

## WILLS – AND THE IMPLICATIONS OF GETTING THEM WRONG

The ramifications of not thoroughly considering all options in a Will can be profound. This article looks at two very real examples and their consequences.

A Will is a child of the legislation of the jurisdiction in which it is made. It can do no more, and no less, than the legislation allows.

Your Will cannot give away what you do not own. Therefore, while your sole assets are covered by your Will, joint assets, assets owned by a company, a family trust or your superannuation fund are not covered by your Will.

A couple of recent Court case studies demonstrate how important it is to ensure that you get correct advice when making your Will, particularly if you also have assets owned by other entities. They further demonstrate how important it is that your professional advisers know what you are up to, and that they each know what role the other is to play in acting on your behalf.

### ***Katz v Grossman [2005] NSWSC 934***

**A Will cannot direct an SMSF trustee as to how that member's death benefits will be distributed.**

The surviving husband of an SMSF fund died leaving two surviving children: a daughter and a son.

The father and the daughter had been co-trustees of the SMSF after the wife had died. The daughter was therefore the only surviving trustee of the family SMSF.

The son was neither a trustee nor a member of the fund.

The fund comprised the father's superannuation benefits of \$1,000,000.00, and his Will directed that SMSF benefits were to be split equally between his two children.

However, the daughter exercised her discretion as the surviving trustee to disregard her father's Will, and paid all SMSF fund benefits to herself.

The Superannuation Complaints Tribunal could not assist the son, as that body has no jurisdiction over SMSFs.

The son was unable to get the father's Will to make up the shortfall as the Will did not contain any equalisation clauses to even up the unequal payment of death benefits.

Further, the father had not made a Binding Death Benefit Nomination. In fact, the SMSF deed did not appear even to allow for a BDBN to be made.

Had the fund deed permitted a BDBN, an additional measure may have been required. An Enduring Financial Power of Attorney with an express authorisation for the attorney to confirm or alter the BDBN could have been executed. Further, it may have been necessary to amend the SMSF deed to allow an indefinite BDBN that would not lapse after 3 years.

In summary, the NSW Supreme Court held that:

- The daughter had validly exercised her discretion as a trustee to distribute the whole of the death benefits to her alone, even though the son had been unfairly excluded, and
- The Will could not direct the distribution of death benefits from the SMSF.

### ***Public Trustee v Smith [2008] NSWSC 397***

**A Will cannot direct the way in which trust assets will be distributed on the death of the Testator.**

Dr Helen Ward was a cat lover, divorced, had no children, and was the sole director and shareholder of Helen Ward Nominees Pty Ltd, the corporate

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trustee of her family discretionary trust.

The trust had purchased the residence in which Dr Ward lived.

However, an oversight in the drafting of the trust deed meant that Dr Ward was not a beneficiary of her own trust. As a result, the trustee could not use the default beneficiary provisions in the trust deed to distribute trust assets to her even if the trustee had failed to distribute all of the income and capital to the beneficiaries.

Dr Ward made her Will appointing The Public Trustee as her Executor and Trustee, and left her “property” to Ms Robyn Smith, giving Ms Smith a right to reside in the property for at least 15 years subject to Ms Smith agreeing to look after Dr Ward's cats. After 15 years, Ms Smith would receive the property in her own right.

After Dr Ward's death, it became clear that the property was an asset of the family trust, and therefore was not part of her estate.

Ms Smith challenged Dr Ward's Will, and commenced proceedings against the Public Trustee of NSW. The parties agreed that ideally the trust deed should be amended to include Dr Ward as one of the trust beneficiaries even though she was now dead.

Ms Smith sought to enforce the gift of the property given by Dr Ward's Will, arguing that she was entitled by “beneficial ownership by virtue of control” as determined by the Federal Court decision in the *Richstar* case. In *Richstar*, the defendant had controlled the Appointor of the family trust, and therefore had controlled the trust because the Appointor could remove and replace the trustee of the trust.

Using the above as a basis for her claim, Ms Smith argued that because Dr Ward had held the power to control the exercise of the trustee's discretion in distributing the trust property, Dr Ward was therefore the beneficial owner of that trust property. Using that logic, Ms Smith concluded that the house (owned by the trust) should be given to Ms Smith as directed by Dr Ward's Will.

The Court rejected this reasoning. *Richstar's* finding of “beneficial ownership” had relied upon ASIC's prosecution for breaches of *The Corporations Act 2001* that had no bearing upon Ms Smith's claim. Sadly for Ms Smith, the Court held that, just because Dr Ward could control the exercise of the trustee's powers, and could cause the trustee to distribute trust income and capital did not make her the beneficial owner of the trust property.

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The Court observed the following:

- The trust deed failed to give the Public Trustee the power to distribute the trust assets as directed by Dr Ward's Will. The fatal flaw was that the trustee could only distribute capital to the named capital beneficiaries who were living at the time of the distribution. As Mrs Ward was now dead, and had not even been a beneficiary of her own family trust at the time of her death, the trustee could not have distributed trust assets to her during her lifetime and certainly could not distribute trust assets to her estate now that she was dead.
- The Public Trustee, with the Appointor's consent, could still wind up the family trust and seek to distribute the trust assets. Yet, the even then the distributions could only be given to the default beneficiaries under the trust deed. As neither Mrs Ward nor Ms Smith was a default beneficiary of the family trust, the Public Trustee as trustee of the trust would breach its duties if it tried to distribute trust assets as directed by the Will.

Notably, the Court did not decide on these issues. Instead, it referred these problems back to the Public Trustee to resolve.

However, a number of questions still remain:

- How was it that the discretionary trust deed had failed to name Mrs Ward as a beneficiary of her own trust?
- What are the tax implications of distributions of capital and income in breach of the terms of the trust deed to Mrs Ward during her lifetime?
- How was Mrs Ward's Will prepared and executed despite her having gifted property that she did not own?
- How would the Public Trustee (as trustee of the family trust) deal with the CGT and stamp duty liabilities if the Court had installed Mrs Ward after her death as a trust beneficiary in light of the ATO's 2001 Statement of Principles regarding resettlement?

How could the Public Trustee even try to distribute family trust property according to the Will when it would be in direct conflict with its obligations as both the LPR of the estate and as the trustee of the family trust, thereby exposing it to claims from dissatisfied default beneficiaries of the family trust as well as beneficiaries under the Will?

### More information

Should you have any queries or require more information, please contact the team at Topdocs on 1300 659 242.

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