Advanced trusts and estates issues and related tax matters

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1. Introduction

1. This paper looks at some more advanced trusts and estates topics, together with some related tax issues. The paper will not cover any particular broad theme, but rather will examine various issues in these areas which I have come across in practice. The main issues covered by the paper are as follows:

(1) When can a beneficiary sue on behalf of a trust or deceased estate?
(2) How can limitation periods be used in trusts litigation?
(3) Charitable will trusts – what if the provisions are not adequate?
(4) What if a beneficiary is not a beneficiary?
(5) Can I lock in my trustee decisions to protect the family?
(6) Some issues with amending the trust deed to change an appointor or guardian.
(7) Is a guardian a fiduciary and does it matter?
(8) Superannuation:
    a. Nature of an SMSF trustee's role.
    b. Binding death benefit nominations – does the wording matter?
(9) Testamentary trusts.
(10) Vesting of trusts – the ATO's draft ruling from 2017.

2. When can a beneficiary sue on behalf of a trust or deceased estate?

2. This question can often arise when a disgruntled family member feels that a trustee or an executor should be pursuing legal action against another family member or third party and is not doing so. I have seen this occur in practice where an aggrieved beneficiary wants to sue on behalf of the trust or deceased estate, regardless of the merits of such an action.

3. It is not as simple as the beneficiary being able to sue solely because a trustee or executor refuses to take that action.

Leave of the Court is required before a beneficiary has standing to sue

4. There is some difference of opinion between jurisdictions as to whether leave from the Court is required for a beneficiary *prior* to filing an action in the name of an executor or trustee. This reference to "leave" may be to the determination of standing as a preliminary issue.[1] In some interstate cases, the Court has found that no prior leave was

[1] *Treadtel International Pty Ltd v Cocco* (2016) 316 FLR 318 at [74] in footnote [23] citing *Prudential Assurance Co Ltd v Newman Industries (No 2)* [1982] Ch 204 and *Oates v Consolidated Capital Services Ltd* (2009) 76 NSWLR 69.

required: see, for example, *Chahwan v Euphoric Pty Ltd* (2009) 73 ACSR 252 at [34]. The NSW Court of Appeal in *Treadtel International Pty Ltd v Cocco* (2016) 316 FLR 318 at [74] suggested that much may depend on context and the need for leave might be understandable when certain conditions prevailed, for example, where there are several beneficiaries one of whom purports to act for the estate as a whole; where there is a question about the benefit that the estate will derive from pursuit of the proceedings; or where it is necessary to discover whether the trustee's decision not to proceed has some sound basis.

5. In Victoria, the law as it stands is that explained in *Randa Lee Investments Pty Ltd & Anor v Ballan & Ors* [2015] VSC 178 per Sifris J at [37]-[44]. In Victoria, leave is required for a beneficiary to proceed on behalf of another party (such as an executor or trustee) prior to the issue of proceedings or at the time of issue. This is a matter of standing. Special and exceptional circumstances must be shown prior to a beneficiary being permitted to proceed: *Randa Lee Investments Pty Ltd & Anor v Ballan & Ors* [2015] VSC 178 at [37].

6. Whether there is a case of sufficient strength or prospects of success may be relevant to whether leave should be granted: see *Randa Lee Investments Pty Ltd & Anor v Ballan & Ors* [2015] VSC 178 at [46] and [51]-[63].

What principles are relevant to a beneficiary's standing?

7. A beneficiary may sue in their own name on behalf of an estate or trust fund but only where there are exceptional or special circumstances indicating some proper reason for proceedings to be taken, such as the trustee not suing to protect the trust property: *Ramage v Waclaw* (1988) 12 NSWLR 84; *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109 at [55] per Gleeson CJ, Gummow and Hayne JJ; *Chahwan v Euphoric Pty Ltd trading as Clay & Michael & Anor* (2009) 73 ALR 252 at [16]; *Robert Deutsch & Ors v Erwin Deutsch & Ors* [2012] VSC 227 at [40]; *El Sayed v El Hawach* (2015) 317 ALR 771 at [56]; *El Sayed v El Hawach* (2015) 88 NSWLR 214 at [56]-[57]; *Treadtel International Pty Ltd v Cocco* (2016) 316 FLR 318 at [72]. It does not matter whether the cause of action is in equity or at common law.[2]

8. Special circumstances are not confined to collusion between the trustee and third party or the insolvency of the trustee and can include a failure by a trustee to perform their duty to the beneficiaries to protect the trust estate or the interests of the beneficiaries: *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109 at [55]-[56] per Gleeson CJ, Gummow and Hayne JJ.

9. Other examples in which exceptional circumstances may exist include the following:

   (1) The plaintiff is most materially interested in due enforcement of the claims, or would be most seriously prejudiced if they were abandoned or not duly prosecuted:

[2] *Ramage v Waclaw* (1988) 12 NSWLR 84 at 91-93; *Lidden v Composite Buyers Ltd* (1996) 67 FCR 560 at 563-564; *Chahwan v Euphoric Pty Ltd trading as Clay & Michael & Anor* (2009) 73 ALR 252 at [18]; *TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* (2016) 332 ALR 507 at [54].

Ramage v Waclaw (1988) 12 NSWLR 84 at 92 citing *Stainton v The Carron Co* (1854) 52 ER 58 at 62;

(2) It is alleged that assets have been handed over to a third party "hastily, improvidently, and not in conformity with their duty": *Ramage v Waclaw* (1988) 12 NSWLR 84 at 91 citing *Consett v Bell* [1842] EngR 639;

(3) There exists a substantial impediment to the trustee prosecuting the proceedings: *Highland v Labraga (No 2)* [2005] NSWSC 1212 at [161];

(4) It can be shown there exist recoverable assets which would "probably be lost to the estate" but for such a suit: *Ramage v Waclaw* (1988) 12 NSWLR 84 at 92 citing *Stainton v The Carron Co* (1854) 52 ER 58 at 63;

(5) The decision by the trustee not to institute proceedings was made by a party against whom the claim may lie; *Lidden v Composite Buyers Ltd* (1996) 67 FCR 560; and

(6) Due to the nature of the assets or the position of the personal representative, it would be either impossible, or, at least, seriously inconvenient for the representatives to take proceedings: *Ramage v Waclaw* (1988) 12 NSWLR 84 at 93 citing *Hilliard v Eiffe* (1874) LR 7 HL 39.

10. In *Hayim v Citibank NA* [1987] AC 730 at 748, Lord Templeman giving the decision of the Privy Council stated as follows:[3]

    A beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owned by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate.

11. And see *TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* (2016) 332 ALR 507 at [55]; *Hunt v Summerharvest Pty Ltd & Anor* [2007] QSC 210 at [19]; and *Chahwan v Euphoric Pty Ltd trading as Clay & Michael & Anor* (2009) 73 ALR 252 at [16]-[17] which, similarly, suggest that there will be special or exceptional circumstances where there is a failure by the trustee to sue on a cause of action in the performance of the duties owed by the trustee to the beneficiary to protect the trust estate or to protect the interests of the beneficiary. A mere refusal to sue by an executor or trustee is insufficient to demonstrate special and exceptional circumstances – an executor or trustee may have properly decided that there was no substance to the claim: *Randa Lee Investments Pty Ltd & Anor v Ballan & Ors* [2015] VSC 178 per Sifris J at [39] and *Hunt v Summerharvest Pty Ltd & Anor* [2007] QSC 210 at [18] both referring to *Hayim v Citibank NA* [1987] AC 730. If that were not the case it could result in multiple beneficiaries, for example, bringing separate

[3] Cited with approval in *Hunt v Summerharvest Pty Ltd & Anor* [2007] QSC 210 at [18]; *Randa Lee Investments Pty Ltd & Anor v Ballan & Ors* [2015] VSC 178 per Sifris J at [39]; and *TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* (2016) 332 ALR 507 at [54].

actions merely on an allegation that the trustee would not sue: see *Sharpe v San Paulo Railway Co* (1873) LR 8 Ch App 597 at 609-610 cited with approval in *Ramage v Waclaw* (1988) 12 NSWLR 84 at 90.

12. Compare the above cases with *Poker v Richards & Ors* [2016] SASC 98 at [88] in which the Court stated that, although the case law refers to the need for exceptional or special circumstances, it is sufficient that the executor or trustee is unable or unwilling to bring the action and the action is meritorious.

How can issues of standing be used by an executor, trustee or third party who is sued?

13. These issues of standing can be used by an executor, trustee or third party who is sued as a defence to the action. As standing is a threshold issue, they are a potential way of avoiding a protracted and costly dispute by seeking to bring an end to the litigation through an interlocutory application.

3. How can limitation periods be used in trusts litigation?

14. The *Limitation of Actions Act 1958* (Vic) (**LIMA Act**) sets out a number of general limitation periods that apply, for example, for claims in contract and tort. Aside from those ordinary period, s 21 of the LIMA Act also provides for a limitation period that is specific to trusts.

15. Section 21 of the LIMA Act provides, inter alia, as follows:

21 Limitation of actions in respect of trust property

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

16. The first thing to note about this provision is that s 21(1)(a) and (b) ensure that there is no limitation period in particular situations involving trusts. The subsections refer to "trustee" and "trust". Those terms take their meanings from the *Trustee Act 1958* (Vic): s 3(1), LIMA Act. The terms extend to implied and constructive trusts: s 3(1), *Trustee Act 1958* (Vic).

17. In respect of s 21(1)(a), to obtain an unlimited limitation period there would need to be a clear allegation of fraud or a fraudulent breach of trust in the statement of claim *and* the allegation would need to be made as against the trustee. An allegation against another party would not obtain the benefit of the unlimited limitation period in this subsection. We will return to this point subsequently.

18. What about the case of the $2 corporate trustee? Can the unlimited period in s 21(1)(a) apply to a claim made against the directors of the trustee company. Unfortunately, the answer is no – the subsection clearly refers to "trustees". A director of a trustee company is not a trustee in their own right, amongst other things, because the property of the trustee company is not vested in the director: see, for example, *Clay v Clay* (2001) 202 CLR 410 at [41]; *Barker v Duke Group Ltd (in liq)* (2005) 91 SASR 167 at [64]-[78] and *Port Ballidu Pty Ltd v Frews Lawyers & Ors* [2017] QSC 19 at [73].

19. Subsection 21(1)(b) is similarly confined to actions against trustees.

20. What about the case of someone who is accused of being an accessory to a breach of trust (but is not a trustee)? There are various principles that have developed from the case law about when a person can be liable as an accessory to someone else's breach of trust or breach of fiduciary duties. This might encompass, for example, a situation where a trustee has breached their duties under the trust deed and a third party has knowingly assisted in the breach (although the categories are much wider than that).

21. The subsections do not apply where a remedial constructive trust is involved. That is, they do not apply to a trust imposed remedially following a breach of an equitable duty including where someone who is not a trustee receives trust assets or dishonestly assists in a breach of trust. In other words, the subsection does not apply to a party with accessorial liability, such as that arising under the *Barnes v Addy* principles: *Port Ballidu Pty Ltd v Frews Lawyers & Ors* [2017] QSC 19 at [68]-[72]. The subsection can only be invoked against a trustee, not against a knowing recipient or a dishonest assister of a breach of fiduciary duty and breach of trust: *Port Ballidu Pty Ltd v Frews Lawyers & Ors* [2017] QSC 19 at [74]-[76] citing *Williams v Central Bank of Nigeria* [2014] AC 1189; *Hasler v Singtel Optus* (2014) 87 NSWLR 609; and *Nolan v Nolan* [2004] VSCA 109.

22. Accordingly, if one can get around the provisions excluding a limitation period, then there is a possibility that the 6 year limitation period under s 21(2) of the LIMA Act could apply to an alleged breach of trust or breach of fiduciary duty.

23. Section 21(2) refers to an action by a beneficiary to recover trust property or in respect of any breach of trust. The action for recovery of trust property must be in respect of the actual property, not just an action for account: *Tito v Waddell [No 2]* [1977] Ch 106. An action for breach of trust referred to in the subsection can, however, include an action for account: *Re Timmis; Nixon v Smith* [1902] 1 Ch 176.

24. The cause of action accrues at the date of the breach of trust: see *Bullhead Pty Ltd Brickmakers Place & Ors* [2017] VSC 206 at [104] (see a recent successful security of costs application in respect of an application for leave to appeal this decision in *Bullhead Pty Ltd*

Brickmakers Place & Ors [2018] VSCA 50); *Re Somerset; Somerset v Earl Poulett* [1894] 1 Ch 231 at 268; *De Braekt v Powell* (2007) 33 WAR 389 at 403. Accordingly, in the absence of fraud, it may be possible to dispose of an action if a breach of trust has occurred more than 6 years ago, even if there is more recent damage claimed (eg for loss of use of funds).

25. Section 21(2) applies, however, only if the action is not one for which a limitation period is prescribed by another provision of the LIMA Act. Sometimes a claim for breach of trust or breach of duties may be framed as an action for account in which case there *is* a separate limitation period. An action for account based on these types of breach is an action in equity.

26. An action for an account has a limitation period of 6 years: s 5(2) of the LIMA Act. An "action" is defined in s 3(1) of the LIMA Act to include any proceeding in a court of law. This has been held to include *all* actions for an account at both law and in equity: *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors* [2016] QSC 94 at [108]-[109]; *Jane v Bob Jane Corporation Pty Ltd & Anor* [2013] VSC 406 at [64]-[73]; *Wheatley v Bower & Ors* [2001] WASCA 293 at [123]; *Feiglin v Ainsworth* [2011] VSC 454 at [12] and [32].

27. The cause of action for an account accrues when the accounting party receives money or property in respect of which he or she is liable to account: *Jane v Bob Jane Corporation Pty Ltd & Anor* [2013] VSC 406 at [78] citing *Metropolitan Bank v Heiron* (1880) 5 Ex D 319 (CA); *Feiglin v Ainsworth* [2011] VSC 454 at [12]. This is significant because it could be a different time to when a breach of trust is alleged or damage is said to have occurred.

28. The above deals with some specific limitation periods that may apply in an action for breach of trust or breach of fiduciary duty, but what if there is no specific limitation period that applies? For example, there is a purely equitable claim which does not fall within the specific statutory limitation periods.

29. The LIMA Act does not, by its terms, provide for a time limit bar on a pure equitable claim based on a breach of fiduciary duties (outside specific statutory bars such as those for breaches of trust and actions for account described above). Subsection 5(8) of the LIMA Act can, however, in substance result in some equitable claims being barred. The subsection reads as follows:

5(8) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner as the enactment corresponding to that provision was applied before the repeal of that enactment by the ***Limitation of Actions Act 1955****.*

30. Section 5(8) preserves the Court's ability to limit actions for equitable relief by analogy to actions for common law relief that are covered by the LIMA Act.[4] The principle was outlined in *Feiglin & Anor v Ainsworth & Ors* [2011] VSC 454 as follows:

368 The principle is succinctly described in Dr Spry's Equitable Remedies.[90] The Court may decide that the material equitable right is so similar to legal rights to which a limitation period is applicable that

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[4] See *Feiglin & Anor v Ainsworth & Ors* [2011] VSC 454 at [379]

a limitation period should be applied to the equitable right also. If there is a sufficiently close similarity between the exclusive equitable right in question and legal rights to which the statutory provision applies, a court of equity will ordinarily act upon it by analogy, but it will so act only if there is nothing in the particular circumstances of the case that renders it unjust to do so. What is regarded by courts of equity as a sufficiently close similarity for this purpose involves a question of degree, and reference must be made to the relevant authorities. The basis of these principles is that, in the absence of special circumstances rendering this position unjust, the relevant equitable rules should accord with comparable legal rules.

31. Differences in the elements of common law causes of action and equitable claims does not necessarily mean that the claims are *not* analogous: see *Port Ballidu Pty Ltd v Frews Lawyers & Ors* [2017] QSC 19 at [38] and *Feiglin & Anor v Ainsworth & Ors* [2011] VSC 454 at [370], but cf the comments in *Barker v The Duke Group Ltd (in liq)* [2005] SASC 81.

32. In *Feiglin & Anor v Ainsworth & Ors* [2011] VSC 454 at [381], the Court also held that limitation by analogy in s 5(8) is not limited to claims in equity's concurrent jurisdiction, but can encompass a claim in equity's exclusive jurisdiction where there is a sufficiently close similarity between the exclusive equitable rights and the legal rights to which the LIMA Act applies.

33. There are several cases which illustrate this principle in the context of fiduciary duties. In *Metropolitan Bank v Heiron*,[5] for example, a fiduciary's liability to account for bribes received in breach of his fiduciary duty was the equitable equivalent of a common law liability for an action for money had and received.

34. In *Cia de Seguros Imperio v Heath*[6] the Court held that limitation by analogy applied for a claim for breach of fiduciary duty in equity's exclusive jurisdiction. This was because the same facts gave rise to alleged claims for breach of contract or breach of duty in tort and a claim for equitable compensation for fiduciary duty was sufficiently similar to the legal rights to which the relevant Statute of Limitations applied (i.e. a claim for damages in contract and tort).[7] A similar result occurred in *Coulthard v Discomix Club Limited*[8] where a dishonest breach of fiduciary duty was found to be analogous because the same facts would give rise to a common law claim of fraud.

35. To give a few examples of equitable actions which might apply in the context of breaches of trust and fiduciary duty and the equivalent legal actions:

    (a) An action to account in equity is equivalent to an action to account at law: *Hewitt v Henderson* [2006] WASCA 233 at [26]. As indicated, that has a 6 year time limit;

    (b) The liability of a fiduciary to account for amounts inappropriately received in breach of fiduciary duty is the equitable equivalent of the legal liability of a defendant sued at law for money had and received: *Candibon Pty Ltd v Minister*

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[5] (1880) 5 ExD 319

[6] [2000] EWCA Civ 219 referring to a similar provision in the UK *Limitation Act 1980*.

[7] Similarly, for a claim to account in equity there would be an analogy to similar legal rights: See *Cia de Seguros Imperio v Heath (REBX) Ltd* [2000] 2 All ER 787.

[8] [2000] 1 WLR 707. See also *Candibon Pty Ltd v Minister for Planning & Anor* [2011] VSC 415.

for Planning & Anor [2011] VSC 415 at [369] citing *Metropolitan Bank v Heiron*. Such an action should fall within the category in the LIMA Act of a "contract implied in law" as that is its historical basis as a quasi contractual action: see *Re Diplock's Estate* [1948] 2 All ER 318 at 343 and, for the history of certain debt actions see, for example, *Pavey v Paul* (1987) 162 CLR 221. Such an action, by analogy, has a 6 year time limit pursuant to s 5(1)(a) and (2) of the LIMA Act. The cause of action accrues at the date of payment to the defendant: *Baker v Courage & Co* [1910] 1 KB 56; *Re Mason* [1929] 1 Ch 1 (CA) at 9;

(c) Assume that there is an action for equitable compensation based on a fraud. This could potentially be analogous to a common law claim for fraud (eg the tort of deceit which has a limitation period of 6 years pursuant to s 5(1) of the LIMA Act). The action accrues at law when the fraud was discovered or could have reasonably with diligence between discovered: s 27, LIMA Act.

36. Accordingly, even with a purely equitable claim made in respect of a trust/estate, there may be potential limitation defences that can be relied upon.

37. There is also another possible statutory bar by analogy to a claim that may apply where a director of a corporate trustee has been involved in a breach of trust or breach of fiduciary duty. Compensation can be sought by a corporation pursuant to s 1317E, s 1317H and s 1317J(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**) for breaches of the director's duties in ss 180 to 183. Such an action is subject to a 6 year time limit pursuant to s 1317K of the Corporations Act which runs from the time of the contravention. A purely equitable claim for breach of fiduciary duty of a director of a trustee company could, generally, be statute barred by analogy to the Corporations Act action: *Port Ballidu Pty Ltd v Frews Lawyers & Ors* [2017] QSC 19 at [34]-[35] and [59]; *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; *Lewis Securities Ltd (in liq) v Marilyn Carter & Anor* [2017] NSWSC 417 at [142]-[145].

38. Once appropriate legal equivalents to an equitable cause of action have been identified, the relevant legal time limits should be applied. In purely equitable proceedings where there is a corresponding remedy at law that is subject to a statutory bar then equity will apply that bar by analogy unless the reliance of the defendant on the bar would be unconscionable. There is no broader residual discretion as to whether to apply the bar: *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435 at [70] per Meagher JA; *Port Ballidu Pty Ltd v Frews Lawyers & Ors* [2017] QSC 19 at [16]. The Court may potentially exercise that power where there has been fraudulent concealment, which requires either fraudulent conduct as an element of the right of action or conduct consisting of active concealment of a right that does not include fraud as an element: *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; *Lewis Securities Ltd (in liq) v Marilyn Carter & Anor* [2017] NSWSC 417 at [137].

4. Charitable will trusts – what if the provisions are not adequate?

39. Not-for-profit organisations are given the benefit of a number of tax concessions. Charities are a smaller sub-set of not-for-profits and, generally, benefit from a wider range of tax concessions. For the Federal tax concessions, a charity must be registered with the Australian Charities and Not-for-profits Commission (**ACNC**) and endorsed by the Australian Taxation Office (**ATO**) as a tax concession charity.

40. The purpose of this section is not to examine those tax concessions, nor the registration process, but rather to consider the situation of a charitable/not-for-profit trust set up by will.

41. To accept an organisation as a not-for-profit (or a not-for-profit that is a charity) the ATO, generally, requires the constituent documents of the organisation to:

    a. Contain a clause prohibiting the distribution of profits or assets while the organisation operates (eg for a company limited by guarantee, a clause might prevent distributions to the members). Instead, the profits and assets must be used to further the objects of the organisation;

    b. Contain a clause prohibiting the distribution of surplus assets on winding up of the organisation. Usually, such a clause would require the surplus assets on winding up to be distributed to another not-for-profit organisation with similar objects.

    c. Contain prohibitions on private persons (including members) receiving profits or assets except as reimbursement of expenses they have incurred for the organisation or as genuine fee for services provided.

42. A competent practitioner can draft a comprehensive charitable/not-for-profit will trust such that these requirements are met and which allows for proper management of the trust funds.

43. What happens, however, if you as a practitioner come across a charitable/not-for-profit will trust which:

    a. Does not comply with the above requirements; and
    b. Contains very limited trust provisions without comprehensive guidance about how the trust is to operate.

44. The first place to look is, of course, the provisions of the will to see if they contain a power to amend the will trust. Inevitably, if the trust provisions are brief there will be no power of amendment.

45. In that scenario, section 63 of the *Trustee Act 1958 (Vic)* may assist. Section 63 reads as follows:

63. Power of Court to authorize dealings with trust property

(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument (if any) or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions (if any) as the Court thinks fit and may direct in what manner any money authorized to be expended, and the costs of any transaction are to be paid or borne as between capital and income.

(2) The Court may from time to time rescind or vary any order made under this section, or may make any new or further order.

(3) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

46. Under s 63(1), the Court has powers which are expressed in very wide and beneficial terms and which must be liberally construed without restriction by any implications.[9]

47. The Court can exercise its powers under s 63(1) if the relevant transaction is:

    (1) "in the management or administration" of property vested in the trustees;
    (2) "expedient"; and
    (3) not otherwise able to be effected because of an absence of power.[10]

48. The third condition is the absence of any power vested in the trustee by the trust instrument or by law. It is therefore a jurisdictional requirement that the trustee must not already have the power it seeks. [11]

49. Under s 63(1), a Court is only empowered to authorise a disposition or transaction that is expedient in the management or administration of trust property.[12] That is, the words "in the management or administration" have a limiting effect on the power.

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[9] *Ballard v Attorney-General for Victoria* [2010] VSC 525 at [27]; *Riddle v Riddle* (1952) 85 CLR 202 at 214 and 220; *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469 at 476[12] and 500[148]; *Norman v Australasian Conference Association* [2008] VSC 573 at [16].

[10] *Ballard v Attorney-General for Victoria* [2010] VSC 525 at [29]; *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469 at 500[149].

[11] *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469 at 487[77] relying on *Riddle v Riddle* (1952) 85 CLR 202 at 214 and 219.

50. The following principles apply in relation to this phrase:
    (1) "management" refers to the management of trust property in the commercial or practical sense;[13]
    (2) "administration" encompasses all of the legal powers and duties which might be possessed by a trustee in respect of trust property;[14]
    (3) the phrase "management or administration" is of wide import and picks up everything that a trustee may need to do in practical or legal terms in respect of trust property;[15]
    (4) "management" and "administration" may overlap, but the terms are not necessarily synonymous and an unduly narrow interpretation should be avoided.[16]

51. For s 63(1) to apply, the transaction must be, in the opinion of the Court, "expedient". The following principles are relevant:

    (1) "expedient" takes it ordinary meaning of advantageous, desirable, suitable to the circumstances of the case;[17]
    (2) expedience is a criterion of the widest and most flexible kind;[18]
    (3) in deciding whether a disposition or transaction is expedient, the Court must consider whether it is expedient in the management or administration of the trust property as a whole;[19]
    (4) in the case of a charitable trust, the question of expediency must be determined by reference to the objects or purposes prescribed in the trust instrument.[20]

52. The scenario we are examining is one where the charitable will trust does not contain the provisions required by the ATO (see above) and has insufficiently detailed administrative provisions to give the trustee guidance as to how the trust should be operated. There is no provision in the trust deed which permits its amendment.

53. The trustee wishes to replace the inadequate provisions of the will trust with a new, comprehensive trust deed which will contain the provisions required by the ATO to

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[12] *Ballard v Attorney-General for Victoria* [2010] VSC 525 at [31]; *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469 at 501[151]; *Municipal & General Securities Co Ltd v Lloyds Bank Ltd* [1950] Ch 212 at 223.

[13] *Ballard v Attorney-General for Victoria* [2010] VSC 525 at [32]; *Hornsby v Playoust* (2005) 11 VR 522 at 527[18],[19]; *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469 at 500[150].

[14] *Ballard v Attorney-General for Victoria* [2010] VSC 525 at [32]; *Hornsby v Playoust* (2005) 11 VR 522 at 527[18],[19]; *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469 at 500[150].

[15] *Ballard v Attorney-General for Victoria* [2010] VSC 525 at [32]; *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469 at 500[150].

[16] *Ballard v Attorney-General for Victoria* [2010] VSC 525 at [32]; *Hornsby v Playoust* (2005) 11 VR 522 at 526[17] and 527[19]; *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469 at 500[150].

[17] *Ballard v Attorney-General for Victoria* [2010] VSC 525 at [34]; *Riddle v Riddle* (1952) 85 CLR 202 at 221-2.

[18] *Ballard v Attorney-General for Victoria* [2010] VSC 525 at [34]; *Riddle v Riddle* (1952) 85 CLR 202 at 214.

[19] *Ballard v Attorney-General for Victoria* [2010] VSC 525 at [35]; *Riddle v Riddle* (1952) 85 CLR 202 at 220; *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469 at 501-2[154]-[157].

[20] *Ballard v Attorney-General for Victoria* [2010] VSC 525 at [37]; *Freeman v A-G (NSW)* [1973] 1 NSWLR 729 at 735; *Norman v Australasian Conference Association Ltd* [2008] VSC 573 at [27].

enable access to the charitable tax concessions and which will provide better guidance as to how, administratively, the trust should be run.

54. The trustee approaches the Court under s 63 to seek its approval of the new trust deed as a substitute for the existing provisions of the will trust.

55. Until quite recently, the Court would likely facilitate such a change under the power in s 63 based on previous case law. Indeed, I have acted in a case in which the Victorian Supreme Court did just that. There are a number of case law examples where the Court has exercised a similar power in such circumstances. In *Ballard v Attorney-General for Victoria*,[21] the Court approved an instrument consolidating the operative provisions of a will trust, as amended. Similarly, in *James N. Kirby Foundation v Attorney-General*,[22] White J approved the complete replacement of a trust deed of a trust with a model deed prepared by the ATO. This enabled the relevant foundation to qualify as a prescribed private fund, and hence donations to it would be tax deductible. The Court considered that the replacement of the trust deed with a model deed was a 'transaction' that was expedient in the management or administration of trust property within the meaning of the NSW equivalent of s 63.

56. That position has recently come under fire in a Victoria Supreme Court case. In *W E Pickering Nominees Pty Ltd & ors v Pickering & ors* [2016] VSC 71, the applicant sought orders under s 63 or s 63A of the *Trustee Act 1958* (Vic) to amend the trust deed, broadly, by providing the trustee with a general power of amendment; providing for certain persons to be the appointors of the trust; and by expanding the class of beneficiaries of the trust. The Court confirmed at [89] and [94] the principle that it could not, under s 63, grant powers to alter the beneficial interests under a trust instrument.

57. The Court refused to allow *any* of the amendments to the trust deed and the following passages at [98] and [99] *appear* to suggest that s 63 would not permit *any* variation of the terms of a trust:

98 Further, interpreting s 63 in a way that it cannot be used for the purpose of varying the terms of the trust, or to vary the interests of beneficiaries inter se is consistent with the enactment of s 63A…

99 Consistently with the reasoning and conclusions in Re Dion, Royal Melbourne and Barns, this Court will not exercise its discretion under s 63 to grant the orders sought to confer the power to make any of the proposed amendments to the deed. All of the proposed amendments involve varying the terms of the trust, in particular, the proposed amendment to expand the class of beneficiaries of the trust, and takes the application beyond the ambit of s 63.

58. That does not mean, however, that the Court cannot grant powers under s 63 which depart from the expressed intention in the trust deed even where it overrides the terms

[21] [2010] VSC 525 at [87]-[90]. And see also *Hutchinson & Ors v Attorney-General for the State of Victoria* [2009] VSC 551.
[22] (2004) 62 NSWLR 276

of the trust or add to them. There is existing authority to that effect: *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469 at [115]; *Riddle v Riddle* at 224 per Williams J.

Tax issues

59. One must be cognisant of the potential, when making such wholesale changes, of resettling the trust as a new trust. This can potentially have some nasty CGT and stamp duty consequences, depending on the asset mix of the trust. A will trust, for example, that had just been settled may only have cash assets in which case resettlement may not be an issue. This topic of resettlement is beyond the scope of this paper (other than where it is discussed in the sections that follow).

General administrative scheme

60. Another option is a general administrative scheme, although it is a somewhat limited option. A general administrative scheme, including for a charitable trust, is aimed at supplementing or clarifying any provisions in the trust deed regarding how the objects of the trust are to be pursued when practical circumstances show that the terms specified by the settlor of the means to carry out the objects are inadequate or impractical: *Corish v Attorney-General's Department of NSW* [2006] NSWSC 1219 at [9]; *The Reverend Father Simon Ckuj as trustee of the Jaroslaw Andrew Oryszkiewycz Halyckyj Permanent Charitable Fund v The Attorney-General in and for the State of New South Wales* [2005] NSWSC 35 at [4].

61. Actions for a general administrative scheme are, however, generally limited to the confines of the trust deed and cannot alter the trust: see *In re Hazeldine's Trusts* [1908] 1 Ch 34 at 40-41 per Farwell LJ which was cited with approval in *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34 at 56, 65 and 73:

> *…if the trustees cannot do it, neither can the Court, for, as Lord Chancellor Law says in* ***Fitzpatrick v Waring*** *(1882) 11 LR Ir 35, 44: "In the exercise of its jurisdiction for the administration of trusts this Court, I apprehend, has no power to make or authorize any leases or other dispositions of the trust property which the trustee could not have made himself. The Court, in such a case, whether it assumes the place of the trustee, or guides him in the discharge of his duties, is still confined within the limits of the trust as constituted by its author, and has no authority to go beyond those limits. Its business is to* ***execute*** *the trusts, not to* ***alter*** *them.*

62. Accordingly, the Court in exercising its inherent jurisdiction for administration of trusts is confined by the trust deed – it cannot alter the trust. Such proceedings are aimed at enforcing trust administration, not authorising or directing departures from it: *Gonzales v Claridades* [2003] NSWCA 227 at [34].

4. What if a beneficiary is not a beneficiary?

63. One particular issue that both accountants and lawyers must be wary of is the potential for distributions of income (or capital) to be made to someone who is not actually a beneficiary. I have seen this occur on a number of occasions.

64. To give an example, let us assume that there is a discretionary trust deed which has Mr A as a specified beneficiary. The classes of general beneficiary include children of the specified beneficiaries. There is, however, a subclause hidden away in the trust deed that states that a guardian of the trust is excluded from being a beneficiary unless they are specifically named in the schedule to the trust deed as a specified beneficiary.

65. Miss V is a daughter of Mr A and so would, ordinarily, be a beneficiary as part of the class of general beneficiaries (i.e. a child of Mr A, a specified beneficiary). Miss V is validly appointed as guardian of the trust, but is not named in the schedule to the trust deed as a specified beneficiary. The trustee, oblivious to the exclusion of guardians from being beneficiaries, distributes income to Miss V over a number of years. Miss V is not, however, a beneficiary because, even though she would fall within the class of general beneficiaries she is excluded by virtue of being the guardian of the trust (and not being named as a specified beneficiary in the schedule to the trust deed).

66. This type of mistake can cause a whole range of issues including:

    a. The possibility that there may be beneficiaries who *should* have received the income and they may demand it from the beneficiaries;

    b. The possibility that the trustee may need to seek the money back from the person who received it who was not actually a beneficiary (and they may have a defence based on a change of position);

    c. Possible tax consequences for the trustee, the purported beneficiary and the other beneficiaries of the trust.

67. The tax consequences of this type of mistake can be the most serious. To understand these consequences, it is first necessary to understand the nature of beneficiary and trustee taxation for a trust.

68. Beneficiaries of a trust not under a legal disability who are presently entitled to a share of the "income of the trust estate" include in their assessable income "so much of ***that share*** of the net income of the trust estate" as is attributable to a period when the beneficiary was a resident (if not a resident, then attributable to sources in Australia).[23]

[23] Section 97, ITAA36.

69. The above assessment provision relies on two concepts to determine how much assessable income is attributable to a particular beneficiary:

    (1) The income of the trust estate; and
    (2) "That share" of the net income of the trust estate.

70. The "net income" is essentially the total assessable income of the trust (assuming it were a resident taxpayer) less all allowable deductions with some exceptions.[24] "Income of the trust estate", however, is not defined. This led to a debate as to whether that phrase referred to taxable income, or to trust law income. The answer to that question could affect the quantum of trust taxable income assessed to a beneficiary.

71. The High Court resolved that issue in *Commissioner of Taxation v Bamford* (2010) 240 CLR 481 (***Bamford's* case**) and held that:

    (1) Income of the trust estate meant trust law income and that trust law income could be defined in the trust deed; and

    (2) The proportionate approach to beneficiary taxation is the correct one.[25]

72. The proportionate approach means that beneficiaries are assessed on a percentage of the trust's taxable income. The percentage is determined as their percentage share of the trust law income. Assume that a trust has trust law income of $100 and taxable income (i.e. net income) of $150. Beneficiary A is presently entitled to $10 of trust income (i.e. a 10% share of trust income). Beneficiary A will therefore be assessed on 10% of the trust's net income (i.e. 10% x $150 = $15).

73. If no beneficiary is presently entitled to all or part of the income of the trust estate then the trustee will be taxed on that income at penal rates.[26] In our scenario, if there was nothing else in the trust deed or distribution resolutions that led to a different result, then no beneficiary would be presently entitled to the income that was paid to Miss V. The trustee would be taxed on the income and, given the income was not correctly treated in prior years, the ATO may impose penalties and interest for the outstanding tax that should have been paid by the trustee (rather than Miss V).

74. That may not always be the case in this scenario. It can also depend on how the trust deed or distribution resolutions are drafted.

75. For example, the trust deed may include a default distribution clause. That is, a clause which provides that in the event that the trustee does not exercise the power to accumulate or to distribute all or part of the income then the undistributed or unaccumulated income will automatically be distributed to named default beneficiaries.

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[24] Section 95, ITAA36.
[25] See also TD 2016/19 and TD 2012/22.
[26] Sections 99 and 99A, ITAA36.

Often, the named primary beneficiaries will be the default beneficiaries in equal shares although the deed can, of course, name other persons as default beneficiaries. The aim of a default beneficiary clause is to ensure that there is no income that is not dealt with by the trustee and that might, for example, be taxed to the trustee. In drafting a power to distribute, it is important to make sure that the decision to distribute or accumulate must be made by the end of the income year. A failure to do so could result in the default distribution clause being ineffective because it would not operate until after the end of the income year as in *BRK (Bris) Pty Ltd v FCT* (2001) 46 ATR 347. Depending on how it is drafted, this type of clause *may* address the type of issue that arises with Miss V.

76. In this situation, the distribution resolutions themselves must also be checked. It is possible for distribution resolutions to provide for any remaining trust income to go to a default beneficiary. One must be careful, however, in relying on such clauses. If the clause is, in any way, contingent or conditional then it may not give a beneficiary a present entitlement to trust income prior to the end of the income year (i.e. the contingency or condition may not be met until after the end of the income year). A trustee may also face potential arguments about whether the distribution resolution as a whole is valid if it purports to distribute some income to a person who is not a beneficiary at all.

5. Can I lock in my trustee decisions to protect the family?

77. Trustees are under a duty to exercise their powers personally. As part of this duty, trustees have a duty not to fetter their discretion.[27] A fiduciary cannot bind him or herself as to the future exercise of a discretion by an antecedent resolution or a contract with a third party or beneficiary.

78. A few examples assist in illustrating this point.

79. In *Re King* (1902) 8 Argus Law Reports 19, the trustees of a deceased estate sought an order for postponement of the sale of property referred to in a will for a period not exceeding six years. The Court declined to make the order and found that the trustees should, as far as possible, keep their discretion open and not put it for a definite period out of their power to sell the property.

80. *Re Stephenson's Settled Estates* (1906) 6 SR (NSW) 420 involved trustees entering into a lease of trust property in which it was agreed that the lessee had the option of purchasing the property for a fixed sum at any time prior to a particular fixed date. The Court held that it was a breach of trust for trustees with a power of sale of trust property to enter into a contract binding them or future trustees to sell the trust property at a future date at a price fixed in the present without the trustees, at that future date, exercising any judgment as to whether a sale at that price would be beneficial to the trust.

[27] See, for example, *Watsons Bay & South Shore Ferry Co Ltd v Whitfield* (1919) 27 CLR 268 (not a trusts case).

81. *Re Vestey's Settlement* [1950] 2 All ER 891 involved the trustees of a discretionary trust making a resolution that, until further resolution, the income of the trust would be appointed to particular beneficiaries in designated proportions. The Court held that the resolution, as an attempt to control future distributions of income, was not an effective exercise of discretion.

82. There may, however, be instances where a discretion can be exercised despite the fact that the transaction or thing covered by the discretion will not occur until the future.[28] The issue comes down to what is the proper time to exercise the discretion. If the discretion itself does not specify when it can be utilised then an exercise of interpretation must be undertaken to determine what is the proper time for exercising the discretion. A fetter for a short period of time and in reasonable circumstances is more likely to be a valid exercise of power.[29]

83. I have come across a number of situations in practice where trustees of discretionary trusts wish to make resolutions to sell property or to distribute capital or income in advance, usually, in the case of blended families where there is some future event which makes it desirable to exercise a discretion in advance.

84. Putting aside the obvious issues about whether a discretion is being exercised in the best interests of the beneficiaries and in line with fiduciary duties, the question arises whether such a use of discretion will place an impermissible fetter on the discretion.

85. One example is where two trustees wish to make a resolution as to how the trust income for the *next* income year will be distributed (and there is nothing in the trust deed specifying when an income resolution must be made, other than that it must be made prior to the end of the income year). A large amount of trust income is expected to be made in a future year. The trustees' reason for wanting to make this resolution is that one of the trustees is going to pass away in the near future and a hostile beneficiary will then become the sole appointor of the trust. The hostile appointor could then remove the remaining trustee from their position and take control of the trust.

86. It is clear from *Re Vestey's Settlement* [1950] 2 All ER 891 that an open-ended resolution as to how income is distributed would be an impermissible fetter on the trustee's discretion. A resolution attempting to fix the distribution of income for multiple income years is probably also a fetter on discretion. Less clear is whether a resolution to distribute income for a single income year would be valid if made prior to the start of that income year. It may be that, if not specified in the trust deed, the correct time for exercising a discretion to distribute income is during the relevant income year. Alternatively, in the right circumstances, there may be valid arguments in favour of an exercise of a discretion

[28] See, for example, *Thorby v Goldberg* (1964) 112 CLR 597 at 605-606.
[29] See, for example, *Rousset v Antunovich* [1963] WAR 52.

to distribute income if it only occurs a short time before the commencement of the relevant income year.

87. Another example is where a resolution is made to sell trust property and, at the same time, a resolution is made to distribute the capital from that sale when it takes place. Is the correct time for the exercise of the discretion to distribute capital after the sale has taken place, or otherwise?

88. These are issues which can be quite important because they potentially could give certainty to family members about what will happen in the future. They are, unfortunately, issues that have not been fully tested in the courts. Overlaid on top of these technical issues would also be the overriding issue of whether such an action is in the best interests of the beneficiaries and trust as a whole (if not, then there may have been a breach of fiduciary duties and breach of trust).

6. Some issues with amending a deed to change an appointor or guardian

89. Trust deeds often contain restrictions on the power to amend the trust deed. The manner in which a power of amendment is drafted can have real impacts on the scope of possible amendments.

90. *Mercanti v Mercanti* [2015] WASC 297; [2016] WASCA 206 (on appeal) (a special leave application was dismissed at [2017] HCASL 59) provides a good illustration regarding the sorts of issues that can arise from amendment clauses in the context of amending the appointor or guardian of a trust.

91. In that case, there were 2 discretionary trusts (**Trust 1** and **Trust 2**). Both of these trusts had an original guardian and appointor who was a member of the Mercanti family. At some stage, deeds of variation were executed to change the guardian and appointor of each trust to another member of the Mercanti family. One of the issues in this case was whether the amendments to each trust deed were valid.

92. The power of amendment in Trust 1's trust deed read as follows:

The Trustee may at any time and from time to time (but whilst there shall be an Appointor only after having given not less than 30 days written notice to the Appointor of his intention so to do) by deeds revoke add to or vary all or any of the trusts hereinbefore provided or the trusts provided by any variation alteration or addition made thereto from time to time and may by the same or any other deed declare any new or other trusts or powers concerning the Trust Fund or any part thereof the trusts whereof shall have been so revoked added to or varied.

93. The critical words were that the "Trustee may... vary.... the trusts hereinbefore provided". The Court found that the trusts hereinbefore provided were the trusts provided for in earlier provisions in the trust deed, namely, the declaration of trust; the trusts and powers

of the trust for dealing with income/capital of the trusts, vesting of the trust; and the trustee's powers.

94. The identity of the appointor did *not* fall within the "trusts" in the trust deed. Certainly, it was part of the terms and conditions of the trust deed, but the power of amendment did not extend to all terms and conditions of the trust deed, only those that were the "trusts". The Court drew comfort from a distinction made in various provisions of the trust deed between "the trusts" and the "powers and provisions" in the trust deed. Consequently, the power of amendment was not wide enough to permit the altering of the appointor's identity.

95. The power of appointment of Trust 2 read as follows:

Subject to clause 10 hereof the Trustees for the time being may at any time and from time to time by deeds revocable or irrevocable revoke add to or vary all or any of the trusts terms and conditions hereinbefore contained or the trusts terms and conditions contained in any variation or alteration or addition made thereto from time to time and may in like manner declare any new or other trusts terms and conditions concerning the Trust Fund or any part or parts thereof the trusts whereof shall have been so revoked added to or varied provided that the rule known as the Rule against Perpetuities is not thereby infringed and provided that such new or other trust powers discretion alterations or variations -

(1) insofar as the beneficial interests created by this Deed are revoked added to or varied shall be for the benefit of all or any one or more of the General Beneficiaries or any one or more persons born or unborn being lineal descendants of whatever degree (or the spouse of any lineal descendant) of any grandparent of any General Beneficiary; but

(2) shall not be in favour of or result in any benefit to any member of the excluded class;

(3) shall not affect the beneficial entitlement to any amount set aside for any beneficiary prior to the date of the variation alteration or addition; and

(4) shall not (save as provided in paragraph (1) of this clause) enlarge the number of persons capable of falling within the description 'beneficiary' hereinbefore contained.

Save as provided in this clause these presents shall not be capable of being revoked added to or varied.

96. The critical words were "the Trustees...may... vary all or any of the trusts terms and conditions hereinbefore contained". The wording is different from the power contained in Trust 1's deed because, as well as the word "trusts", it also refers to "terms and conditions". This made all the difference to the outcome.

97. The terms "appointor" and "guardian" were defined at the beginning of the deed in a clause that preceded the power of amendment. The definition, however, referred back to the schedule to the trust deed which was *after* the power of appointment. There was therefore an issue about whether the identity of the appointor and guardian was

something "hereinbefore" the power of amendment in the trust deed. The Court held that those definitions were hereinbefore contained. They were operative provisions and should be construed as one with the schedule.

98. The second issue was whether the reference to "trusts terms and conditions" included the identity of the appointor and guardian. The Court held that "terms and conditions" did include the identity of the appointor and guardian and, to that extent, the schedule which identified those persons formed part of the terms and conditions of the trust deed due to the operation of the definition clause located earlier in the deed.

99. Consequently, the power of amendment could be used to change the identity of the appointor and guardian. It is a stark illustration of how subtle changes in the wording of a trust deed can dramatically alter the result.

100. I have seen similarly worded trust deeds which illustrate the issues in *Mercanti's* case. For example, I have seen a trust deed where:

   a. Similar wording to Trust 1 in *Mercanti* was used in the power of variation and there was no currently named guardian in the schedule to the deed. Accordingly, the power of variation could not be used to introduce a guardian.

   b. Despite that similar wording, a specific power *had* been included in the schedule itself which permitted the appointor to be changed by deed of variation.

101. One should not simply assume that a widely drafted power of variation will enable them to alter the trust deed in any manner they see fit. The power of variation needs to be carefully considered, particularly when plain English is not used, to ensure that there are no issues like those arising in *Mercanti's* case.

7. Is a guardian a fiduciary and does it matter?

102. An issue that has arisen in some relatively recent case law is whether a guardian is a fiduciary. To understand this issue, a quick overview of the nature of the fiduciary relationship between trustees and beneficiaries is in order.

103. The relationship between trustee and beneficiaries is a fiduciary one.[30] A fiduciary has no positive legal duty to act in the interests of the beneficiary.[31] A fiduciary duty is proscriptive, forbidding a conflict of interest and duty, and any unauthorised profit from use of position, property or confidential information.[32] Trustees also have other specific duties that are often characterised as having a fiduciary nature (eg the duty to comply with the terms of the trust deed).

[30] See, for example, *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41 at 68.
[31] *Breen v Williams* (1996) 186 CLR 71 (***Breen***) at 113 and 137-138.
[32] *Breen* at 82-83, 93-94 and 112-113. And see *Chan v Zacharia* (1984) 154 CLR 178 198-199.

104. The issue of whether a guardian is a fiduciary is an important one because a guardian is often given an overriding power to approve or veto certain decisions of the trustee (eg the exercise of a power to appoint capital to beneficiaries, or to amend particular provisions of the trust deed). If a guardian is a fiduciary, they must exercise their power in the interests of the beneficiaries and trust as a whole and not by reference to their own self-interest or other matters.

105. In *Blenkinsop v Herbert* [2017] WASCA 87, the Western Australian Court of Appeal considered whether a guardian's power to consent to the appointment of income and capital and the advancement of capital to beneficiaries was a fiduciary power.

106. The Court held that simply being a guardian under a trust deed does not automatically mean that the guardian is a fiduciary. Determining whether they are a fiduciary depends upon a construction of the trust deed and whether the particular power(s) are fiduciary in nature. In that particular case, the guardian did not occupy a fiduciary position as, amongst other things, they were entitled to act in their own interests in deciding whether to consent and did not have any obligation to the other objects of the trust to consider whether to grant consent.

107. One way of dealing with this issue may be to include a specific provision in the deed to make it clear that a guardian is intended to occupy a fiduciary role and/or act in the best interests of the beneficiaries as a whole rather than solely in their own interests. As the Court of Appeal found the matter to be one of construction that would arguably deal with the issue because it would explicitly set out the settlor's intent in the deed.

8. Superannuation death benefits

108. An interesting question arises as to what fiduciary duties are placed upon a trustee, or a director of a corporate trustee, of a self-managed superannuation fund (**SMSF**). In order to remain an SMSF, by definition, other than for single member funds:[33]

(1) If the trustees are individuals, each individual trustee must also be a member of the fund;
(2) If the trustee is a corporation, each director of the corporation must also be a member of the fund.

109. A legal personal representative of a deceased member of a fund can also be a trustee or director of a corporate trustee after death until death benefits start to be payable in respect of the deceased member.

[33] S 17A, *Superannuation Industry (Supervision) Act 1993*.

110. The issue that arises is whether a trustee (or director) of an SMSF will breach the no-conflict rule of a fiduciary relationship if they exercise a discretion or power in their own favour as a member (given that they *must* be both trustees/directors and members under the rules).

111. There is an exception to the no-conflict rule that has been recognised in *Mordecai v Mordecai* (1988) 12 NSWLR 58 where a testator or settlor, with knowledge of the facts, imposes a duty on a trustee which is inconsistent with a pre-existing interest or duty which the trustee has in another capacity. The trustee can, in that scenario, act under the trust and is not prohibited from doing so by the no-conflict rule.

112. There is United Kingdom authority, in the context of pension funds, that suggests that the no-conflict rule should not extend to a trustee of a pension fund who is also a member of the fund due to regulatory requirements.[34]

113. In *Edge v Pensions Ombudsman*,[35] the Court stated that:

The member trustees are placed by the rules themselves in the position of conflict between interest and duty to which the Pensions Ombudsman referred. The rules require the body of trustees to include employee members. The rules contemplate that, as trustees, the employee members will from time to time have to exercise discretions in which their duty and interest may conflict. In these circumstances there is, in my judgment, no rule of equity that requires them to account for the benefits that an entirely proper exercise of discretionary powers may produce for them.

114. There is, however, no Australian authority that has considered this issue. The closest the Australian authority comes is to consider an executor's potential conflict of interest in respect of payment of a superannuation death benefit where there had been consent to the breach of fiduciary duty for a period of time: see *Brine v Carter* [2015] SASC 205.

115. In Australia, there is authority that fiduciary duties are not the same in their application to all facts and circumstances. The particular fiduciary duties are "moulded" to the context in which they apply: see *Howard v Commissioner of Taxation* (2014) 253 CLR 83. Accordingly, the fiduciary obligations of an SMSF trustee should be moulded to the particular legislative framework that governs such trustees (i.e. the *Superannuation Industry (Supervision) Act 1993*).

116. A case that I acted in provides an illustration of how these issues can arise. The case involved a corporate trustee of an SMSF which had a husband and wife as the directors (they were also members of the fund). The husband died leaving the wife as the sole director of the corporate trustee. The wife, together with the solicitor, were the executors of the deceased estate.

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[34] *Edge v Pensions Ombudsman* [1998] Ch 512; [2000] Ch 602 (upheld on appeal). And see *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32 at 40–41.
[35] [1998] Ch 512.

117. There were substantial death benefits that needed to be distributed. Under the trust deed, the corporate trustee had discretion as to who the death benefits could be distributed to. There had been a binding death benefit nomination made several years beforehand, however, that nomination had lapsed. That lapsed nomination expressed a preference for the death benefits to be paid to the husband's estate.

118. The husband's family situation was complicated. He had many adult children from a previous marriage. He had one step-child from his current marriage who was within the class of persons to whom the death benefits could potentially be distributed.

119. The adult children of the previous marriage were concerned that the wife would distribute all the death benefits to herself, or herself and her son. They wanted the death benefits to be distributed to the estate, in which case they would benefit.

120. The wife recused herself from acting in respect of the death benefits in her capacity as executor, leaving the other solicitor-executor to act. She was, however, still a director of the corporate trustee in her own right.

121. The adult children applied to the Supreme Court for an injunction to prevent the death benefits from being distributed. They also sought various alternative forms of final relief to ensure that the wife did not make the decision about where the death benefits should be distributed (eg preventing the corporate trustee from exercising the discretion and putting the decision into the hands of an independent person). The rationale was that there was a conflict of interest as the wife, a director of the trustee, was also a member of the superannuation fund in whose favour the discretion to distribute the death benefits could be exercised.

122. At the time, the corporate trustee had not *actually* exercised the discretion, nor had the wife given any indication as to how the discretion might be exercised. Nonetheless, the adult children still obtained an injunction to prevent the discretion from being exercised. The matter squarely raises the issue as to whether a trustee of an SMSF can exercise a discretion in favour a member, notwithstanding the conflict of interest. The matter resolved so, unfortunately, the Supreme Court was not given the opportunity to provide some clarity on this issue.

123. Another interesting aspect of the case was the adult children's reliance upon a lapsed binding death benefit nomination to support their view that the death benefits should be paid to the estate. The nomination referred to the death benefits being paid "to my estate". In *Munro v Munro* [2015] QSC 61, the Court found that similar wording ("trustee of deceased estate") was invalid. Under the relevant regulations[36], the nomination needed to specify that it was the legal personal representative or executor receiving the death benefits, or it had to name the relevant person.

[36] Regulation 6.22, *Superannuation Industry (Supervision) Regulations 1993*.

9. Testamentary trusts

124. Testamentary trusts are a common estate planning tool. One of the key benefits is that they permit access to a concession from the penal tax regime that applies to minors (i.e. minors get taxed at penal rates once their income exceeds $416). This concession allows a minor beneficiary to access the adult income tax thresholds (the concession applies to what is term "excepted income", which can include income from a testamentary trust). It is important to note that the benefit is *not* available if income is distributed to a minor beneficiary from a testamentary trust via another inter vivos trust.[37] The 2018-2019 Budget has made an announcement that suggests there may be changes to the concession in the near future, although there is little detail as yet.

125. The purpose of this section is not to examine that tax concession in any detail, but rather to touch upon some issues involving testamentary trusts that I have come across in practice.

What if a client is worried about their pension or does not want to be a beneficiary of a trust?

126. A client may, for family or other reasons, wish to be excluded from being a beneficiary under a testamentary trust once the settlor has passed and the trust commences.

127. A beneficiary can, of course, disclaim any interest they have in a testamentary trust pursuant to the general law. Some testamentary trust provisions allow a beneficiary to also seek exclusion pursuant to the trust deed on a prospective basis. It is important to distinguish what occurs under such clauses from a general law disclaimer. At general law, a disclaimer, as between the trustee and beneficiaries, is retrospective in its operation.[38] Clauses in a trust deed that allow exclusion as a beneficiary are generally drafted in a manner such that they operate prospectively.

CGT consequences of disclaimer

128. A CGT asset is defined very widely, so a beneficiary's interest in a fixed trust can be a CGT asset, as could rights as a discretionary beneficiary to due administration of a testamentary trust and rights as a taker in default .[39] Consequently, the surrender of such rights by disclaimer should result in a CGT event happening.[40] As a general proposition, it is likely that for a discretionary testamentary trust such a capital gain (for other than a default beneficiary) would be nil or nominal because the cost base and market value of the rights would be nil or nominal. The Australian Taxation Office (**ATO**) accepts that is the case, however, is of the view that for a default beneficiary it is possible that such a

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37 See, for example, Private Ruling Number 1012846046513 and s 102AG, *Income Tax Assessment Act 1936*.

38 *Nemesis Australia Pty Ltd v Commissioner of Taxation* (2005) 150 FCR 152 at [50]; *FCT v Ramsden* (2005) 58 ATR 485 at [30].

39 See definition of CGT asset in s 108-5 of the *Income Tax Assessment Act 1997* (**ITAA97**).

40 Most likely CGT event C2 which deals with a person's ownership of an intangible CGT asset ending by, inter alia, being abandoned, surrendered or forfeited: see s 104-25, ITAA97. And see *TD 2001/26*.

beneficiary's interest could have more than a nil or nominal value and, if so, there could be a capital gain on surrender of those rights[41] (even where no consideration is given for the surrender, there is a market value substitution rule[42] that can deem a taxpayer to have received capital proceeds equal to the market value of the CGT asset, in this case, the rights held a discretionary object or other beneficiary of the trust).

129. Unhelpfully, the ATO gives no practical guidance about how to determine if such rights have any value. The ATO merely says[43] that whether a default beneficiary's interest has any substantial value or not will be determined on a case by case basis depending in each case on the terms of the particular trust and its purpose, the past history of distributions made by the trustee in favour of the default beneficiary and all the other circumstances of the particular case.

130. A secondary issue is whether a person's cessation as a beneficiary would cause a resettlement of the trust such as to cause a CGT event to occur (keeping in mind that resettlement is not a specific CGT concept, however, there may be CGT events that occur if there is a trust resettlement). There are a number of possible CGT events[44] that could occur on a resettlement of a trust, for example, CGT event E1 which occurs when a person creates a trust over a CGT asset by declaration or settlement.[45] This is likely to be more of an issue for fixed trusts, as an exclusion of a discretionary object would, in most cases, be unlikely to cause a trust resettlement (i.e. result in a new trust) where done pursuant to a power in the trust instrument.[46] Clients can always seek a private ruling from the ATO if they want certainty on such an issue.

Stamp duty consequences

131. A resettlement of a trust itself is not a dutiable transaction for stamp duty purposes. However, if a trust is resettled, there may be dutiable transactions that apply, specifically, certain types of declaration of trust or a change in beneficial ownership (which can occur, inter alia, if dutiable property becomes the subject of a trust or ceases to be the subject of a trust[47] and also to changes in equitable interests in dutiable property). This makes it important to very carefully consider how the exercise of a power of disclaimer in a trust deed is dealt with so that it does not, at least, result in a declaration of trust.

132. A change in beneficial ownership can also include a change in equitable interests in dutiable property. A beneficiary of a discretionary trust, however, only has an interest in the underlying assets of the trust if the trust instrument creates that result: see *Commissioner of State Revenue v Serana Pty Ltd* (2008) 36 WAR 251 at [124]; *CPT Custodian v*

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41 *TD 2001/26* at paragraphs 2 to 4.

42 s 116-30, ITAA97.

43 *TD 2001/26*.

44 See subdivision 104-E, division 104, part 3-1, ITAA97 which contains a number of different CGT events relating to trusts.

45 See s 104-55, ITAA97.

46 See *TD 2012/21* at paragraphs 1 to 5 and *FCT v Clark* [2011] FCAFC 5.

47 See s 7, *Duties Act 2000* (Vic).

Commissioner of State Revenue (Vic) (2005) 224 CLR 98 at [15]; *Kent v SS 'Maria Luisa' (No 2)* (2003) 130 FCR 12 at [60]. My own personal view is that where a discretionary trust's provisions do not give any beneficiary an interest in the underlying assets, no beneficiary has an equitable interest in any underlying dutiable property such that an addition or exclusion of beneficiaries to a discretionary trust should not result in a change in equitable interests in that underlying dutiable property. The Commissioner of State Revenue may not necessarily share this view.

133. As I have mentioned, a change of beneficial ownership could also occur if there were a trust resettlement by creation of a new trust. I refer to my comments above under the CGT section about trust resettlements.[48]

134. One other risk to note is that, under the *Duties Act 2000* (Vic) a surrender of dutiable property (which is a dutiable transaction) can include an interest under the will or codicil of a deceased person disposing of, for example, Victorian land or an interest in or under the estate of a deceased person in Victorian land.[49]

Centrelink – pension consequences of disclaimer

135. The income and assets of a controlled private trust can, broadly, be attributed to an individual for the purposes of the income and asset tests for determining pension eligibility. A person, for example, who is a trustee, potential beneficiary and appointor of a testamentary trust would likely control the trust and have income and assets of the trust attributed to them for pension eligibility purposes (assuming that none of the assets are exempt).[50]

136. Under Centrelink's practices, excluding a person as a beneficiary of the trust would not be sufficient for them to relinquish control. The following additional steps would need to be taken:[51]

(1) relinquish *all* formal roles and control (i.e. the person would need to cease being trustee, and appointor, as well as ceasing to be a beneficiary);

(2) relinquish all beneficial interest;

(3) the person needs to make a written declaration that they will not exert any control over, or benefit in any way from, the trust.

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48 See *FCT v Clark* [2011] FCAFC 5. The NSW Chief Commissioner shares the view in the context of the NSW legislation that deletions of discretionary objects/default objects of a discretionary trust would not result in a dutiable transaction consisting of a transfer or a declaration of trust provided that the relevant document does not contain a declaration of trust (the NSW legislation does not deal with changes in beneficial ownership): see Revenue Ruling DUT 017 (NSW). Although I also note the NSW Chief Commissioner's view that a default capital beneficiary's interest is dutiable property under the NSW legislation to the extent that the trust fund comprises dutiable property.

49 See ss 7(1)(b) and 10(1)(e), *Duties Act 2000* (Vic).

50 See ss 1027B, 1027C, 1027E, 1027P, 1027V, 1027X, s 1027Y, *Social Security Act 1991* (Cth).

51 Government's Guide to Social Security Law, section 4.12.9.10.

137. Technically, a private trust can still be controlled by an individual for pension purposes if it is controlled by an associate of an individual (which could include a relative). Theoretically, if a relative became the trustee/appointor of a testamentary trust, the disclaiming individual could still be treated as controlling the trust and have income and assets of the trust attributed to them.

138. In practice, Centrelink, generally, would not treat a person that has relinquished control in the above manner as if they had control such as to attribute assets and income of the trust to them for pension eligibility purposes.[52]

139. There is also another consequence of disclaiming. At the time of writing, for pension eligibility purposes, a person could only make gifts of up to $10,000 in a year or $30,000 in a 5 year period. Amounts in excess of these thresholds can potentially have an effect on the asset and income eligibility tests.[53]

140. Centrelink's view is that a relinquishment of control of a private trust results in a gift of the assets held by the trust.[54] Those gifts can then be taken into account in assessing eligibility under the pension tests for 5 years after. Consequently, practitioners and clients need to be careful not to assume that they can simply disclaim a trust interest in order to meet the pension tests.

CGT exemption on transfer of an asset from a legal personal representative to a beneficiary – what happens if a beneficiary is added who was not part of the will?

141. There is a CGT exemption that applies for deceased estates, namely, where a CGT asset passes to a beneficiary of a deceased estate. Any capital gain that a legal personal representative (i.e. executor or administrator) makes if the asset passes to a beneficiary in the estate is disregarded.[55] An asset passes to a beneficiary in the estate if the beneficiary becomes the owner of the asset:[56]

(1) Under the deceased's will or that will as varied by a court order;

(2) By operation of an intestacy law, or such a law as varied by court order;

(3) Because the asset is appropriated to the beneficiary by the legal personal representative in satisfaction of a pecuniary legacy, or some other interest or share in the estate; or

(4) Under a deed of arrangement if the beneficiary entered into the deed to settle a claim to participate in the distribution of the estate and any

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52 Government's Guide to Social Security Law, sections 4.12.10, 4.12.3.10 and 4.12.9.10.

53 See s 1081 and the sections that follow in the *Social Security Act 1991* (Cth).

54 See s 1126AA and s 1126AB, *Social Security Act 1991* (Cth) generally on gifts and the policy at, for example, the Guide to Social Security Law, section 4.12.9.10.

55 s 128-15(3), ITAA97.

56 s 128-20(1), ITAA97.

consideration given by the beneficiary for the asset consisted only of the variation or waiver of a claim to one or more other CGT assets that formed part of the estate. Importantly, for his particular category it is not necessary for a potential beneficiary to actually commence court proceedings. The ATO accepts that it is sufficient if a potential beneficiary communicates their dissatisfaction with the will to the trustee/executor.[57]

142. Although, technically, a trustee of a testamentary trust does not fall within the requirements to obtain the exemption, the Commissioner has a practice of accepting that a distribution from a testamentary trust to a beneficiary of that trust can come within the exemption (even if distributed to a trustee of another trust).[58]

143. What happens if a person should have been included in the testamentary trust in the will as a beneficiary but they inadvertently have not been included? If they were subsequently added pursuant to a power of amendment in the will, could the exemption apply to a distribution of property to them?

144. In my view, a mere amendment to the testamentary trust provisions would not be sufficient because it would only operate prospectively.[59] The property would not pass under the deceased's will, instead, it would pass due to an amendment made to the provisions of the testamentary trust which did not alter the provisions of the will itself when it commenced operation.

145. Contrast the consequences of amendment with those of rectification. Rectification, as opposed to amendment, operates retrospectively to treat the trust deed as if it had always operated in that manner. The Federal Commissioner of Taxation, generally, accepts that is the case (and that such a change by rectification would not amount to a trust resettlement)[60], although he would not necessarily accept that *any* particular change to a trust deed constituted rectification.[61] It may therefore be possible to mount an argument that rectification to add a beneficiary to a testamentary trust would satisfy the requirements of the CGT exemption because rectification would, arguably, mean that the provisions of a testamentary trust that are contained in a will are treated as if they had always been like that.

146. In order to rectify a document, there must be a mistake in how the instrument is drafted such that it does not reflect the intention of the parties to it (eg words that have

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57 See *TR 2006/14*.

58 See, for example, *PS LA 2003/12* and Private Ruling Number 1012846046513.

59 See, for example, Private Ruling Number 1012846046513.

60 See, for example, Private Ruling Number 69643. Private Rulings do not bind the Commissioner in respect of other taxpayers, however, at least they give some indication of the Commissioner's views on particular issues. And see *PS LA 2008/4*.

61 See, for example, Private Ruling Number 67210.

been incorrectly added, wrongly used, or omitted[62]). This can even include a case where the document contains the wording it was intended to contain but it has an effect or meaning different from that intended.[63] This has been expressed in some authority as the common intention of the settlor and the trustee at the time the trust was created.[64]

147. Importantly, for there to be rectification there needs to be clear and convincing proof of the intention of the party at the time of execution of the document as to the effect which the document had. If the intention of the party is too equivocal or general or not sufficiently exact or precise, then a court would not permit rectification.[65]

148. Accordingly, simply because a client believes that someone *should* have been included as a beneficiary of the testamentary trust does not mean that rectification will be available. There needs to be that clear and convincing proof of intention at the time of execution of the document.

9. Vesting of a trust – the ATO's draft ruling from 2017

149. For Victorian trusts, the trust deed must contain a vesting clause which places a limit on the life of the trust (i.e. provides that the trust fund must vest within a specified period). This is required so that the rule against perpetuities is not infringed. In Victoria, a period of up to 80 years can be specified.[66] A failure to include such a provision risks the trust granting interests which could vest outside the perpetuity period resulting in an invalid trust. The trust does, however, remain valid during a statutory "wait and see" period until it becomes established that the vesting must occur after the end of the perpetuity period.[67]

150. Greater flexibility can be provided in the trust deed by giving the trustee a power to bring forward the vesting date (this power might, for example, only be exercised with the consent of the appointor). Sometimes vesting will occur on the happening of a specified event such as the death of a particular beneficiary.

151. The trust deed must contain provisions to specify what happens with the trust fund on vesting of the trust. There are many options available. The trust deed might, for example, provide for specific property or all property to pass to particular beneficiaries or their deceased estates.

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62 *Re Butlin's Settlement Trusts* [1976] Ch 251.

63 *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329; *AMP (UK) plc v Barker* [2001] PLR 77;

64 *Kirkham as trustee of the Kirkham Family Trust* [2010] WASC 106 at [7] and *Public Trustee v Smith* [2008] NSWSC 397 at [71].

65 *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329. And see the summary of principle in *Franknelly Nominees Pty Ltd v Abrugiato* [2013] WASCA 285 at [176]-[182].

66 See s 5, *Perpetuities and Accumulations Act 1968* (Vic).

67 s 6, *Perpetuities and Accumulations Act 1968* (Vic).

152. The more common type of vesting clause will give the trustee a power to determine who takes the trust capital. In default of the exercise of that power, the clause will provide for a priority list of takers in default of appointment. The list might, for example, specify that certain family members are to take in default and, if they are all deceased, that a charitable institution is to take or funds are to be used for charitable purposes by the trustee.

ATO's draft ruling on vesting

153. The ATO has recently, in December 2017, released a draft ruling (*TR 2017/D10*) which sets out the ATO's views on various tax issues relating to the vesting of trusts.

154. The ATO accepts that, prior to a trust vesting, it might be possible for a trustee (pursuant to a power in the trust deed) or a Court (pursuant to s 63 of the *Trustee Act 1958* (Vic)) to extend the vesting date. The ATO's view is, however, that once the vesting date has passed it is no longer possible to extend the vesting date, even by conduct if the trustee and beneficiaries have continued to treat the trust as being in operation (and not having vested yet).

155. The ATO's view is that, in the case of a discretionary trust, once vested the trustee holds the income (and other trust property) for the absolute benefit of those specified as takers on vesting. That is, any income accumulated post-vesting should go to the specified takers. The ATO will accept an allocation of trust income between pre and post-vesting periods that is done on a fair and reasonable basis (eg if vesting occurs part-way through an income year). The ATO will treat any distribution resolution post-vesting that is not consistent with the specified takers' interests as being void or otherwise ineffective.

156. The views above have the potential to create some serious issues if the trustee and beneficiaries are unaware that the vesting date has passed (eg by not reading the trust deed). Essentially, these are the same type of issues that occur when distributions have been improperly paid to someone who is not a beneficiary of the trust (i.e. beneficiaries wanting income that should have been paid to them; tax issues for the trustee and beneficiaries; and the ability to recover from the beneficiaries who *did* receive the funds).

157. The ATO accepts that vesting, of itself, will not necessarily cause a CGT event to happen. CGT event E1 operates when a new trust is created over a CGT asset by declaration or settlement. The ATO accepts, however, that a trust vesting will not ordinarily cause a trust to come to an end and settle the trust property on a new trust (resulting in CGT event E1). This is because the nature of the trust relationship may have changed, but the underlying trust relationship continues.[68] Subsequent events may occur which change this position (eg if the beneficiaries decided, because the vesting date had passed, to create a new trust on the same terms as the original one).

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[68] Relying on *Clay & Ors v James & Ors* [2001] WASCA 18 and *Hancock v Rinehart* [2015] NSWSC 646.

158. Another potential CGT event which may operate is CGT event E5 which applies where a beneficiary becomes absolutely entitled to a CGT asset(s) of a trust. It is possible that the vesting of a trust could have this result, although that will not always be the case. The ATO's views on absolute entitlement are set out in draft ruling *TR 2004/D25* and will not be canvassed further in this paper.

159. The only good news about absolute entitlement is that *Oswal v FCT* [2013] FCA 745 has limited the concept somewhat. An unfulfilled trustee's indemnity may prevent absolute entitlement arising, unless the quantum of the liability is ascertained and there are sufficient other assets to pay out the liability (i.e. assets other than the property for which the question of whether there is absolute entitlement arises). *Oswal* also suggests that a power of sale could create some issues for absolute entitlement.

160. In most cases, actual distribution to a beneficiary will be the relevant CGT event, however, practitioners need to be vigilant because, as explained, it is possible that another CGT event could trigger prior to any property being distributed to a beneficiary.

Dr Philip Bender

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