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# FOLKLORE -v- REAL LAW. . .YOUR WILL DOES NOT BIND YOUR SMSF ESTATE!!!

**THE QUALITY OF YOUR SMSF ESTATE DOCUMENTATION IS ALL THAT STANDS BETWEEN YOU RESTING PEACEFULLY WHEN YOU DIE AND A POTENTIAL FAMILY CRISIS HAUNTING THE FAMILY BOTH FINANCIALLY AND EMOTIONALLY WHEN YOU ARE GONE**

**IOPPOLO & HESFORD -v- CONTI [2013] WASC 389** is a recent Western Australian Supreme Court decision that again highlights the need for quality SMSF Estate planning documents to be in place for all SMSFs. The facts in dot point format are>>>

- The plaintiffs (persons bringing the claim to court) were the Executors for the Estate of the late Francesca Conti.( Mrs. C)
- Mrs. C until her death was a Member and individual trustee of a SMSF with her husband.
- The court action was brought against Mr. C as the only remaining Member & Trustee of the couple's SMSF.
- Mrs C's Executors were applying to the court to be appointed Trustees of the SMSF with Mr. C.
- The court had to decide whether or not Mr. C as the surviving member of the SMSF, was obliged to appoint Mrs C's Executors as Co-Trustee of the SMSF.
- The court also had to decide whether or not Mr. C as the sole remaining SMSF Trustee had to distribute Mrs C's SMSF death benefit interests in accordance with Mrs C's will.

## FOLKLORE -v- REAL LAW

The upshot of the ruling in this case, which is now a Common Law precedent, is that:-

1. Mr.C as the surviving member of the SMSF was not obliged to appoint Mrs C's Executor as a Trustee of the fund under the terms of their SMSF Deed, and,
2. Mr.C as the surviving Trustee of the SMSF was also entitled to distribute Mrs.C's interest in the fund at his discretion. The content of Mrs C's Will was not binding on the SMSF Trustees in this matter.

**THE COMMONLY HELD OPINION IN SOCIETY THAT A WILL CAN DETERMINE HOW A DECEASED PERSON'S SUPERANNUATION WILL BE DEALT WITH IS A MISCONCEPTION**

## THE CRITICAL NEED FOR QUALITY SMSF ESTATE DOCUMENTS

Master Sanderson of the WA Supreme Court who heard the matter stated: "*Under the superannuation deed rules, absent a binding written direction from a deceased member, the trustees may in their absolute discretion pay or apply the amount of the fund standing to the credit of a deceased member's account to a spouse or child of the member or any other person who in the opinion of the trustees was dependent on the member at the relevant date. As at the date of death of the deceased there was no binding written direction given by the deceased.*" Master Sanderson noted that Mrs. C's personal Will clearly stated that she did not want any of her superannuation paid to her husband. She wished for her superannuation to be distributed to her four children. Both Mr.C, as well as Mrs. C's Executors,

understood that the couple's SMSF trust deed did give Mr.C as the surviving trustee the discretion to carry out the wishes expressed in his wife's Will, but he was under no obligation to do so!

*"In this case the second defendant as sole trustee of the fund determined the monies standing in the deceased's account should be paid to the first defendant [Mr.C] and not to the beneficiaries mentioned in the deceased's Will," said Master Sanderson.*

Mrs.C's Executors argued that Mr. C had not carried out his duties as Trustee in a "bone fide manner" as required by clause 21.2 of their SMSF Deed. The Executors had the onus of proving this point. Master Sanderson concluded on this point *"There is simply no evidence that was not done in this case. Before exercising his discretion the first defendant took advice. He had his solicitor instruct tax specialists ... as to his rights and obligations...This advice makes it plain Mr. Conti was quite within his rights to have the trustee make payment to him ... It is difficult to see how the first or second defendants could be said to be acting with a lack of bona fides when they had taken advice from a specialist."*

*"Mr. C also relied on a document entitled 'Application for Membership of Conti Superannuation Fund' in relation to Mrs C. In it under the heading 'Nomination of Beneficiaries' there is a direction to the Trustees to pay any death benefit to the first defendant. Whilst this document couldn't be considered a binding death nomination, it was clearly a direction made by Francesca to which the trustee was entitled to have regard when determining to whom the benefit ought to be paid".*

The wise solution to the problem that every lawyer, accountant and financial planner should be recommending to all of their SMSF clients is that proper SMSF estate documents are put in place and that there is no attempt to rely upon a person's Will to attempt to bind their SMSF Estate.

If you don't have a copy of my article entitled, **"THE 3 LEVELS OF SANITY IN HANDLING YOUR SMSF ESTATE +1"** please email me on the address at the foot of this article. Our legal firm specialises in this field and assists clients Australia wide.

## REPLACING A TRUSTEE AFTER THEIR DEATH

Mr. & Mrs. C established their SMSF in 2002, and they were the only members and the individual trustees. Mrs. C passed away in 2010. She had made a will in 2005, upon which probate was granted to the plaintiffs as executors in October 2010. The amount in Mrs.C's account in the SMSF at the time of her death was over \$600,000.

Shortly after his Mrs. C's death in 2011, Mr.C established "Augusto Investments Pty Ltd" (the second defendant in the court case) as corporate trustee of the fund which the law permitted him to do. Master Sanderson in his ruling explained S17A of the Superannuation Industry (Supervision) Act, 1993 ("SISA") which states that a single-member SMSF must have a body corporate acting as its trustee.

*"The single member of the fund must be the sole director of that body corporate save in a situation where a relative of the member is also a director of the body corporate."*

S17A(4) of SISA gives the surviving SMSF member six months to introduce new individual members or to convert the SMSF to a single member fund with a corporate trustee. Mr.C complied with that section of SISA.

He also noted that S17A(3) allows for the possibility of the Legal Personal Representative ("LPR") of a deceased fund member to be appointed as a trustee for a limited amount of time. The LPR can act as a trustee but they don't become a member of the SMSF. They simply act as a stand in representative of the deceased member until the commencement of the deceased member's death benefit payments.

The main argument mounted by Mrs.C's executors to explain why they should be appointed trustees to the SMSF was that, in accordance with S17A of SISA, it was necessary to ensure that the fund remained compliant. They argued that was the only way the SMSF could continue to meet the basic requirements as spelt out in s 17A.

Master Sanderson did not agree. He said, *"Section 17A(3) allows for the appointment of an executor as a trustee of the fund but does not in its terms require such an appointment. Section 17A(4) provides a period of grace - that is to say it allows a fund six months to organise its affairs so it can remain a SMSF."*

*So in the case of a fund which has two members and which would qualify under s 17A(1), on the death of one of the members it remains a SMSF for six months. If the remaining member has not taken some steps during that period to bring the fund within the terms of s 17A(2) then it will cease to be a SMSF. In this case Mr Conti appointed a corporate trustee and the fund remained a SMSF. The fund remained a SMSF because it migrated from the type of fund covered in s 17A(1) to a fund covered by s 17A(2)."*

## **THE LAPSING OF BINDING DEATH BENEFIT NOMINATIONS**

Mrs.C had made a binding death benefit nomination ("BDBN") in 2002 and another one in 2006. Both BDBNs requested the SMSF trustee to pay Mrs.C's SMSF death benefits to Mr.C.

A standard BDBN lapses after three years, and accordingly neither was binding on the SMSF Trustee at the time of Mrs.C's death.

This was a simply rectifiable error.

A properly drawn SMSF Deed would have allowed for a non-lapsing BDBN or even better still a non-lapsing SMSF Will. Again, this is comprehensively covered in the article entitled; "**THE 3 LEVELS OF SANITY IN HANDLING YOUR SMSF ESTATE +1**" please email me on the address at the foot of this article. Our legal firm specialises in this field and assists clients Australia wide.

## **& THEN THE PLAINTIFF'S LAST GASP ATTEMPTS ALSO FAILED**

The final last gasp attempts by the plaintiffs were also hosed out of court. One was to seek to have one of them appointed as a trustee under S77 of the Trustees Act 1962 (WA). Master Sanderson found that the plaintiffs had no good reason to succeed on that point, saying "*I am not satisfied the trustee acted with a lack of bone fides or in any way improperly. There are no grounds for appointing an additional trustee.*" "*Moreover, to do so would sow the seeds of disaster. It would result in there being one corporate trustee aligned with the first defendant and one individual trustee aligned with the beneficiaries under the will. There is no mechanism for resolving the inevitable disputes that would arise in this situation. In such circumstances there would have to be a compelling reason to appoint an additional trustee.*"

Further, the plaintiff's final point of claim for a review of the discretion exercised by the Trustee of the SMSF, was also rejected by Master Sanderson.

Mr.C, was found to have acted totally within his rights under SISA by firstly having moved to a corporate trustee for the SMSF and then by using the trustee's discretion to distribute Mrs.C's SMSF death benefits to himself as an eligible beneficiary under the laws. There were no documents to compel or bind him in place at the time of Mrs.C's death to pay her death benefits otherwise. Her wishes in her personal will were just that. . . simply wishes!!!

**THE MORAL TO THIS TRUE CASE STORY IS THAT THE QUALITY OF YOUR SMSF  
ESTATE DOCUMENTS ARE PARAMOUNT!!!  
THE CASE WAS DETERMINED ON THE CONTENT OF THE  
SMSF DOCUMENTS THAT WERE BEFORE THE COURT.  
QUALITY SMSF DOCUMENTS MAY HAVE LIKELY PROVIDED A DIFFERENT RESULT  
FOR THE DECEASED'S SMSF ESTATE.**

**SO PLEASE CONTACT US NOW TO ASSIST WITH YOUR CLIENT'S SMSF DOCUMENTS.  
A PERSON'S SMSF ESTATE IS OFTEN THEIR No.1 OR No.2 ASSETS BY SIZE IN THEIR  
HOUSEHOLD. AS SUCH IT DESERVES PROPER CARE AND PROTECTION.**

**“Prevention IS better than cure in the real world,  
AND PREVENTION IS OFTEN VERY  
MUCH CHEAPER IN THE LEGAL WORLD”.**



Shane Ellis is the Managing Director of the Shane Ellis legal Group including SMSF Law Equityprotect. He is a Senior Consulting Lawyer specialising in **SMSF ESTATES & LAW, FAMILY ESTATE PLANNING, and Asset Protection Structuring & Business Structures**. He is one of few lawyers in Australia to hold SPAA ACCREDITED SMSF SPECIALIST ADVISOR status & ASIC RG 146 SPECIALIST SELF MANAGED SUPERANNUATION FUND ACCREDITATION. He has won Best of the Gold Coast Awards for three consecutive years for quality of legal services. He speaks regularly to business and professional groups on SMSF Estate Planning; Asset Protection & Business Structures & for the Queensland Law Society Magazine 'PROCTOR' on patterns for success in business.

**From the desk of Shane Ellis  
Shane Ellis legal Group  
SMSF Law Equityprotect**

**Shane is available to assist you!**

**Shane would love to speak to your clients on these matters and assist you with the growth of your business.**

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