

T H I R T E E N **WENTWORTH** SELBORNE

# **Administration of, and Disputes concerning Trusts**

**Denis Barlin**

**Barrister**

**(02) 9231 6646**

**[dbarlin@wentworthchambers.com.au](mailto:dbarlin@wentworthchambers.com.au)**

# Overview

- Overview
- Fraud on powers
- Removal of trustees
- Judicial advice
- Access to trust documents
- Family Provision & trusts
- Family Law & trusts
- Asset protection & trusts
- Present entitlements & estate considerations
- Barnes v Addy

# Removal of Trustees

- Terms of trust deed
- Section 6 of the *Trustee Act 1925* (NSW)
- Inherent jurisdiction
- *s.70 Trustee Act 1925 (NSW)*
  - Court may order appointment;
  - in substitution or addition;
  - expedient to approach;
  - inexpedient, difficult or impracticable without Court assistance.
- *Pope v DRP Nominees Pty Ltd* (1999) 74 SASR 78
  - statutory power used even if there is a power of appointment.

# Removal of Trustee

- *Letterstedt v Broers & Anor* (1884) 9 App Cas 37
  - ancillary to principle duty – see trusts properly executed;
  - continuance of trustee detrimental to execution of trusts;
  - main guide = welfare of beneficiaries.

# Removal of Trustee

- In re Tempest (1866) 1 Ch App 485
  - exercise of discretion;
  - three rules and principles:
    1. Have regard to wishes of person who created the trust;
    2. Court will not appoint a person who has interest to some – in opposition to other or testator;
    3. question – will appointment promote or impede execution of trusts.

# Removal of Trustees

- *Miller v Cameron* (1936) 54 CLR 572
  - no general rule
  - dominant consideration – welfare of beneficiaries
  - Dixon J:
    1. protect interests of beneficiaries;
    2. security over trust property;
    3. efficient and satisfactory execution of trusts;
    4. faithful and sound exercise of the powers conferred on trustee.

# Removal of Trustee

- *Crowle Foundation v NSW Trustee and Guardian* [2010] NSWSL 647
  - No practical difference between s.70 and interest jurisdiction:
    1. change conducive to efficient management of trusts;
    2. significant risk of conflict if trustee not removed.

# Removal of Trustee

- General rule – not appoint near relatives
- No close family ties
- Unless ‘special circumstances’
- *John Leslie Kennedy v Glenn Raymond Kennedy*  
[2011] NSWSL 1619
  1. beneficiaries small family group;
  2. administration of trust simple;
  3. trust property – single property;
  4. family members in fact acted as trustees.

# Judicial Advice

- Section 63 of the Trustee Act 1925 (NSW)
- Macedonian Church Case
- Questions concerning:
  - Management or administration of trust property
  - Interpretation of trust instrument

# Access to trust documents

- Limited approach – *Schmidt v Rosewood Trust*
- Expensive approach - *Londonderry's Settlement*
- *Schmidt*:
  - beneficiary has no proprietary interest in trust documents;
  - no automatic right of production and inspection;
  - require Court to exercise inherent jurisdiction – intervene in administration of trust.

# Access to trust documents

- *Londonderry*:
  - trust documents are closely related to trust property;
  - documents in which beneficiaries have an interest;
  - proprietary right – fall short of beneficial interest;
  - entitled as of right.

# Access to trust documents

- *Avanes v Marshall*
  - no proprietary interest;
  - disclosure is aspect of Court's inherent jurisdiction to supervise;
  - intervene in administration of trust;
  - applies to trust documents not trust accounts;
  - not abrogate trustee's duty to keep accounts.

# Access to trust documents

- *Silkman* – preferred *Schmidt*
  1. definition of ‘trust documents’;
  2. object of discretionary trust – due administration but no proprietary interest – denied access;
  3. only limitation is confidentiality;
  4. reconciling beneficiary entitlement with trust deed – not themselves assets.

# Access to trust documents

- Court intervene – trustee fall short of duty to disclose
- Consider purpose for request
  - assess whether actioned breaches of trust
- OR
- whether trustee falls short of duty to provide information
- Production would not be denied:
  - unfettered discretion to invest;
  - improper purpose does not erode entitlement to compel inspection.

# Access to trust documents

- *Rouge v IOOF Australia Trustees Limited*
- Trustee may refuse inspection of documents
- Grounds of confidentiality:
  - Reasonable grounds to conclude – not best interest of beneficiaries;
  - Disclosure prejudices ability of trustee to discharge duty.

# Access to trust documents

- Schmidt approach
- Burden shifts to beneficiaries
- Two conditions to be satisfied:
  1. documents answer definition of 'trust documents' [evidence or record the nature, value and condition of trust assets];
  2. documents required for proper supervision and administration of trust.

# Access to trust documents

- Unclear:
  1. Can it be used for fishing?
  2. Does Court require – for ‘supervision and administration’ an identification of a cause of action?
- Different to preliminary discovery or discovery in proceedings.

# Family Provision and Trusts

- Family provision orders may be made out of the estate or notional estates (s.63(5) *Succession Act 2006 (NSW)*).
- Property affected by certain inter vivos transactions that disadvantage:
  - (a) estate;
  - (b) eligible person;
  - (c) deceased.
- May be designated “*notional estate*”.

# Family Provision and Trusts

- s.80 – designate property as “*notional estate*” where relevant property transaction takes effect.
  - 3 years before death
    - Intention (wholly or in part) of denying or limiting (wholly or in part) family provision
  - 1 year before death
    - moral obligation to make provision for eligible person.
  - took effect, or is to take effect on or after death.

# Family Provision and Trusts

- Take effect at time of transfer of property
- But:
  - ss.77(4) – if contract and valuable consideration (but under m/v) – when contract entered into
  - ss.77(2) and (3) – powers of appointment, trusts (etc), relevant property transaction takes effect upon death or occurrence of event that deals with entitlements.
- Distributed property may be notional estate (s.79)

# Family Provision and Trusts

- *Kavalee v Burbidge*
- Asset transferred by deceased
- Series of transactions
- Ultimately – a foundation under laws of *Liechtenstein*
- Held – assets available to be designated as notional estate
- “*Founder*” could have obtained instructions from deceased
- Founder obliged to follow such instructions

# Family Provisions and Trusts

- *Kavalee v Burbidge*
- Deceased may effect entitlements
- Either act or omission
- Legal duty of “*founder*” to follow wishes of deceased

# Family Provision and Trusts

- ***Flinn v Fearne***
- Distinguished. *Kavalee v Burbidge*.
- *Position of appointor – one step removed*
- May be fiduciary capacity
- Difference between appointer and trustee

# Family Provision and Trusts

*Wardy v Wardy [2014] NSWSC 473*

# Asset Protection and Trusts

- *Richstar Enterprises Case*
- *s.1323 Corporations Act 2001*
- Definition of “*property*” in *Corporations Act*
- Alter ego approach

# Asset Protection and Trusts

*“in the ordinary case of the beneficiary of a discretionary trust other than perhaps the sole beneficiary of an exhaustive trust, **does not** have an equitable interest in the trust income or property which would fall within even the most generous definition of ‘property’ in s9 of the Act and be amenable to control by receivers under s.1323. **I distinguish** the ‘ordinary case’ from the case in which the **beneficiary effectively controls the trustee’s power of selection. Then there is something which is akin to a proprietary interest in the beneficiary.**”*

- *Richstar* at para. 25

# Asset Protection and Trusts

*'I am inclined to think that a beneficiary in such a case ... at arm's length from the trustee, does not have a 'contingent interest' but rather an expectancy or mere possibility of a distribution... On the other hand, where a discretionary trust is controlled by a trustee who is in truth the alter ego of a beneficiary, then at the very least a contingent interest may be identified because, in the words of Nourse J 'it is as good as certain that the beneficiary will receive the benefits of distributions either of income or capital or both'*

- *Richstar* at para. 36

# Present entitlements and estate considerations

- ***Wood v Inglis* [2009] NSWSC 601**
- Unpaid present entitlements of discretionary trust

# Present entitlements and estate considerations

- ***Wood v Inglis* [2009] NSWSC 601**
- Dr Inglis left residuary of estate to wife
- Issues:
  1. Whether trustee can treat increase as income?
  2. Whether trustee in fact did treat increase as income?
- If so then:
  1. Did trustee make the distributions?
  2. Did trustee discharge obligations to pay the distributions?

# Present entitlements and estate considerations

- ***Wood v Inglis* [2009] NSWSC 601**
- If movement is income – present entitlement & residuary estate
- If not income – asset of the trust

# Present entitlements and estate considerations

- ***Wood v Inglis* [2009] NSWSC 601**
- Trustee could treat movement as income
  - ‘profit’ can be made even if not realised
  - Trust deed confirmed this
- Trustee did in fact resolve to include unrealised gains as income
  - Change of accounting method
  - Inglis – controlling mind of corporate trustee
  - Approved trust accounts by Inglis

# Present entitlements and estate considerations

- ***Wood v Inglis* [2009] NSWSC 601**
- Distributions were validly & effectively made
  - Beneficiary loan account
- Estate did not release trustee from debt