TWO WENTWORTH

Craig Birtles

War on Trusts

Testamentary trusts can provide tangible tax and asset protection benefits to beneficiaries in appropriate circumstances. But in other cases they have no real benefit to the beneficiaries and can be difficult and expensive to terminate or vest. In this paper Craig Birtles prompts discussion on the utility of testamentary trusts.

He will address opportunities to "opt out" from, terminate and vary testamentary trusts through drafting and/or an application pursuant to the newly enacted s 86A of the Trustee Act 1925 (NSW) in light of Cisera v Cisera [2023] NSWSC 1507.

Craig is recognised as a preeminent junior counsel in the Doyle's Guide Wills & Estate Litigation practice area. He is a member of the Society of Trust & Estate Practitioners (STEP) and the NSW Bar Association Succession and Elder Law Committee. He is a co-author of C Birtles, R Neal & C Sims, Hutley's Australian Wills Precedents (LexisNexis Butterworths) 10th Edition (2021).

TWO WENTWORTH SUCCESSION CONFERENCE

23 March 2024

Two Wentworth Chambers
Level 2, 180 Phillip Street,
Sydney NSW 2000
P: (02) 8915 2036

About the author

Craig was called to the Bar in May 2017. Craig is a member of the Society of Trust & Estate Practitioners (STEP) and the Succession & Elder Law Committee of the NSW Bar Association.

He is a co-author of C Birtles and R Neal, Hutley's Australian Wills Precedents 8th Edition (LexisNexis Butterworths) 2013, 9th Edition 2016 and C Birtles, R Neal and C Sims 10th Edition 2020.

Craig was named in the Doyle's Guide as a leading New South Wales Estate Litigation Junior Counsel in 2019 – 2023. He was also recognised in the 2024 Best Lawyers Lawyer of the year in the Trusts & Estates practice area.

Craig has presented CPD papers and appeared in proceedings concerning all aspects of deceased estate litigation.

Introduction

Continuing testamentary trusts can provide tangible asset protection and tax benefits if deployed with restraint and a clear purpose. But they should not be deployed without a clear purpose in mind, and if deployed, they should be drafted having regard to that purpose. In this paper I will address some common varieties of testamentary trusts, where some common problems arise, and the operation of the relatively new variation of trusts legislation s 86A *Trustee Act* 1925 (NSW).

1. Table of Contents

1. VARIETIES OF TESTAMENTARY TRUSTS

1.1. C Birtles, R Neal & C Sims, *Hutley's Australian Wills Precedents 10th Edition*, LexisNexis 2021 contains commentary and precedents for the following types of continuing testamentary trusts:

a. Protective trusts, chapter 24.

b. Discretionary testamentary trusts, chapter 25.

c. Special disability trusts, chapter 25.17

d. Life interests, chapter 26.

1.2. C Rowland, P Bailey & V Sundar, *Discretionary Testamentary Trusts: Precedents and Commentary*, Lexisnexis 2013 Ch 4.11 refers to the concept of a superannuation proceeds will trust designed to enable an executor to direct payment of a superannuation death benefit to a death benefits dependent but the precedent provided is a power contained within a discretionary testamentary trust deed to create a separate trust containing the superannuation death benefit, rather than a completely different type of trust.

2. PROTECTIVE TRUSTS

2.1. A protective trust of income is a reference to a statutorily defined form of trust in all states (apart from South Australia) and the Australian Capital Territory (but not the Northern Territory), the essential elements of which are –

a. Income is to be held on trust for a principal beneficiary during the trust period (perhaps for life) unless the trust of the income fails or determines;

b. The trust of the income shall fail or determine if the principal beneficiary assigns, alienates or charges the entitlement, or suffers sequestration of his or her estate.

c. In the event of forfeiture of the income entitlement, the income is to be held for the maintenance, support and benefit of any one or more of the principal beneficiary, his or her spouse, children and remoter issue, or in default thereof, for the persons otherwise entitled on the death of the principal beneficiary.

2.2. The entitlement of the income beneficiary is fixed, subject to forfeiture of the entitlement.

2.3. The relevant legislation is equivalent across the states where it exists: s 45 *Trustee Act* 1925 (ACT); s 45 *Trustee Act* 1925 (NSW); s 64 *Trusts Act* 1973 (QLD); s 30 *Trustee Act* 1898 (TAS); s 39 *Trustee Act* 1958 (VIC) and s 61 *Trustees Act* 1962 (WA).

3. DISCRETIONARY TESTAMENTARY TRUSTS

3.1 A discretionary testamentary trust is a testamentary trust where a trustee is given a discretion as to accumulation or distribution of income during the duration of the trust, and/or as to the distribution of capital either during the duration of the trust or upon the vesting of the trust.

3.2 The trust deed will contain detailed provisions about the appointment of the initial trustee, the power of appointment and removal (and/or disqualification) of trustee, the identity of the beneficiaries, the power to accumulate income or distribute income amongst the income beneficiaries, the power to distribute capital to the capital beneficiaries at or prior to the vesting date, the power to cause the trust to vest, powers of investment and powers relevant to the administration of the trust fund.

3.3 Perceived asset protection and income tax benefits depend for their effectiveness on the trustee having a discretion to distribute amongst a range of beneficiaries rather than the trust deed providing for fixed entitlements.

3.4 The way in which a trustee's discretion is to be exercised can be influenced (and in some respects controlled) through:

a. Making a beneficiary a trustee, or giving the beneficiary the shares in the corporate trustee;

b. Giving a beneficiary a power of appointment and removal of the trustee;

c. Requiring that particular decisions eg capital distribution decisions, not occur without the consent of the beneficiary or alternatively giving the beneficiary the power to veto trustee decisions.

3.5 The main precedent in chapter 25 of *Hutley's Australian Wills Precedents 10th Edition* is Form 25.01 which is a discretionary testamentary trust for the testator's spouse, or if the spouse predeceases, separate discretionary testamentary trusts for each child in the event the spouse predeceases. Variations are provided where it is not necessary to make provision for the testator's spouse, or where one or more beneficiary suffers from a disability.

3.6 The Will Precedents in J Kessler & M Flynn, *Drafting Trusts & Wills Trusts in Australia*, Second Edition, Thomson Reuters 2018 at pp 456-499 have a similar type of structure, with modified precedents distinguishing between minor children and adult children, and one providing for immediate provision both for the spouse and children.

3.7 V Sundar, *Testamentary Trusts: The Australian Master Guide, 3rd Edition*, Lexisnexis 2021, provides a more modular system of drafting discretionary testamentary trusts.

4. SPECIAL DISABILITY TRUSTS

4.1. A special disability trust is a trust which can be used to provide for a severely disabled beneficiary in a way which may not affect their social security entitlements.

4.2. The requirements for a special disability trust are set out in Pt 3.18 of the *Social Security Act* 1991 (Cth), essentially -

a. Assets of a value of up to $781,250 (as at 1 July 2023, excluding a property which is the principal home of the beneficiary) indexed annually are not counted towards the pension assets test; and income on the exempt asset amount is similarly excluded. Additional assets above the threshold can be settled on the trust, but they will not be exempt.

b. The primary beneficiary must be assessed as “severely disabled” and must be the sole beneficiary (subject to the contributor’s right to nominate a remainder beneficiary). The criteria for a “severely disabled” beneficiary over the age of 16 years is that the beneficiary must have a level of impairment that meets the criteria for a disability support pension or other pension on the grounds of permanent incapacity, have care needs that would qualify a sole carer for a carer payment or allowance, or be living in accommodation for people with severe disabilities, and not be working, or have any likelihood of working, in employment at or above the minimum wage for more than 7 hours per week.

c. For a sole beneficiary under the age of 16 years, the criteria for “severely disabled” is that a treating health professional has certified that because of the disability or condition the beneficiary will need personal care for 6 months or more and the personal care is to be provided by a specified number of persons; the carer is qualified under the Disability Load Assessment (Child)

Determination with a rating of intense; and the carer has certified in writing that the beneficiary will require the same care or additional care in the future.

d. The trustee must hold the trust fund for the primary purpose of reasonable care and accommodation needs of the beneficiary. Discretionary spending of $14,000 per year (indexed to CPI increases from 1 July 2023) is also permitted.

e. The terms must incorporate the Model Trust Deed which is available on the Department of Social Security website: www.dss.gov.au/disability-and-carers-programs-services/special-disability-trusts

f. Annual financial statements for the trust must be prepared and audited.

g. The trustee cannot pay any immediate family member for providing care or for services provided to the principal beneficiary. Any paid care or service must be provided by an arms-length employee of the special disability trust, for example, nurse, physiotherapist, cleaning, mechanical services etc.

h. Where another party (not the principal beneficiary) benefits from expenditure that was incurred for the principal beneficiary, the expenditure is allowable where the other party's benefit was of a non-cash nature, minor and provided on a basis that is infrequent and irregular.

5. LIFE INTERESTS AND RIGHTS OF RESIDENCE

5.1. Chapter 26 of *Hutley's Australian Wills Precedents 10th Edition* provides a variety of rights or residence and life interest clauses.

5.2. The following aspects need to be considered when drafting a life interest or right of residence:

a. Whether a life interest is to be flexible, with the beneficiary having the right to cause the executor trustee to sell real estate and acquire substitute property or direct that funds be used for an accommodation bond or some other payment to secure accommodation and, if so, how transaction costs are to be borne.

b. Whether the right is to be personal to the beneficiary (a right of residence) or whether the beneficiary is to have the right to vacate the real property and direct the executor to lease it out and pay the income to the beneficiary (a life interest).

c. Responsibility for outgoings, repair and maintenance and insurances.

5.3. If the estate is to have an ongoing obligation to pay outgoings or the costs of repair and maintenance, a fund must be established by the Will to meet those obligations.

5.4. A well drafted right of residence or life interest will make specific provision for these matters. In the absence of specific provision, there may be litigation concerning the rights and obligation attaching to the right of occupation or life interest.

5.5. The law on these issues (absent specific provision in the Will) was summarised by Powell J in *Binetter v Dunkel* (NSWSC unreported 28 May 1993 at 32) cited with approval by Bryson J in *Hatzantonis & Anor v Lawrence; Cox v Lawrence* [2003] NSWSC 914 at [17] and referred to by Lindsay J in *Estate of Gilmore JA, deceased* [2014] NSWSC 1263 at [30] as follows:

> "There appears, over the years, to have developed a rule of construction that, in the absence of a contrary intention, a devise of the "free use" or the "use and occupation" of land passes an estate in the land … whereas a direction to trustees to permit a named person to reside rent free, or an option to reside, is to be construed as a mere personal licence…
>
> The general rule would seem to be that, as a life tenant is entitled to the rents and profits of the subject land, he is also liable to pay the annual charges, as, for example, rates and taxes …but, quaere insurances …but that, in the absence of an express duty to repair …or liability for permissive waste, is not liable to repair …
>
> Although - since, prima facie, a "right to reside" is not to be equated to a life tenancy - one might be disposed to think that, in a case in which there is but a "right to reside", recurrent outgoings would therefore be a charge upon the income of residue, there appears to have developed a practice that, during such time as the right of residence is exercised such outgoings are payable by the person exercising that right …"

5.6. The proposition that a life tenant has an obligation to pay council, water and sewerage rates and taxes in respect of real estate during the tenure of the interest unless there is a contrary intention in the Will was referred to in R Jennings & J C Harper, *Jarman on Wills*, Sweet & Maxwell London 1951 at p1188 and D M Haines, *Construction of Wills in Australia*, Lexisnexis Butterworths 2007 at [23.9]. In the Haines text at [23.11-23.14] it is said that a life tenant has no obligation to repair (but may be liable in the event of waste) or to insure.

6. SUPERANNUATION WILL PROCEEDS TRUSTS

Why superannuation could be paid to an estate

6.1. Section 4(3) of the *Succession Act* 2006 (NSW) provides:

> "(3) A person may dispose by will of property to which the person's personal representative becomes entitled, in the capacity of personal representative, after the person's death."

6.2. The effect of s 4(3) of the Act is that superannuation interests can be disposed of by will where the superannuation is paid to the personal representative after the testator's death.

6.3. Many superannuation trust deeds permit the payment of a member's death benefit to a death benefits dependant, or to a member's legal personal representative.

6.4. If the testator wishes for his or her superannuation death benefits to be paid to his or her estate:

a. He or she should make a binding death benefit nomination, having regard to the requirements of the trust deed for validity of such nominations (including any requirements that they be made within 3 years of death);

b. He or she should state in their wills any intention that the superannuation be paid or applied in a particular way.

6.5. In the absence of a binding death benefit nomination, the beneficiary of the death benefit depends on the exercise of a discretion by the trustee of the superannuation fund, applying the terms of the fund trust deed.

6.6. There is authority in other states that an administrator to whom Letters of Administration has been granted has a fiduciary duty to apply for a deceased person's superannuation to be paid to his or her estate: *McIntosh v McIntosh* [2014] QSC 99; *Burgess v Burgess* [2018] WASC 279 and *Gonciarz v Bienias* [2019] WASC 104.

6.7. The same considerations have been held to apply to an executor: *Brine v Carter* [2015] SASC 205. The rationale for applying such principles to executors (in contrast to administrators) is, with respect, not as clear particularly where a testator names his or her executor with knowledge (express or imputed) that he or she may be entitled to be paid the superannuation death benefit as a death benefits dependent.

6.8. Where a deceased person's superannuation is held by a retail or industry fund, the executor or administrator cannot do anything more than apply for payment of the death benefit to the estate, complete the necessary paperwork, and await the outcome of the fund's decision.

6.9. Where a deceased person's superannuation is held in a self-managed super fund, the executor or administrator will need to consider appointing himself or herself as either a trustee or a director of a corporate trustee of the fund, in order to make a decision as to the payment of the death benefit.

Relevant provisions of the Income Tax Assessment Act 1997 (Cth)

6.10. Section 302-60 of the *Income Tax Assessment Act* 1997 (Cth) provides that a superannuation death benefit paid to a death benefits dependent is not assessable income.

6.11. Section 302-65 provides to the same effect for a superannuation income stream benefit where the recipient is over 60 years when the benefit is received and the deceased died aged under 60.

6.12. "Death benefits dependent" is defined in s 302-195 as meaning:

a. the deceased person's spouse or former spouse;

b. the deceased person's child, aged less than 18; or

c. any other person with whom the deceased person had an interdependency relationship under section 302-200 just before he or she died; or

d. any other person who was a dependent of the deceased person just before he or she died.

6.13. Section 302-200 provides that two persons have an interdependency relationship if:

a. they have a close personal relationship; and

b. they live together; and

c. one or each of them provides the other with financial support; and

d. one or each of them provides the other with domestic support and personal care.

Nature of the problem addressed by a superannuation proceeds trust

6.14. Absent an effective binding death benefit nomination, the trustee of the testator's superannuation fund may have a discretion as to payment of the death benefit.

6.15. If the death benefit is paid to the estate, tax may be payable on the death benefit unless the effect of the Will is to direct the death benefit to a tax dependent.

6.16. A superannuation will proceeds trust is an express direction or discretionary power given to the executor to hold the superannuation death benefit on the terms of a separate trust, but excluding any non-death benefits dependents as beneficiaries.

7. INTER VIVOS TRUSTS DISTINGUISHED

7.1. Section 4 of the *Succession Act* 2006 (NSW) provides:

> "(1) A person may dispose by will of property to which the person is entitled at the time of the person's death.
>
> …
>
> (5) A person may not dispose by will of property of which the person is trustee at the time of the person's death."

7.2. The effect of s4(5) of the Act is that trust interests cannot be disposed of by will except where either permitted by s 37 of the Act (exercise of a power of appointment over trust property) or s 4(3) of the Act (where the trust property is paid or transferred to the personal representative after the person's death).

7.3. If a testator wishes to make a gift of the income or capital of a trust consideration should be given to the following options:

a. Causing the trustee to make the capital or income distribution, after consideration of tax consequences, during the testator's lifetime.

b. Appointment of a new trustee.

c. Appointment of new directors of a corporate trustee and a gift of the shares in the trustee company.

d. Succession to any appointor power given in the trustee.

8. OPTING OUT FROM DISCRETIONARY TESTAMENTARY TRUSTS

8.1. Form 25.01 in *Hutley's Australian Wills Precedents 10th Edition* gives the primary beneficiary the right to request the executor transfer all or some of the assets to be settled on a discretionary testamentary trust to the primary beneficiary prior to the transfer of the assets to the fund. The executor is then given a power to accede to

the primary beneficiary's request. The reason why the drafting is done in this way is because if the primary beneficiary had an absolute right to call for the asset, the asset protection objective would be defeated.

8.2. The form of "opt out" provision in J Kessler & M Flynn, *Drafting Trusts & Wills Trusts in Australia* Second Edition is expressed differently, giving the primary beneficiary the power to elect to take the whole or a proportion of his or her entitlement but conditions the right of election on the primary beneficiary satisfying certain conditions (eg, not being an undischarged bankrupt).

9. A FINANCIAL RESOURCE?

9.1 Depending on the terms of the trust and the level of control given, an interest in a discretionary trust may be considered to be a "financial resource" for the purpose of either matrimonial property settlement proceedings under the *Family Law Act* 1975 (Cth) or in Family Provision proceedings pursuant to Chapter 3 of the *Succession Act* 2006 (NSW).

9.2 The reference to a "financial resource" in the context of s75(2)(b) of the *Family Law Act* 1975 (Cth) is a reference to "a source of financial support which a party can reasonably expect will be available to him or her to supply a financial need or deficiency": *Hall v Hall* (2006) 257 CLR 490 at 506 – 507 [54] to [55]. Whether a potential source of financial support amounts to a financial resource of a party turns in most cases on a factual enquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the party to call on it.

9.3 Form 25.01 in *Hutley's Australian Wills Precedents* 10th Edition provides that a trustee who has separated from his or her spouse or partner is ineligible to be a trustee and any power to appoint and remove the trustee given to that person is terminated. The same consequences follow from bankruptcy and a determination that the trustee/appointor suffers from a legal incapacity.

10. WHETHER PROVISION THROUGH A DISCRETIONARY TESTAMENTARY TRUST IS ADEQUATE PROVISION

10.1 As to whether an interest as a beneficiary of a discretionary trust could be considered to be adequate and proper provision for the purpose of Chapter 3 of the *Succession Act* 2006 (NSW), in *Bowers v Bowers* [2020] NSWSC 109, Hallen J said at [268] – [271] as follows:

268. “In *Belfield v Belfield* (2012) 83 NSWLR 189 at 206–207 [71]; [2012] NSWSCA 416, Campbell JA (Sackville AJA agreeing) wrote, at [71]:

> “... when the FPA was enacted in 1982, it was common and well known that there were significant advantages for a person with some capital (who I will call the instigator) to arrange the setting up of a family trust, with a structure like that of the present trust deed. Common features of such trusts were that the trust was established by a settlor who was not the instigator or someone the instigator wished to benefit, the eligible beneficiaries were relatives by blood or marriage of the instigator, and there could be a discretionary allocation of income each year amongst eligible beneficiaries and ultimately a discretionary allocation of capital amongst eligible beneficiaries. Other common features were that there was power to alter the eligible beneficiaries, certainty achieved by provisions stating where income, and capital respectively would be distributed in default of a specific allocation of income or capital, and distribution of capital delayed for as long as permissible under the rule against perpetuities but with a discretionary power to advance the distribution date: see, for example, I J Hardingham and R Baxt, *Discretionary Trusts* (1975) Sydney, Butterworths. Those discretions were usually conferred on the trustee of the trust. Such trusts enabled an instigator who was concerned to provide for a family, usually a parent or grandparent, to arrange for assets that they had accumulated to be made available to different members of the family as the need for money presented itself. Such trusts also had the effect of lessening the impact of death duties, while death duties remained in force in Australia, and of lessening the impact of income tax on the members of a family unit considered collectively, by enabling income to be appointed to those members of a family who had a lower marginal rate of taxation.”

269. In *Gregory v Hudson (No 2)* (Supreme Court (NSW), Young J, 18 September 1997, unrep), it was written, at 10–12:

> “Mr Broun QC puts that the authorities clearly show that a provision in a will that trustees might pay additional moneys out

of the estate for the benefit of the applicant is not a proper provision. He cites Re Brown [1972] VR 36. In that case, after citing some decisions from New Zealand and Canada, together with the note of Re WTN C McLelland, CJ in Eq (1959) noted 33 ALJ 240, Norris, AJ said at 39, 'It is true to say that in most of the cases the fact that a discretion to increase a benefit existed was not regarded as rendering adequate a provision which otherwise was inadequate. I think, nevertheless, it is consistent with the authorities to say that such a discretion is not to be excluded from consideration in determining whether or not adequate provision has been made, and that it may in an appropriate case render adequate a provision otherwise inadequate.' He then cites Re Allen [1922] NZLR 218.

Dickey on Family Provision after Death (LBC Sydney 1992) says at p 121,

> 'There is some authority for the proposition that where a person is in need of provision but the quantum of provision made for him or her from a deceased's estate is wholly dependent upon the discretion of trustees, this provision is not adequate. In all probability, however, this is not an inflexible rule. In all probability the question of whether provision of this kind is adequate depends upon the particular facts and circumstances of the case.'

...

I consider, with respect, that Professor Dickey's comment is close to the mark. Ordinarily, a benefit provided under a discretionary trust is a fairly illusory benefit because it can be terminated without reason and there is little likelihood of the discretionary beneficiary being able to force the trustee to pay her a benefit. Hartigan's case shows that even if there is a memorandum of wishes, there is no obligation on the trustee to take that into account. Furthermore, even though the trustees say that they intend to follow the wishes, they are not bound to do so, and indeed, circumstances may change in such a way that they feel it is not proper to continue to

follow the memoranda of wishes and carry out the spirit of what the deceased intended.

...

It seems to me that where a wealthy man, with an estate of at least 11 million dollars, leaves the bulk of the benefits to his widow under a discretionary trust over which she has no control, he has not made proper provision for his widow. The community would expect that the widow of such a man would at least have a home in her own name and some capital to which she could resort whenever she felt like it."

270. I referred to the authorities in *Barbuto, Bradley v Barbuto; Barbuto, James v Barbuto* [2019] NSWSC 1023, where I added, at [335]–[338]:

"The point raised by these decisions was more recently, and succinctly put, in *Lemon v Mead* (2017) 53 WAR 76; [2017] WASCA 215, in which Buss P wrote, at [188]:

> "In my opinion, a provision under a testator's will may not make adequate provision from his or her estate for the proper maintenance, etc, of a person mentioned in s 7 of the Act if, in all the circumstances, the form of the provision is not adequate or proper. That is, the evaluation by the court of the adequacy or propriety of a provision in a will is not confined to whether, in all the circumstances, the actual or potential quantum of the provision is adequate and proper."

Mead v Lemon (as Executor of the estate of the late Michael John Maynard Wright) and Leonie Angela Maynard Baldock and Alexandra Odette Burt and VOC Group Ltd [2018] HCATrans 152, was the subject of a special leave application, which was refused upon the basis that there were insufficient prospects that the appeal would succeed.

More recently, in *Bkassini v Sarkis* [2017] NSWSC 1487, Robb J, before quoting what I had written in *Hedman v Frazer*, wrote, at [304] that a discretionary object's "fate in the present case is an exemplar of the proposition that discretionary testamentary

> trusts will usually provide an inappropriate mechanism for ensuring that a beneficiary under a will receives adequate provision".
>
> An earlier example of such a view is *Shepherd v Shepherd* [2010] NSWSC 167, at [53]-[55], in which McDougall J concluded that a will had made inadequate provision for an adult beneficiary, a son of the deceased, who had no vested entitlement to income and who was entirely dependent upon the trustees (his brother and sister) exercising their discretion in his favour from time to time."

271. In *Taylor v Farrugia*, Brereton J wrote, at [62]:

> "Provision for eligible persons may be inadequate or improper in form as well as, or as distinct from, in quantum. Thus, provision which is dependent upon the exercise of a discretion by the trustee of a discretionary trust will often, though not invariably, be inadequate or improper: *Re WTN* (NSWSC Unreported, 3/7/59, McLelland CJ in Eq); referred to in [1959] 33 ALJ 240 *Gregory v Hudson (No 2)* (New South Wales Supreme Court, Young J, 18 September 1997, unreported)."

10.2 The above passages do that mean that all testamentary trust structures will be found to not provide adequate and proper provision for an eligible person. The answer to that question depends on the terms of the trust, the financial circumstances of the eligible person, and the other relevant s 60(2) *Succession Act* 2006 (NSW) factors.

11. REDUCING TAX

11.1 The utility of the trustee being able to spread the income tax burden will depend on the availability of discretionary objects with lower marginal tax rates to share that burden.

11.2 A discretionary testamentary trust structure is only going to be effective if there are sufficient assets to settle on the trust (and sufficient income generated) to warrant the annual accounting costs, and a desire to benefit a range of beneficiaries.

11.3 If separate discretionary testamentary trusts are to be considered the composition and value of the assets to be settled also need to be considered. For example, if the main asset is property which is to be divided between two or more testamentary

discretionary trusts, consideration needs to be given to the workability of the arrangement from a co-ownership and property management (including funding of repairs, maintenance and improvements) perspective.

12. DISCRETIONARY TESTAMENTARY TRUSTS ARE AN INAPPROPRIATE VEHICLE IN WHICH TO HOLD A HOME FOR A BENEFICIARY

12.1 Property intended to be provided as a home for a beneficiary should not be held within a discretionary testamentary trust.

12.2 A special trust is defined in s 3A of the *Land Tax Management Act* 1996 (NSW) as a trust where the trust property includes land, the trustee is the owner of owner of the legal estate in the land and the trust is not a fixed trust. Cl 11 of Schedule 1À provides that the principal place of residence exemption to land tax does not apply to land held in a special trust.

12.3 Land held in a discretionary testamentary trust thus not receive the principal place of residence land tax exemption. It will also not receive the benefit of the land tax threshold. Land tax will be levied at a flat rate of 1.6% of the unimproved value of the land each year up to the premium land tax threshold then at 2%.

12.4 Upon the disposal of land held in a discretionary testamentary trust, land occupied as a main residence will not receive the capital gains tax exemption (as the exemption applies to individuals not trusts).

13. A WAR ON TRUSTS

13.1. The introduction to this paper referred to the different varieties of continuing trusts that might be found in a Will.

13.2. Protective trusts, special disability trusts, and life interests/rights of residence will usually have a prominent and obvious purpose, and single beneficiary, for the duration of the trust (leaving aside remainder interests). Those trusts may the subject of an application pursuant to s 86A of the *Trustee Act* 1925 (NSW) discussed below, and are not the principal focus of this part of the paper.

13.3. My suggested approach is to evaluate the utility of a testamentary trust having regard to the nature and value of the testator's estate, the intended beneficiaries or charitable purposes and the financial circumstances of the beneficiaries where relevant.

13.4. In order to achieve the desired asset protection and income splitting tax benefits where testamentary discretionary trusts are concerned (and superannuation will proceeds trusts can be considered a subset for the purpose of this discussion), the drafting requires by definition an element of discretion and in some instances for asset protection reasons control may be away from the intended beneficiary.

13.5. Where a testator has a large estate, with income generating assets, and a range of beneficiaries (or charitable purposes) to whom the testator wishes to provide a variable income stream, at the trustee's discretion, the rationale for a discretionary testamentary trust is self-evident.

13.6. The same rationale does not hold if the testator wishes to benefit a small number of beneficiaries where those beneficiaries are likely to want to use their inheritance to purchase a home. (There are creative ways such as a loan from the trust which may make purchase of a home more feasible, but in my view this would only be relevant to the minority of cases.)

13.7. Asset protection concerns for one or more beneficiary, due to the beneficiary operating as a sole trader, or concerns about creditors, or potential property settlement, are another good reason why a discretionary testamentary trust might be considered.

13.8. If the utility of a testamentary trust having regard to the nature and value of the expected estate and the circumstances of the beneficiaries is not obvious, a simple will is sufficient in my view.

14. *OWIES V JJE NOMINEES PTY LTD* [2022] VSCA 142

14.1. *Owies v JJE Nominees Pty Ltd* concerned the Owies Family Trust, established by deed made in 1970. The Trust had assets in excess of $23million, and an annual income of hundreds of thousands of dollars.

14.2. The beneficiaries of the trust included the late Dr John and Dr Eva Owies and their (adult) children Michael, Deborah and Paul. The three children were the default income beneficiaries.

14.3. The Preamble to the trust deed provided that the settlor settled the sum "being desirous of making provision for the Primary Beneficiaries and the General Beneficiaries".

14.4. Clause 3 of the trust deed provided with respect to the income of the trust:

(i) "The Trustees shall in each accounting period until the Vesting Day pay apply or set aside the whole or such part (if any) as they shall think fit of the net income of the Trust Fund of that accounting period for such charitable purposes and/or to or for the benefit of or for all or such one or more exclusive of the others or other of the General Beneficiaries living from time to time in such proportions and in such manner as the Trustees in their absolute discretion and without being bound to assign any reason therefor (but after considering the wishes of the Guardian) shall think fit;

(ii) the Trustees shall hold so much of the income of the Trust Fund as the Trustees shall not pay apply or set aside pursuant to the powers contained in paragraph (i) of this Clause in trust for the persons successively described in paragraphs (a) (b) and (c) of Clause 4 hereof as though each date on which such income becomes subject to the Trusts hereof were the Vesting Day specified in the Schedule;

(iii) notwithstanding anything contained in paragraphs (i) and (ii) of this Clause the Trustees may determine in their absolute discretion before the expiration of any accounting period prior to the Vesting Day to accumulate all or any part of the income arisen or arising during such period and such accumulation shall be dealt with as an accretion to the Trust Fund."

14.5. The vesting day was due to be 30 June 2050. Clause 4 of the trust deed dealt with distribution of capital on the vesting of the trust:

"As from the Vesting Day the Trustees shall stand possessed of the Trust Fund and the income thereof in trust for such charitable purposes and/or for such of the General Beneficiaries for such interests and in such proportions and for one to the exclusion of the other or others as the Trustees may with the consent of the Guardian by instrument in writing revocable or irrevocable before the Vesting Day appoint PROVIDED ALWAYS that the Trustees shall not without such consent revoke any revocable appointment AND PROVIDED FURTHER that if there is no Guardian alive the Trustees shall have no such power of appointment and in default of and subject to any such appointment in trust –

(a) for such of the Primary Beneficiaries as shall be living on the Vesting Day and attain the age of twenty-one years as tenants-in-common in equal shares absolutely PROVIDED ALWAYS that the children (if any) who shall be living on the Vesting Day of any Primary Beneficiary who dies before the Vesting Day (and the descendants of any of such children or the children of such children who dies before the Vesting Day) shall take as tenants-in-common a share calculated per stirpes which such deceased Primary Beneficiary would have received had he or she survived to the Vesting Day;

(b) if in the events which happen or if for any reason whatsoever any part or parts of the Trust Fund shall not be effectively or validly disposed of by the trusts declared by this Deed or by any Deed from time to time in force varying altering or adding to such trusts the Trustees shall stand possessed of such part or parts of the Trust Fund as aforesaid for the statutory next of kin (excluding the Settlor) who are according to law next of kin of the Guardian first named in the Schedule who are living when the same falls or fall into possession as tenants-in-common in equal shares absolutely and if there shall be no such next of kin upon trust for such charitable purposes as the Trustees may determine any resulting trust to the Settlor being hereby expressly negatived"

...

14.6. Clause 17 provided, subject to provision to the contrary "every discretion vested in the Trustees shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion".

14.7. Clause 22 was a power to appoint and remove the trustee. The initial appointor was John and after his death Eva.

14.8. In a deed made in 2002 John and Eva were appointed as joint appointors and guardians. In a deed made in 2010, John was given those roles, after his death Eva, and after her death Michael. In a deed made in 2017, Michael was given those roles and after his death his legal personal representative. The trial judge found these deeds were invalid as the trust deed did not permit amendment to the identity of the appointor and guardian.

14.9. From 2011 to 2018 the income of the trust was paid as to 40% to each of John and Michael and 20% to Eva. None was paid to Deborah or Paul. In 2019 all of trust income was paid to John.

14.10. The evidence was that Deborah had a low income, and various health conditions. She lived in a unit owned by the trust, which the trustee later resolved to distribute to her. Deborah was estranged from Eva from 1986 to 1998. After that there were some periods of close contact and annual phone contact but there were some periods where Deborah did not see her mother for years.

14.11. Paul was financially independent from his parents. He saw them most weeks from 1993 and 2013. His evidence was that he had a good relationship with John until 2013 and a somewhat distant relationship with Eva between 2010 and 2013. He had no contact with his parents between January 2014 and October 2016. He saw John in an aged care facility on 30 November 2016. He met with Eva on 20 January 2017 but then did not see her until July 2017.

14.12. At trial:

a. It was alleged that the trustee had not made resolutions concerning the trust income. This claim failed, as although no copies of the trust resolutions were produced, the accountant gave evidence that they had been made, and the financial statements recording the income distributions were presumed to be an accurate record of their contents: s 1305 *Corporations Act* 2001 (Cth).

b. Claims that the trustee had not given proper consideration to the circumstances of Paul and Deborah and had not exercised the income discretion with due and proper consideration were successful in respect of Paul and Deborah for the years 2015, 2016 and in the case of Deborah 2018. This was found to be a breach of trust. Claims for the other years were not made out, because of contact between Paul and Deborah and Eva and/or John during that time, and the likelihood of personal or financial information being communicated during that time (the information imputed to the trustee through Eva and/or John).

c. The Court dismissed the claim for one third of the income distributions for the years 2015, 2016 and 2018. The Court found that the income distributions were voidable rather than void, and no application had been paid in the originating process for orders setting them aside. A late application for leave to amend was refused.

d. The application to remove the trustee and appoint a new trustee was dismissed.

14.13. The Victorian Court of Appeal referred to the principles relevant to the fiduciary obligations of a trustee of a discretionary trust as follows:

[82] "A trustee in the exercise of its fiduciary discretions is under constraints that do not apply to adult individuals disposing of their own property (*Pitt v Holt* [2013] YKSC 26; [2013] 2 AC 108; [10]; [2013] UKSC 26 (Lord Walker)). In *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] EWHC 318; [1998] 2 All ER 705, Robert Walker J said (at 717):

> Certain points are clear beyond argument. Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever.

…

[85] In *Karger* (*v Paul* [1984] VR 161), McGarvie J said (at 163-4):

> In my opinion the effect of the authorities is that, with one exception, the exercise of a discretion in these terms will not be examined or reviewed by the courts so long as the essential component parts of the exercise of the particular discretion are present. Those essential component parts are present if the discretion is exercised by the trustees in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. The exception is that the validity of the trustees' reasons will be examined and reviewed if the trustees choose to state their reasons for their exercise of discretion.

...

[89] *Wareham* (v Marsella (2020) 61 VR 262; [2020] VSCA 92) provides an illustration of a failure to give real and genuine consideration by a trustee. In that case, the trustee misapprehended the identity of a beneficiary and proceeded on an incorrect basis that had the effect of excluding a potential beneficiary from consideration for the payment of a death benefit.

[90] The Court explained that the application of the ground in a given case requires consideration of three matters. First, what are the relevant matters that must be considered? Second, what standard of review should the Court adopt in assessing whether there has been non-compliance with the obligation? Third, what is the consequence of a failure by the trustee to give real and genuine consideration?"

14.14. At [92] the Court said that the nature of the trust and the terms in which the power is expressed will be important in determining the matters to which the trustee must have regard in the exercise of the power.

14.15. At [93] and [94], after referring to *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254; [2010] HCA 36, the Court said the obligation of a trustee to be properly informed is universal, although the extent of the obligation will be dependent on the particular circumstances, including the nature of the trust. The size and scale of the trust, the nature of the relationships that may subsist, and the purpose of the power will all be relevant.

14.16. At [95] the Court said:

> "In the case of some trusts, the number of potential objects might be very large and a requirement to undertake a detailed analysis of the identity and needs of each would be unworkable. Having considered whether or not to exercise the power and understood the range of objects that might benefit, the trustee is required to give adequate consideration as to how to exercise the power."

14.17. The Court had regard to the Preamble to the trust, the settlor "being desirous of making provision for the Primary Beneficiaries and the General Beneficiaries" in determining the content of the trustee's fiduciary duty to give real consideration to the exercise of the power to distribute income.

14.18. The Court allowed the appeal, finding that the trustee had not given real consideration to the discretion to distribute income for the whole of the 2011 to 2019 period having regard to:

a. The absence of enquiry of Deborah and/or Paul as to their circumstances during that time.

b. The substantial income generated by the trust, which Eva and John had no need for in light of their substantial credit loan accounts.

c. Deborah's parlous financial circumstances.

d. The discernible pattern of trust distributions.

e. The antipathy between Eva and Paul and Deborah at different times.

14.19. The Court determined that the trustee should be removed and an independent trustee appointed.

14.20. The Court did not order that Paul and Deborah receive one third of the income distributions for the years in which the breach occurred, because the distributions were voidable rather than void, and the appellants sought no orders setting them aside or for equitable compensation.

14.21. *Owies* was referred to in *Soulos v Pagones* [2023] NSWCA 243 at [576] by Ward P (with whom Meagher and Mitchelmore JJA agreed) as authority for the proposition that even a trustee given a wide discretion must give due consideration to the potential beneficiaries.

15. THE IMPORTANCE OF PURPOSE

15.1. The *Owies* decision suggests a trustee of a discretionary trust has an obligation to enquire as to the circumstances of discretionary objects before exercising some discretions, subject to the terms of the trust deed and the breadth of the beneficiaries to be considered.

15.2. Many trustees may now be better served making enquiry with beneficiaries about their circumstances before exercising a discretion as to income and/or capital.

15.3. The importance of maintaining trustee resolutions is also highlighted.

15.4. The broader existential issue is that a trustee of a testamentary trust will have fiduciary duties shaped by the purpose of the trust instrument.

15.5. The intended purpose of the testator in establishing a discretionary testamentary trust will shape the drafting as to purpose, range of discretionary objects, and control mechanisms (including any opt out provision) in the trust deed. (There is a tension between a narrow purpose and asset protection and tax effectiveness for reasons which I have mentioned.)

15.6. If the testator's purpose is to benefit a handful of beneficiaries, their estate is not a large one, and there is no particular asset protection concern, in my view a simple will is sufficient and a discretionary testamentary trust unnecessary.

16. NEW VARIATION OF TRUSTS LEGISLATION – S 86A TRUSTEE ACT 1925 (NSW)

16.1. Section 86A of the *Trustee Act* 1925 (NSW) was introduced by the *Stronger Communities Legislation Amendment (Courts and Civil) Act* 2020 (NSW) Schedule 1.14[4].

16.2. In the *Second Reading Speech* to the NSW Legislative Assembly on 16 September 2020 the Hon Mark Speakman said:

> "…Section 81 of the Trustee Act currently empowers the court to make orders relating to the management and administration of trust property that can be seen to be expedient.
>
> The Court of Appeal has held that section 81 does not authorise the court to make orders for the variation of trusts, which will be beneficial to the interests of the beneficiaries or to the fulfilment of the trust purpose but which are not concerned with the management or administration of the trust assets. This amendment will ensure that the court can approve arrangements to vary or revoke trusts in these circumstances. There are legitimate reasons for which a trustee may seek to modify the terms of a trust in order to discharge their duty to a beneficiary. Set laws (sic) often create trusts without consideration to future circumstances and there may be a need to amend the trust to accommodate those circumstances in a way that is consistent with the intention of the settler (sic). This would bring New South Wales law into line with the law in the United Kingdom and in other Australian States…"

16.3. The reference in the *Second Reading Speech* to Court of Appeal decisions was a reference to *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753; [2014] NSWCA 367 and *Cisera v Cisera Holdings Pty Ltd* (2018) 98 NSWLR 747; [2018] NSWCA 286. It was held that s 81 of the *Trustee Act* 1925 (NSW) ("advantageous dealings") did not confer an authority on the Court "to alter the trusts on which trust property was held which would have been beneficial to the interests of the beneficiaries, or to the fulfilment of the trust purpose, but which were not concerned with the management or administration of the trust assets".

16.4. In *Cisera* White JA (with whom Bathurst CJ and Beazley P agreed) suggested that an amendment to the *Trustee Act* 1925 (NSW) would be appropriate to fill the gap

in power that had been identified and this may have been what inspired the introduction of s.86A.

16.5. There are four published judgments on the application of s86A:

a. *Re PDC* [2021] NSWSC 1701;

b. *Campbell v Campbell* [2022] NSWSC 554;

c. *In the Application of Nyasa No.19 Pty Ltd* [2023] NSWSC 578;

d. *Cisera v Cisera* [2023] NSWSC 1507 (concerning the same trust as the earlier decision rejecting the application for approval of a variation as an advantageous dealing pursuant to s.81 but applying the new s.86A).

16.6. Judicial consideration of other, similar provisions is of assistance to construing s.86A of the NSW Act. In Victoria, s.63A of the *Trustee Act* 1958 (Vic) allows the Supreme Court to approve "any … arrangement varying or revoking the trusts or enlarging the powers of the trustees", where there is no variation power, or if the variation power is limited.

16.7. In *Re Plator Nominees* [2012] VSC 284, the trustee of a discretionary trust sought an order from the Court to extend the vesting date. The trust was established with a vesting date of 40 years. The Court agreed to extend the vesting date as it was the settlor's intention to benefit his family for the long term and noted that the Court:

> [10] "Must consider the benefits and disadvantages of the proposed variation overall, taking into account the purpose of the trust and the settlor's intention in establishing the trust".

16.8. *The Variation of Trusts Act* 1958 (UK) is another similar provision. In applying that legislation it has been held that the Court will examine the arrangement as a whole, in the light of the purpose of the trust as disclosed by the trust instrument and any other available evidence, applying a practical and business-like consideration of the arrangement, including the total amounts of the advantages which the various parties obtain, and their bargaining strength. In considering the application of the *Variation of Trusts Act* to discretionary trusts, *Lewin on Trusts* suggests that the matters which the Court will be primarily concerned with, inter alia, are evidence as to the past operation of the trust, evidence of the intention of the trustees as to the future operation of the trust, and the comparison of the expectations of the beneficiaries under the proposed arrangement with their expectations under the present trust.

16.9. As summarised in *Cisera v Cisera* [2023] NSWSC 1507 at [51] – [56], variation of trusts legislation exists in Western Australia (s 90 *Trustees Act* 1962 (WA)); Queensland (s 95 *Trusts Act* 1973 (Qld)); South Australia (s 59C *Trustee Act* 1936 (SA)) and Tasmania (Pt 3 *Variation of Trusts Act* 1994 (Tas)).

16.10. Most recently in *Cisera v Cisera* [2023] NSWSC 1507 the Court construed the power under s 86A of the *Trustee Act* 1925 (NSW) to approve variations or revocations of trusts narrowly. The Court said that the section did not give power to the Court to effect a resettlement as opposed to a variation. On the difference between variation and resettlement, the Court approved the substratum test of Megarry J in *Re Bell's Settlement Trusts* [1968] 1 WLR 899:

> "… If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts".

16.11. The Court rejected the "reasonable businessman" or "reasonable layman" test in favour of a legal standard.

16.12. The Court said if it was satisfied that the arrangement was a variation not a resettlement, the Court would need to consider whether the proposed arrangement is in the interests of the beneficiaries (particularly minors) to enter into.

16.13. Judicial consideration of s 86A *Trustee Act* 1925 (NSW) is in its infancy. *Cisera v Cisera* [2023] NSWSC 1507 is an important decision, drawing from the UK authorities to construe the new legislation narrowly.

16.14. It is reasonably arguable that the scope of s 86A extends beyond the narrow bounds identified in *Cisera*:

a. In *Cisera* whilst the Court was not satisfied that the Court had the power to approve the arrangement, it invited further argument once a contradictor was appointed. The plaintiffs having eschewed the Court's invitation, the application was struck out rather than dismissed: *Cisera v Cisera (No 2)* [2023] NSWC 1531. There was no decision on the merits.

b. *Cisera* does not deal with the power in s 86A *Trustee Act* 1925 (NSW) to authorise revocation of a trust, which presumably would result, in the case of a testamentary trust, in the trust property being returned to the estate on a resulting trust (*Lewin on Trusts 20th Edition*, Thomson Reuters 2020 at [33-104] on the extinguishment of the existing trust; and the second type of resulting trust described in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 708; *Mantovani v Vanta Pty Ltd (No 2)* [2021] VSC 771, overturned on appeal *Vanta Pty Ltd v Mantovani* [2023] VSCA 53).

c. If the power of revocation is given a broad meaning, there is jurisdiction to bring property back into an estate on a resulting trust basis. The more challenging step is then to establish a basis for a reappointment of trust property, the jurisdictional basis for which is less clear. *Lewin on Trusts 20th Edition* at [33-108] suggests a power of reappointment would be implied where a power of appointment is made reserving a power of revocation, but that analysis does not directly apply where the terms of the will contains no further power of appointment.

16.15. But again, the permissible scope of the variation power comes back to the identification of a substratum (or purpose) of the initial trust. If the proposed variation (or resettlement) is consistent with the maintenance of the substratum (or purpose) of the initial trust, there is jurisdiction for the Court to authorise the variation.

16.16. The power of the Court to approve variations of trusts does not matter if:

a. The terms of a discretionary testamentary trust give the trustee the power to give effect to the proposed arrangement on the face of the trust deed. In fact in *Cisera v Cisera* [2023] NSWSC 1507 at [131] the Court suggested that s 86A Trustee Act 1925 (NSW) might not apply to discretionary trusts; or

b. all of the beneficiaries are of full age and capacity, and can enter into a Deed of Family Arrangement (the capital gains tax and stamp duty consequences of which would need to be considered).

17. *RE PICKERING FAMILY TRUSTS* [2024] VSC 5

17.1 In *Re Pickering Family Trusts* [2024] VSC 5 the trustee of the Ted Pickering Family Trust and the George Pickering Family Trust sought approval of an arrangement on behalf of underage and potential unborn beneficiaries pursuant to s 63A of the *Trustee Act* 1958 (Vic). The Victorian legislation is similar to s 86A of the *Trustee Act* 1925 (NSW), noting that the proviso at the end of s 63A of the *Trustee Act* 1958 (Vic) has its equivalent in s86B *Trustee Act* 1925 (NSW) in NSW.

17.2 Ted Pickering had married Dorothy in 1956. They had five children:

a. Dawn born 1958 who had an adult child Natasha.

b. Roger born in 1959 who had two adult children, Justin and Rebecca.

c. Peter born in 1960 who had two adult children, Emma and Lachlan.

d. Robyn born in 1961 who had three adult children, Christopher, Teghan and Lana.

e. Daryl born in 1969 who had three adult children, Benjamin, Mykaela and Mathew.

17.3 Dorothy died in September 1973. Ted married Jacqueline in 1975. They had a daughter Cindy born 1975 who had two children under 18: Nicholas born April 2009 and Mitchell born March 2012

17.4 Ted died in 2012.

17.5 George Pickering married Betty in 1961. They had three adopted children:

a. Kaye born 1962 who had four adult children: Melissa, Timothy, Michael and Kirsty.

b. Joanne born 1966 who had two adult children, Sammyl and Tailah; and

c. James born 1967 who had two adult children, Bradley and Mark.

17.6 Betty died in 1977. George married Lynette in 1990. George died in 2020.

17.7 Each trust deed provided that the beneficiaries were the relevant brother and his spouse, the current and future children of the relevant brother and his spouse, and the current and future grandchildren of the relevant brother and his spouse.

17.8 For the Ted Pickering Family Trust the potential beneficiaries were the surviving persons listed in paragraphs 17.2 and 17.3 above and any further child or children of Ted and Jacqueline and any further grandchildren.

17.9 For the George Pickering Family Trust the potential beneficiaries were the surviving persons listed in paragraphs 1.5 and 17.6 above and any further child or children of George and Betty and any further grandchildren.

17.10 Clause 2 of the trust deeds provided a discretion as to payment of the income to any one or more of the beneficiaries or there was a default accumulation.

17.11 The distribution date was said to be the later of the 21st anniversary of the death of the last survivor of the descendants of Queen Elizabeth II living at the time that the Family Trust was established (in relation to which the Court took judicial notice that Prince Edward born 1964) or the last to die of the beneficiaries living at the time the Family Trust was established (Cindy, born 1975).

17.12 Clause 3 of the trust deeds gave the trustee a discretion as to distribution of capital both during the trust and on the distribution date.

17.13 Clause 7 of the trust deeds have the power to the trustee to pay a share of capital to or for the benefit of any minor beneficiary for their maintenance education benefit or advancement in life.

17.14 Clause 10 of the trust deeds have the trustee, after the settlor's death, the power to revoke the trust in whole or in part and to resettle the same on a new trust for the benefit of any one or more of the beneficiaries to the exclusion of the others.

17.15 A solicitor and counsel were appointed to represent potential unborn beneficiaries as a contradictor.

17.16 The original proposed arrangement involved expanding the class of beneficiaries in each trust. This was put forward as part of a proposal for two of Ted's children Roger and Daryl and one of George's children Jamie ("Group Managers") to take the assets of the Pickering Transport Group in equal shares (as a business succession plan) and Ted's remaining children and Geroge's remaining children to share the non Group assets.

17.17 It was not possible to distribute the Group assets to the Group Managers because Ted's sons were not beneficiaries of the George Pickering Family Trust and George's son was not a beneficiary of the Ted Pickering Family Trust.

17.18 It was said not to be possible to do two subsequent distributions for capital gains tax, stamp duty, professional fees and commercial reasons.

17.19 The original proposed arrangement was not approved. The Court was not satisfied as to the proviso contained in the Victorian legislation.

17.20 A revised proposed arrangement was consented to by the adult beneficiaries.

17.21 After referring to *Perpetual Trustees Victoria Ltd v Barns* [2012] VSCA 77; (2012) 34 VR 387, 395 the Court said that the Court must be satisfied that the benefit would be of benefit to the relevant person as a first stage, and that once the proviso is satisfied the Court may approve the arrangement if it is a proper and fair one.

17.22 The Court referred to the following principles:

a. The Court is not limited to the arrangement put forward inter parties.

b. Benefit is not limited to a financial benefit: it may include a benefit of any other kind including social, familial, moral or educational benefits.

c. In the context of a discretionary trust, any benefit to a discretionary object said to arise from the proposed arrangement must be considered in light of the present rights of such an object.

d. The Court expressed reservations as to the appropriateness of the questions posed in earlier authorities:
   i. "Where the arrangement may involve a risk from the point of view of infants or unborn children, the following question has been posed: "is the risk one that an adult would be prepared to take?": *George v Kollias* [2007] VSC 56 at [46].
   ii. "Was it, in a broad sense of the word, for the benefit of the patient to have done for him what he would in all probability have done himself if he had been of sound mind": *Re CL* [1969] 1 Ch 587

e. Where the arrangement or the carrying into effect of the arrangement involves such risk that any purported benefit is theoretical or illusory, it is not a benefit for the purpose of the proviso.

f. Familial harmony was not considered a sufficient benefit for the purpose of the proviso.

g. The second stage – that the arrangement is a proper and fair one – involves a consideration of the arrangement as a whole.

17.23 A revised proposed arrangement was approved which included a series of undertakings given by the Trustees and their directors relating to the provision of benefits for the underage beneficiaries and potential beneficiaries. The undertakings are described at paras [80] – [82] of the judgment. The Court was satisfied of the proviso and that the arrangement was a proper and fair one overall and should be approved.

18. PARTIAL ADMINISTRATION ORDERS

18.1 In *Falkenhagen v Perpetual Trustee Company Limited* [2017] NSWSC 580, the Court made partial administration orders authorising distribution of a trust during the lifetime of a life tenant, notwithstanding the possibility of additional beneficiaries becoming entitled to share in the remainder.

18.2 The rule in *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282 could not be utilised by the plaintiff as the remainder beneficiaries were defined by reference to the plaintiff's spouse and issue (and otherwise remoter relatives) in existence at the time of the plaintiff's death.

18.3 The 77 year old life tenant was married but had no children. He disclaimed on oath any intention to have or adopt a child. The Court found that the possibility that he would ever have a child or remarry was remote.

18.4 Having regard to those assumptions, the Court found that all persons presently known to have an interest in the trust, vested or contingent, agreed to have the trust terminated and the trust property conveyed to the plaintiff absolutely.

18.5 The trustee defendant, Perpetual Trustee Company Limited, did not object to this course, provided it could be achieved in a manner consistent with principle and provided it was protected against any prospective liability should another beneficiary materialise.

18.6 The Court referred to the function of partial administration orders at [17]:

> "In technical terms, partial administration orders of the type in contemplation do not determine the legal or equitable rights of parties interested in trust property but, rather, act in the convenient administration (management) of a trust. The trust is not terminated, only its administration".

18.7 The Court was satisfied, as a factual enquiry, that the contingencies (such as those associated with having a child or remarriage) were remote. This was a factual enquiry.

18.8 The Court made orders:

1. "NOTE that the plaintiff, by his counsel, gives to the Court an undertaking that he will submit to such order (if any) as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct), or otherwise (as the Court may direct) to account for trust property transferred to him, or at his direction, pursuant to these orders in the event that any person (other than his wife Lola Patricia Falkenhagen, and Robert John Lamph, Dougal Richard Lamph, Helen Patricia Heslop, Bruce Darley Thompson, Anne Louise Brickwood, John Darley Thompson and Jennifer Jane Loft, who have submitted to the making of these orders) is in the future found to have an entitlement to participate as a beneficiary in property the subject of the "Vera Whittaker Trust" ("the Trust") constituted by a Deed dated 1 April 1969.

2. Upon that undertaking:

    1. ORDER that the defendant would be justified in distributing to the plaintiff, or as he should direct, all of the assets of the Trust; and

    2. ORDER that, subject to further orders of the Court and any and all just claims the defendant may have against such assets, the defendant transfer to the plaintiff the whole of the assets of the Trust."

19. CLOSING REMARKS

19.1 "War on Trusts" was inspired by frustration with testamentary trusts that are not fit for purpose, and in some cases inflexible with a sting in the tail in the form of land tax and/or captial gains tax consequences. They can also be difficult to vary where minor and unborn beneficiaries have real interests.

19.2 Discretionary testamentary trusts and other testamentary trusts can provide tangible asset protection and tax benefits if the nature and value of the testator's expected estate and the circumstances of the beneficiaries make those structures suitable and they are drafted with the intended purpose at front of mind.

19.3 If flexibility is desired the opt out provisions should be given careful attention.

19.4 Absent utility considered by reference to the nature and value of the testator's estate and the cicumstances of beneficiaries, restrained enthusiasm is encouraged. There is much to be said for the simple will.

Craig Birtles

Two Wentworth Chambers

Level 2, 180 Phillip Street

SYDNEY NSW 2000

P: (02) 8915 2036

E: cbirtles@twowentworth.com.au