the perpetuity period. That is, the wait and see rule means the initial distribution will not be void when made, and will not become void until such time as there is a failure to distribute out of the recipient trust before the vesting date of the original distributing trust.

Importantly, however, the ability to rely on the wait and see rule is also subject to the often referenced mantra "read the deed". That is, the trustee of the distributing trust must ensure that the approach is in fact permissible in accordance with the terms of the trust instrument.

That said, another common strategy to manage the issues in this area is for the original trust to distribute to a corporate beneficiary (owned by the second trust), rather than distributing directly to the second trust. This approach ensures that the rule against perpetuities is not triggered, as the distribution results in an immediate vesting of the distributed amount (in the company). In essence, the 80-year perpetuity period (or longer, if the shareholding trust of the recipient company is a South Australian trust[7] or a Queensland trust[8]) starts again as at the date of the distribution.

This can be contrasted with a distribution made to another trust, where the amount does not vest in any ultimate beneficial owner until a further distribution is made by the second trust.

Avoiding a trust vesting (for tax reasons)

Many recent cases have explored various aspects of the ability of trustees of trusts, with vesting dates earlier than the perpetuity period available by law, to apply to a court for an extension. For example, in *Re Gengoult-Smith Family Trust*,[9] an impending (in less than 10 days) vesting was accepted by the court as likely to incur a CGT liability of up to $10 million.

The relevant trust deed had a variation clause that did not extend to the clauses setting out the perpetuity period. In granting an extension of the vesting date from the original 50 years to 80 years, the court confirmed that the fact that there were infant and unborn children helped support the application because there would then be a longer period of time by which those people could become a beneficiary.

The court held that the purpose of the trust, the settlor's intention and the attitude of other beneficiaries led inexorably to the conclusion that the proposed extension of the vesting date was a proper and fair one.

The trust deed recorded the settlor's intention "to make provision herein for the children of" certain named beneficiaries, whose interests would have been detrimentally affected by the extension.

Critically, and decisively, those adversely affected beneficiaries had each consented to the proposed arrangement.

Thus, the deferral of those revenue-related implications was held to be of clear benefit to both the present and potential future beneficiaries of the trust, as well as fair and proper overall.

Arguably, the starkest example of the need for trust advisers to embrace the foundational heuristic (ie read the deed) is where a trust instrument contains no, or an inadequate, power to vary. The issues in this regard are particularly stark as the trustee of a discretionary trust cannot amend or vary a trust deed, unless expressly permitted by the terms of the deed (or legislation).[10]

Helpfully, there have been numerous cases in recent years confirming the framework for what is often the only potential remedy, that is, a court application.

Unhelpfully, not only does the solution require court approval (with all of the second order consequences, including costs, time investment and publicity — see, as one high-profile example, the 2024 case instigated by Rupert Murdoch[11]), there is also the threshold holistic estate planning heuristic that the answer as to whether any application will be successful is, "it depends". For example, in *Re Evangelista Family Trust*,[12] the relevant trust deed was established in 1975, and had a 50-year vesting date. While the deed granted the trustee an unfettered discretion to

vary the trusts, that power was subject to the restriction, "except to the extent of the vesting date".

The parties had confirmed that an immediate vesting would trigger very substantial CGT and duty implications.

The court, in granting the extension, confirmed that it was a well-established proposition that an extension may have the potential effect of deferring revenue consequences to a later date. The court noted that such deferral does not ultimately deprive proper authorities of revenue; rather, it merely defers the costs to another date, subject to the laws that exist at the time.[13]

Interestingly, the court specifically acknowledged the (at the time) proposed amendments to the *Property Law Act 1974* (Qld). These changes were not due to commence until after the existing vesting date of the trust, but otherwise, only a few months after the application, would have permitted as extension of the perpetuity period to 125 years. This point was held to be a relevant consideration only to the extent that it provided the court with some comfort that there was nothing unusual about it granting the perpetuity date of 80 years in this case.

The decision in *Re EM McPherson Settlement*[14] provides further lessons in all of the key areas.

In relation to a trust deed from 1972, the application involved four key requests, as set out below, including a brief summary of the approach adopted by the court:

1. **an extension of the vesting date:** the court approved the extension of the vesting date to 80 years from the date of the original deed. This decision was based on the benefits of allowing more time for potential beneficiaries to be born and benefit from the trust, as well as deferring CGT liabilities;
2. **broadening the range of potential beneficiaries:** the court approved the amendment to include companies and trusts in which beneficiaries had an interest, subject to certain qualifications;
3. **managing various other tax issues:** in addition to flagging the deferral of CGT by granting an extension to the perpetuity period, the court endorsed changes that would allow distributions to entities with tax losses, the creation of sub-trusts (designed to avoid adverse tax consequences under Div 7A of the *Income Tax Assessment Act 1936* (Cth), which can deem unpaid distributions to corporate beneficiaries to be dividends), general income streaming powers, and give the trustee power to choose the method for determining the "net income" and the "income" of the trust (ie to address the impact following the decision in *Federal FCT v Bamford*[15]); and
4. **a general power of amendment:** the court rejected the request for introducing a general power of amendment, primarily as it was unable to be satisfied that all future amendments would in fact benefit minor and unborn beneficiaries (a key mischief that the court needs to be satisfied about before granting any variation, and thus in turn effectively mandating that any future desired changes to the trust deed will require further court applications).

In a comprehensive decision that numbers over 215 paragraphs, a summary of some of the other noteworthy elements that advisers should be aware of include each of the points set out below.

The trust, with assets at the date of the hearing in excess of $20 million (which included shares owned in a family investment company which, at the date of the application, was not in fact a beneficiary of the trust), would have vested by 30 June 2030, but for the successful application.

Given the revenue-driven nature of a number of the proposed changes, notice of the court application was issued to both the Federal Commissioner of Taxation and the Commissioner of State Revenue, with a request that they advise whether they sought to be joined — both Commissioners declined.

However, before granting an extension to the vesting date of a trust, the court must be confident that it is appropriate, having regard to whether it is for the benefit of the beneficiaries, and fair and proper, and what form the amendment providing for the extension should take — the issues in addressing these two factors can be complex, and certainly were in this case (occupying some 60 paragraphs of the judgment).

The mere fact that extending a vesting date has a purpose of obtaining a tax advantage should not see the court decline to exercise its power, if it is otherwise appropriate to do so.[16]

Similarly, broadening the class of potential beneficiaries can be justified by reasons such as using a corporate beneficiary (or a "bucket company") to cap tax at the company tax rate, distributing to related trusts with carry forward income tax losses, and minimising the accumulation of assets in personal names which would be available for division among creditors, in the event of bankruptcy.

Before extending the class of potential beneficiaries, however, the court needs to consider the intention of the settlor[17] and whether adding beneficiaries destroys the substratum of the trust or would constitute a resettlement.[18]

Ultimately, it is likely that a court can approve arrangements which have no identified purpose other than for tax-related objectives, assuming it is satisfied that the arrangement is for the benefit of all beneficiaries, including those who cannot consent[19] (that is, "the court is not a watch-dog for the Inland Revenue"[20]), particularly where the revenue authorities are informed of the application and choose not to intervene (as was the case here).

Furthermore, the financial advantage to certain beneficiaries from a more tax-effective allocation of trust income was held to also flow, to some degree, to the broader family, at least indirectly. While the extent to which that would occur was uncertain, it was still appropriately regarded as a "benefit" to all relevant beneficiaries, although this conclusion was subject to altering the initially proposed definition of "beneficiaries" to require a closer

relationship between the family member beneficiaries and the corporate beneficiaries.

That is, instead of a definition of "any company in which any beneficiary has any interest", an alternative definition of "beneficiary" was appropriate, relevantly, "private companies in which a beneficiary has a controlling interest".

Finally, at least in Victoria (and jurisdictions with similarly drafted enabling legislation, where the court must be satisfied that granting a general power of variation will for evermore be for the benefit of the beneficiaries who are unable to consent for themselves), it is very difficult to reach that state of satisfaction "when the court does not have the detail of all the variations that the trustee will make, once given the general power of variation".[21]

Failed trust distributions

The decision in the case of *Benaroon Pty Ltd v Larmar*[22] provides one of the leading examples of the issues that can arise from a failure to embrace what should arguably be the mantra of every trust adviser — and mentioned twice already in this article, that is, to "read the deed".

Here, in summary:

- the (assumed) "standard" discretionary trust deed was created in 1977;
- for over 40 years, distributions had been made to Mr Larmar (the person responsible for requesting that the trust be established[23]) and his wife at the time of establishment of the trust and a subsequent wife (following divorce from the first wife);
- the trust deed, however, did not include in the range of potential beneficiaries Mr Larmar, nor either wife;
- it was accepted that, in the absence of rectification of the trust deed to add Mr Larmar as a beneficiary, any distribution to him (and his former wife and current wife) will have been made without authority; and
- the requested rectification was opposed by Mr Larmar's current wife (Margaret Larmar), in relation to whom the ATO took the view, after an audit, that she would be entitled to a tax refund if not a beneficiary of the trust, but would have a tax liability of nearly $8 million if she was a beneficiary.

In denying the rectification application, the court confirmed the following key points.

As was confirmed in the case of *Public Trustee v Smith*,[24] the key test for rectification, is that:

> "… there must be *clear and convincing evidence* that at the time the trust deed was executed the trustee and the settlor had an actual intention as to the effect which the deed was intended to create which was different from the effect which the instrument did have in a clearly identified way. It must be *demonstrated with clarity* that the parties had *a sufficiently precise intention* that the court can determine both the substance and the detail of the precise variation to be made to the wording of the instrument."

Here, the available evidence was uncertain in many respects and could not be described as either clear or convincing.

The evidence submitted by the trustee to the court about trust distributions that were made to Mr and Mrs Larmar (in breach of the terms of the trust deed) did not help to provide clear and convincing proof of the form which the trust deed was intended to take — indeed, these distributions only added to uncertainty about what the original intentions were.

Ultimately, the function of a court rectification is to reform a trust instrument so that it accords with the relevant intention, not to redraft it into a form that it might have taken had the parties thought more about it at the time it was executed.

While it was not expressly stated, and admittedly a rather obvious observation with hindsight, the question must also be asked: why were distributions being made for around 40 years, apparently without any reference to the definition of beneficiaries under the trust instrument?

As a further point of reference, the decision in *Doma ACT Pty Ltd v LN Sydney Pty Ltd*[25] is instructive. The case involved entities controlled by the Domazet family (a group featured earlier in this article, in relation to trust-to-trust distributions).

The document in question was a June 30 trust distribution resolution that, on its face, distributed $10 million to another trust (which would have caused tax at the top marginal rate), as opposed to a corporate beneficiary (or bucket company) that would have limited the tax to the corporate rate.

The court accepted that the error appeared to have occurred due to data entry limitations in computer technology which confined the number of characters for company names, although the physical funds were distributed to who the parties argued was the intended recipient.

The ATO was given the chance to appear before the court and confirmed that it would give effect to any orders the court made.

The court, on drawing together the subjective intentions (or the states of mind) of the directors, the advice given by the internal accountants, the explanation given by the external accountant and adviser, and the contemporaneous business records setting out what was to occur and what did occur, allowed the rectification, given its view that there was clear and convincing proof of the intended outcome.

In reaching the above conclusion, the court specifically made the points set out below.

The availability of relief in rectification depends on "disconformity between the form or effect of the document executed and the intention of the parties or party who executed it".[26]

The simplest kind of case in which rectification is appropriate is where a provision that was intended to be included in a document is inadvertently omitted, where an

unintended provision is included, or where a provision is inadvertently mis-expressed.[27]

The rectified instrument takes effect in its rectified form retrospectively, from the date at which the document was executed (as opposed to the date the order is made),[28] which is significant because of third parties who may be affected by the consequences at a particular point in time (such as the ATO).

The "usual type" of mistake capable of rectification involves incorrectly recording the intention of the maker of a document. Such a mistake may be rectified by inserting words or deleting words, or substituting different words because the words that are there have the wrong meaning.[29]

All of these principles also assume that basic compliance issues have been met, such as ensuring that a distribution resolution is signed and dated by the time required under the trust deed, or by 30 June, whichever is the earlier. The courts have been blunt in their dismissing of attempts to circumvent this requirement, including accepting metadata evidence about the date that a purported resolution was created to prove that it must have been backdated.[30]

The decision in *Re Estate of Stagliano*[31] provides a further stark example across two further key trust distribution compliance-related areas.

The court needed to consider whether an intended "beneficiary" was in fact a valid recipient of an attempted distribution. In particular, in this case, there was an attempted distribution to a deceased estate of a deceased beneficiary.

The trust deed included a beneficiary class as follows:

> "75 … 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 a shorter vesting date — a restriction often not included in specialist trust deeds so as to ensure that the benefits under the wait and see rule can be accessed (as explored earlier in this article).

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

In concluding that the purported distribution failed, the court made a number of observations, as set out below.

As an initial point, the court confirmed that a deceased estate was not a "trust" within the meaning of the trust deed, nor in any relevant sense under general law.

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.

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 *In the Estate of Constantinou*[32] as follows:

> "[33] 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.
>
> [34] 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.
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> [35] 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.
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> [36] [Where an] estate is still under administration, [and] 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."

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. Thus, prior to the administration of the deceased estate, there is no specific property capable of constituting the subject property of any trust in favour of a beneficiary.[33]

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.[34]

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 summarised principles were relevant.[35]

As a threshold issue, 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.

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.

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.

Generally, the 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.

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.

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.

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.

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).

Joint tenancy asset ownership

As is generally well understood by specialist advisers, assets that are owned as a joint tenancy (as opposed to tenants in common) pass automatically to surviving owners on the death of a joint tenant.

However, for CGT purposes, joint tenancy assets are deemed to be owned as tenants in common, in equal shares.[36] This means that the conversion from one ownership mode to the other has no tax consequences. It also means that the death of a joint tenant owner will cause a tax event.

As explored in an earlier article in this journal,[37] critically, from an estate planning perspective, even where title records indicate that an asset is owned as joint tenants, if it is a partnership asset, it will be deemed to be effectively owned as tenants in common. If this deeming rule applies, the death of a partner essentially causes the value of their interest to pass under their estate plan, and not automatically by survivorship (as is the case generally with assets owned as joint tenants) to the other owners.

Historically, the generally accepted position has been that it is not possible that a chose in action, such as shares, can be held as tenants in common at law.[38]

From an estate planning perspective, this means that many specialist advisers include a provision in wills along the following lines:

> "I direct that any gift of shares by this will is to be gifted on the basis that each recipient is to receive a discrete whole number of shares in their sole name (or if the recipient is two or more people, then as joint tenants)."

The decision in *De Lorenzo v De Lorenzo*[39] provides some further insight into the rules in this area. Relevantly, in this case, a will provided as follows:

> "5. … I GIVE AND BEQUEATH to my [three] children … as tenants in common in equal shares all shares in the companies [X, Y and Z] registered in my name at the date of my death AND I DECLARE if in the division of such shares in accordance with the terms of this Clause 9 of this my will the shares are not divisible by three (3) my daughter … is to receive more of such shares than my said sons so as to achieve the intent of this Clause."

The key question before the court was what should be done where the number of shares on issue were two, and were therefore not divisible by three.

The court confirmed a number of key principles, as set out below.

Tenants in common is a concept well known to the law which has an accepted meaning. It is a form of co-ownership where each owner has a distinct but undivided share in the whole, in common with the others. It is not individual ownership of split-up parts.[40]

Although it was an issue not needed to be determined to resolve this case, it was confirmed that the proposition that a chose in action cannot be held by tenants in common is not universally true, particularly when the authorities were written centuries before the rise of the joint stock company. That is, the court confirmed that there is no reason to think that universal statements about choses in action continue to apply to Australian shares, many aspects of which have changed by later legislation.

For example, the court said that it was at least arguable that the effect of the *Corporations Act 2001* (Cth) (which defines the nature of shares as personal property) is to enable the legal title to shares to be held in co-ownership, either as joint tenants or tenants in common.[41]

Where, as in this case, there is ambiguity with a clause in a will, the court can impute wording so that it best accords with the effect which the willmaker is taken to have intended.[42]

In this case, the clear intention of the willmaker could be achieved by the three children (as executors) holding the shares on trust for themselves as tenants in common in equal shares.[43] This equitable remedy meant that it was unnecessary for the court to decide whether the legal title to shares held by co-owners must be held by them as joint tenants, or whether the legal title to the shares can be held as tenants in common.

Furthermore, although partition of property held by tenants in common was not an available remedy at common law, statute has long-provided the remedy of partition, that is, the division of property held in co-ownership (other than chattels) by court order. In this case, s 66G(1) of the *Conveyancing Act 1919* (NSW) was relevant as the court could use that section to order the co-owners to vote in favour of a share split of the ordinary shares on issue.[44]

Practically, the case highlights the importance of a holistic approach to estate planning and ensuring (for example) that the number of shares on issue in a company are divisible by whole numbers. 120 shares on issue is a popular choice, given it is divisible by multiple numbers, including 2, 3, 4, 5, 6, 8, 10 and 12.

A related issue is that, generally, share splits (if permitted by the company constitution) are significantly preferrable to share allotments, as splitting (unlike allotment) should not have any adverse revenue consequences.

An iteration on the issues here can come up in the estate planning context where, for example, a couple own shares in a private company as joint tenants and there is a desire to "sever" the joint ownership to ensure that each spouse owns a whole number of shares.

As noted above, all capital assets, including shares, are deemed to be owned as tenants in common (even if at law they are owned as joint tenants). This means that each spouse is deemed to own a 50% interest in each share.[45] However, as noted, if shares cannot be owned as tenants in common, to achieve the desired outcome, it would be necessary to transfer a discrete number of shares by the couple jointly to each of them individually.

Therefore, while changing from joint tenants to tenants in common is not a CGT event, if the holding of each share is changed from joint to only one of the two previous owners, a CGT event will be triggered for every half-interest in every share.

Interestingly, however, the ATO is on public record as stating that:[46]

> "Shares can also be owned in unequal proportions. You have to be able to demonstrate this (for example, with a record of the amount contributed by each party to the cost of acquiring the shares). Dividend income and franking credits are assessable in the same proportion as the shares are owned."

While this ATO statement does not expressly confirm that share ownership in a company can be as tenants in common, arguably, this conclusion is implicit as ownership as joint tenants can never be proportionate.

Conclusion

In the 2026 version of estate planning, advisers will expose their clients (and themselves) to risk unless a holistic approach is embraced, particularly around the interplay of legislation relating to tax, trusts and jointly owned assets. To coin a phrase mentioned in previous articles that remains critical in every holistic tax and estate planning situation, "estate planning always needs to be more than a will".[47]

Furthermore, as has been the case in each of the last few years, in 2026, there are fundamental reasons why specialist tax and structuring advice will remain critical components of any holistic estate planning exercise — with any will merely being one part of a much broader landscape.

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References

1 M Burgess, "Tax and estate planning in 2025: strategies and risks", (2024) 59(5) *Taxation in Australia* 214.

2 [2005] FCA 1273.

3 Enshrined by statue in each Australian jurisdiction. See, for example, historically s 210 of the *Property Law Act 1974* (Qld), replaced by s 203 of the *Property Law Act 2023* (Qld) (with a commencement date of 1 August 2025).

4 [2016] ACTSC 33.

5 *Howard v Duke of Norfolk* (1682) 3 Ch Cas 1.

6 [1999] 1 WLR 1399.

7 South Australian regulated trusts potentially have an unlimited perpetuity period pursuant to the abolition of the concept in South Australia under s 61 of the *Law of Property Act 1936* (SA). However, note s 62 which gives the court, if requested, the power to order a trust to vest if, 80 years or more after the disposition, the trust is unvested, taking into account the spirit of the original disposition.

8 Pursuant to s 201 of the *Property Law Act 2023* (Qld), trusts regulated by Queensland law potentially have a perpetuity period of 125 years from 1 August 2025.

9 [2024] VSC 189.

10 See *Lowther Park Pty Ltd as trustee for the Lowther Park Family Trust v Simon Della Marta* [2023] NSWSC 1555 and *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753.

11 See M Burgess, "Murdoch succession: a lesson in tax and estate planning", *Weekly Tax Bulletin*, 18 October 2024, issue 42, para 772.

12 [2025] QSC 83.

13 See *Re Arthur Brady Family Trust* [2015] 2 Qd R 172.

14 [2024] VSC 744.

15 (2010) 240 CLR 481.

16 *Re Plator Nominees Pty Ltd* [2012] VSC 284.

17 *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53.

18 *Re McGowan & Valentini Trusts* (2021) 63 VR 449.

19 *Re Arthur Brady Family Trust* [2015] 2 Qd R 172; *Ridgewell v Ridgewell* [2007] EWHC 2666; *Re The Pickering Family Trusts* [2024] VSC 5.

20 *Re Weston's Settlement* [1969] 1 Ch 223.

21 *In the matter of the Alan Synman Family Trust* [2013] VSC 264; *Re The Pickering Family Trusts* [2024] VSC 5.

22 [2020] QCA 62.

23 Mr Earl Larmar was a Brisbane accountant and property investor.

24 [2008] NSWSC 397.

25 [2024] ACTSC 270.

26 See on *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329.

27 *Domazet v Jure Investments Pty Ltd* [2016] ACTSC 33.

28 *Craddock Brothers v Hunt* [1923] 2 Ch 136; *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305.

29 *GE Capital Finance Australasia Pty Ltd v FCT* [2011] FCA 849; *Allnutt v Wilding* [2007] EWCA Civ 412.

30 For an example from 2025, see *The Trustee for Goldenville Family Trust A/C Xiangming Huang and FCT* [2025] ARTA 1355.

31 [2025] VSC 39.

32 [2012] 2 QSC 332.

33 *Official Receiver in Bankruptcy v Schultz* [1990] HCA 45.

34 *Re Roth* [2022] VSC 511.

35 See leading authorities such as: *Pitt v Holt* [2013] UKSC 26; *Lewin on trusts*, 20th ed, vol II, Thompson Reuters, 2020; and *Owies v JJ Nominees Pty Ltd* [2022] VSCA 142 (a case explored in M Burgess, "Tax and estate planning in 2023: the road ahead", (2022) 57(5) *Taxation in Australia* 270).

36 S 108-7 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).

37 See M Burgess, "Tax and estate planning in 2021: where are we at", (2021) 55(7) *Taxation in Australia* 357, and its exploration of the High Court decision in *Commissioner of State Revenue v Rojoda Pty Ltd* [2020] HCA 7.

38 *Re VGM Holdings Ltd* [1942] Ch 235.

39 [2020] NSWCA 351

40 *Nullagine Investments Pty Ltd v Western Australian Club Inc* [1993] HCA 45.

41 See s 1070A(3)(a) of the *Corporations Act 2001* (Cth).

42 See *Re Pulbrook; Pulbrook v Pulbrook* (1937) 37 SR (NSW) 345 and *Clerk v Equity Trustees Executors and Agency Co Ltd* (1913) 15 CLR 625.

43 See *Rule v Mallon* [2000] NSWSC 346 and *Re Wood Trading Co Ltd* (1927) 28 SR (NSW) 106.

44 See *Beck v Henley* [2014] NSWCA 201.

45 S 108-7 ITAA97.

46 Australian Taxation Office, "Joint ownership of shares". Available at www.ato.gov.au/forms-and-instructions/you-and-your-shares-2022/joint-ownership-of-shares.

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