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LexisNexis welcomes submissions to this newsletter. Please send proposals to the editor, Banita Jadroska, at banita.jadroska@lexisnexis.com.au.

Information contained in this newsletter is current as at November/December 2012

LexisNexis Butterworths

Practice note from General Editors: estate proceeds trusts

Christine Smyth *ROBBINS WATSON SOLICITORS and* ***Katerina Peiros*** *HARTWELL LEGAL*

Following on from Richard Williams'article, it has recently been raised with the General Editors, by estate planning professionals, that estate proceeds trusts (EPTs) can be utilised to establish a trust where a will has not done so. The suggestion being that this is a means to rectify an oversight by a testator who has omitted to incorporate a testamentary discretionary trust (TDT) in the will and a cheaper mechanism than an application for a statutory will.

In principle this is correct, s 102AG of the Income Tax Assessment Act 1936 (ITAA 1936) allows a trust to be set up for a beneficiary of a deceased estate in certain circumstances.

However, it is important to remember that an EPT is a post death mechanism, and is not strictly an estate planning tool. Section 102AG of the ITAA 1936 confines EPTs to very limited application. Accordingly, an EPT is not an adequate substitute for the benefits provided by a fully-fledged TDT.

Essentially, an EPT is a reactive device whereas a TDT is a proactive device. A TDT is created by the testator through the terms of his or her will. Whereas an EPT is created by the beneficiary of the estate, upon the death of the testator, where there is an outright gift to the beneficiary either through a will or through intestacy.

The advantage of establishing an EPT is that the beneficial entitlement is transferred to the EPT and any income earned within the EPT distributed to minors is taxed at the adult marginal rate, instead of the penalty rate applicable to unearned income distributed to minors, such as from family discretionary trusts, and so on.

The significant limitation of the EPT is that the capital beneficiaries of the trust can only be those persons who would receive a share of the estate under intestacy laws that apply in that state or territory, and these beneficiaries will only receive the proportion they would have been entitled to under an intestacy.

EPTs are often used by the surviving spouse, who has inherited the assets from his or her deceased spouse's estate, life insurance policy or superannuation, to be able to share income from the EPT with the children of the relationship. The limitations of an EPT are numerous:

- It is a fixed trust, ie, the one beneficiary must receive all of the income generated by his or her share in the trust.
- The tax benefits only apply to the value which the beneficiary would have taken under intestacy, not more.
- The EPT must be established within three years of the date of death by a person who receives assets from a deceased estate.
- When the EPT must come to an end, the beneficiaries must acquire the assets — this often occurs when the minor turns 18 years old. The end date can be later than that, but when the minor turns 18, he or she has a right to call for the capital. If the beneficiary is under a disability, the EPT can continue until the beneficiary's death.
- If the beneficiary dies during the life of the EPT, his or her share in the EPT is paid to the beneficiary's estate.
- There may be additional stamp duty and CGT — when assets are transferred from the beneficiary to the EPT.
- EPTs enjoy the very careful scrutiny of the ATO as the ATO is keen to prevent abuse of the excepted income provisions

Having regard to these limitations, a properly crafted TDT provides greater benefits. For example, it can exist for 80[1] years, has a wider class of beneficiaries, and is capable of being either wholly or partially discretionary.

There is, however, a further and often overlooked benefit of EPTs and that is the assets in an EPT are creditor protected for the child and are not subject to a challenge by the future partner of the spouse — in other words, it is the asset of the child and not of the parent.

A typical example of where an EPT would be advantageous is where a husband (Steve) dies leaving all of his assets (worth $1 million) to his wife (Naomi) via a will. Steve and Naomi have two minor children, Isabella (aged 7) and Tom (aged 3).

Using Victorian[2] intestacy laws as an example, if Steve died intestate, Naomi would have received (roughly) the first $100,000, plus a third, and Isabella and Tom would have shared the balance.

Accordingly, even though Naomi is entitled to the entire $1 million pursuant to Steve's will, she can choose to deal with the $1 million as follows:

- take the first $100,000, plus a third ($300,000), for herself as a direct benefit;
- establish an EPT for Isabella with $300,000 as the trust capital; and
- establish an EPT for Tom with $300,000 as the trust capital.

Each child is the sole beneficiary of his or her EPT and is entitled to all of the income derived from his or her EPT. The income will be taxed in the child's hands at the adult marginal tax rates.

For the 2012–13 financial year, the tax rates (including the Medicare levy) are as follows:

- $0–$18,200 — Nil
- $18,201–$37,000 — 20.5%%
- $37,001–$80,000 — 34%
- $80,001–$180,000 — 38.5%%
- $180,001 and over — 46.5%

Naomi can transfer less than $300,000 to each EPT but not more, and she must establish the EPTs within three years of Steve's death.

If Naomi is a high income earner, this can be a substantial tax saving for her.

When each child reaches 18 years of age, the child can take the balance of the EPT outright. It cannot revert to Naomi, nor can the EPT contain a term diverting the trust assets anywhere else other than to the child's estate, upon his or her death.

This last requirement can create many issues, where the child dies without a will and the assets then pass under the rules of intestacy. In these circumstances, regard ought to be had to the making of a statutory will on behalf of the child.

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Footnotes

1. Unless it is domiciled in SA in which case there is no perpetuity period.
2. In Queensland, under Pt 3 of the Succession Act 1981, the spouse receives the first $150,000, plus household chattels, plus one third of the residue with the issue sharing the balance. In NSW, under ch 4 of the Succession Act 2006 pursuant to s 103, the spouse receives the entire estate. In SA, under the Administration and Probate Act 1919, Pt 3A under S72G, if the estate is more than $100,000, then the spouse receives the first $100,000, plus half of the residue with the issue sharing the balance.

One with the lot — power of attorney, joint tenancy, breach of fiduciary duties and equitable claim for account

Christine Smyth *ROBBINS WATSON SOLICITORS*

Hajnal Dahlia Ban is famously known for having her legs extended 8 cm by way of bone grafts in Russia.[1] However, her challenges now extend to civil and criminal matters,[2] with *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban*,[3] being the most recent of her travails. This case is the latest instalment of a series of Supreme Court actions[4] involving Ms Ban, arising from her conduct in the management of the affairs of her long-time elderly friend ADF.[5] The focus of this case was a claim in equity for an account, arising out of Ms Ban's use of funds withdrawn from a bank account she held with ADF as joint tenants.[6] It is a case that reminds practitioners to consider both the legal and equitable status of an interest in property where the property is held in joint tenancy, in circumstances where the creation of the interest is borne of impropriety.

Ms Ban had a longstanding personal relationship with ADF of some 10 years. On 28 April 2009, Ms Ban became ADF's power of attorney and on 2 July 2010, Ban was given leave to resign as his attorney.[7] On 28 July 2009, four months after her appointment as attorney, Ms Ban opened a joint bank account with ADF at a time when his capacity was in question.

The manner in which the joint account came into existence and the source of the funds was explored in the 2011 matter.[8] In that case, Ms Ban claimed ADF gifted the funds to her. However, she received those funds while exercising dual roles as attorney and trustee. As such, the law imposed upon her equitable and statutory obligations and duties. Having regard to those duties and obligations, the court found the gift was incomplete and determined Ms Ban held her share of the joint account on resulting trust for ADF.[9]

Relevant to this action, Ms Ban drew on the joint account and applied the bulk of the funds for her personal use. There were some 40 withdrawals in question. On behalf of ADF, The Public Trustee of Queensland sought the equitable remedy of an account. The withdrawals ranged from as large as $700,000 to $8000, as well as a series of smaller withdrawals.

In order for the court to ascertain if the claim could be made out against Ms Ban, it considered the relevant principles relating to the duty of a fiduciary. As ADF's then power of attorney, Ms Ban was in a fiduciary position to ADF and as such she owed him various duties. Those duties were paramount to the manner in which she dealt with the funds in the joint bank account.

Boddice J stated the primary duties owed by a fiduciary are:

> A fiduciary is not entitled to make a profit out of, or by reason of, a fiduciary position without the knowledge and assent of the person to whom the fiduciary duty is owed. If the fiduciary made a profit or benefit by reason of the fiduciary position or by reason of taking advantage of an opportunity or knowledge derived therefrom, the fiduciary must account for that profit or benefit. It is no defence that the fiduciary acted honestly and reasonably.[10]
>
> Where it is established that the fiduciary obtained such a profit or benefit, a court must determine the true measure of that profit or benefit. That can be difficult in practice. Where appropriate, there must be an allowance for the skill expertise and other expenses of the fiduciary. An account should not be transformed into a vehicle for the unjust enrichment of a plaintiff. The purpose of the remedy is not to impose a burden on the fiduciary beyond the benefit he or she has received. The remedy ought to ensure the beneficiary does not receive a windfall not reflecting any detriment suffered or benefit which the beneficiary ought to have received.[11]
>
> It is for the fiduciary to establish it is inequitable to order an account of the entire profit or benefit. The guiding principle is that of equity. Regard must be had to the nature of the case and the particular facts. In determining whether the fiduciary has discharged this onus, the central issue for consideration is whether any of the monies withdrawn were ultimately used for the benefit of the beneficiary.[12]

Accordingly, the onus was on Ms Ban to establish that the application of the funds were not to her profit or benefit.

Item 1 of the claim related to a withdrawal of $700,000 — the largest single transaction. The funds were expended on multiple transactions including funding her wedding, a gift to her husband of $100,000 and $40,000 for her election campaign.[13]

In relation to the $700,000 withdrawal, Boddice J held:

> While the defendant contends all of the monies expended by her as part of this item involved expenditure on items

> ADF had previously met, the issue for consideration is whether this expenditure was for ADF's benefit. The determination of this issue involves a consideration of all of the circumstances, including the significant change in ADF's circumstances.[14]
> While ADF, in the past, may have readily expended money in payment of the defendant's personal expenses, his own circumstances significantly changed as his health deteriorated, and he required access to considerable funds to meet his own medical and other needs. This change in circumstance necessitated a reconsideration of ADF's ability to meet those expenses in the future. Otherwise, he would be acting to his detriment.[15]

Boddice J held that apart from the funds expended on her wedding, the balance of the funds in this item were applied to Ms Ban's benefit and to the detriment of ADF.[16]

The ruling as to the expenditure on the wedding is interesting. Boddice J noted Ms Ban's evidence that "ADF treated her as his daughter, gave her away at the wedding, and intended that he pay for her wedding".[17] And so, in relation to funds expended on the wedding, he found:

> The payment of the defendant's wedding expenses falls into a different category. I accept ADF was very fond of the defendant, and treated her as his daughter. I accept he would have obtained considerable joy from giving the defendant away, and from being able to pay for her wedding. In considering whether a payment is for ADF's benefit, "benefit" should be given a wide interpretation. Undertaking activities which result in great joy for ADF constitutes a benefit to him. The first defendant has satisfied me, on the balance of probabilities, that the payment was for ADF's benefit.[18]

As to the remaining items, there was a mixed result, with the court finding various of the transactions were for the benefit of ADF and various were not.

This decision clearly demonstrates that the concept of detriment and benefit in the context of a claim for account is not simply a mathematical exercise. While the convoluted history and facts of this case are at the extreme end of the spectrum, in our day-to-day practice, we often encounter situations where powers of attorney are misused.

Having regard to the Anshun Principle,[19] practitioners would be wise to advise clients-attorneys of the equitable remedies of constructive and/or resulting trusts, as well as the remedy of account, where the clients' instructions indicate that the manner in which the jointly held asset came into existence might have the scent of impropriety attached to it.

The Anshun Principle is always relevant — practitioners should be alive to all possible causes of action and ensure that they advise their clients to pursue those causes of action in a timely fashion. If an action for an account is not undertaken in a timely fashion, where the funds are available to be recovered, then the practitioner might be faced with a negligence suit for failing to advise of the risk of the funds being dissipated and thereby thwart the action for account.

And finally, it strikes the writer as peculiar that as practitioners we are duty bound to ensure that clients executing a power of attorney fully comprehend the significance of the act they are undertaking, yet the donee of the attorney is not required to undergo a similarly rigorous process. One wonders that if there was a testing process for the donee of the attorney there might be a corresponding reduction in their misuse.

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Footnotes

1. See, www.hajnalban.com.
2. B Baskin, "Hajnal Black fined $5000 after being found guilty of four charges relating to pecuniary interests" (2012) *The Courier-Mail*, www.couriermail.com.au. *APL6/05 BAN -V- COMMISSIONER FOR POLICE* District Court Queensland.
3. *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2012] QSC 255; BC201206848.
4. *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban (No 2)* [2012] QSC 97; BC201206848 (19 April 2012); *Ban v The Public Trustee of Queensland as Litigation Guardian for TAA* [2012] QCA 093; BC201202261 (12/2154); *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380; BC201109623 (7 December 2011).
5. The identity of the adult must not be published. See, Guardianship and Administration Act 2000, s 1114A:

   > Publication about proceeding that discloses adult's identity
   > (1) Generally, information about a guardianship proceeding may be published.
   > (2) However, a person must not, without reasonable excuse, publish information about a guardianship proceeding to the public, or a section of the public, if the publication is likely to lead to the identification of the relevant adult by a member of the public, or by a member of the section of the public to whom the information is published.
   > Maximum penalty — 200 penalty units.

6. *The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380; BC201109623 was a successful application for summary judgement by the Public Trustee for a

declaration that the proceeds of a property sale paid into the joint account on 30 October 2009 were held on trust for ADF. The property from where the proceeds originated belonged to ADF. Ban and others were involved in the sale of that property at a time when ADF's capacity was in question.

7. Above, n 6 at [5]–[6]. This action involved a successful application by the Public Trustee of Queensland for summary judgement of its application for a declaration that Ban held the money in an account held in joint tenancy with ADF, on trust.
8. Above, n 6 at [7] (b)–(c). The statement of claim alleged that:

> On 21 July 2009 the first defendant attended with ADF at the Logan Hospital. ADF was in a confused and disoriented state, having difficulty communicating with other persons. He was admitted to that hospital. On 28 July, 2009, the first defendant transported ADF from the hospital to … a branch of the National Australia Bank at Garden City where ADF signed a typewritten authority and a draft account authority card provided by the first defendant to open a joint bank account in their names. As a consequence of those authorities, a joint account was opened in the names of ADF and the first defendant (the joint account). ADF was then returned to the hospital by the first defendant.

The claim as to lack of capacity at that time the power of attorney was created, was not resolved in this matter, however, at [23], Boddice J found that on the day of settlement, 30 October 2009, and the day the proceeds of sale were deposited to the joint account, the first defendant "categorically admitted … ADF lacked capacity to undertake any significant transaction 'on and from at least 28 October 2009'". This led to an ultimate finding that the depositing of the funds into the joint account was a conflict transaction. At [30]:

> As the use of that power constituted a conflict transaction, the first defendant's direction to pay the proceeds of the cheque into the joint bank account was ineffective to perfect any gift to her. The first defendant holds those proceeds on constructive trust.

9. My thanks to Tina Cockburn, Associate Professor, Faculty of Law, Queensland University of Technology, for her observations on this point.
10. At [4].
11. At [5].
12. At [6].
13. At [12]–[20].
14. At [21].
15. At [22].
16. At [23].
17. At [15].
18. At [27].
19. The Anshun Principle or Anshun Estoppel arose out of the High Court case of *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; 36 ALR 3; [1981] HCA 45; BC8100097. In essence, it stands for the principle that a party may be prevented from making claims which should have been pursued in an earlier proceeding. For a further discussion on this principle, see, C Smyth "Is it an FPA? The Anshun Principle" (March 2011) *Proctor* 18.

Estate of affairs: General Editors' column

Stanford v Stanford: impact of Family Court on estate planning

On 15 November 2012, the High Court handed down its decision in the case of *Stanford v Stanford* [2012] HCA 52; BC201208691 in the appeal. The prior decision was examined in detail by Richard Williams in issue 15.4 of *Retirement and Estate Planning Bulletin*. Readers should refer to that article for a detailed discussion of the facts.

While the husband's appeal was ultimately allowed on the basis that the orders from which he appealed were not just and equitable, the High Court did determine that the Family Court had the jurisdiction to make property orders dividing matrimonial property where the parties were involuntarily separated by illness. This has significant consequences for estate planners.

The High Court determined that the wife's daughters, as the wife's executors, had not shown that it was just and equitable in all the circumstances for the original orders to stand while the wife was alive, and consequently, neither after her death. The orders were for the husband to pay 42.5% of the matrimonial assets amounting to $612,931 to the wife. This payment would have necessitated the husband to sell his home of 48 years.

Rejecting the husband's submission that there cannot be property orders made in circumstances where the separation was involuntary, nonetheless the court found that:

- the wife's needs were met while she had been alive (as she was supported by the Department of Veterans Affairs, as well as by the trust fund which the husband had set aside for her needs); and
- the original orders were not just and equitable in all the circumstances, taking into account that the family home would have to be sold.

Consequently, such orders would not be appropriate after the wife had died.

Although the court decided in the husband's favour in this matter, this was entirely on the particular facts of the case (small matrimonial pool of assets and wife's needs met through other resources). This case demonstrates that Family Court property proceedings are a viable strategy available to parties who may seek to advance their inheritance requirements. This case was particularly disturbing as both the husband and wife in this matter had lost capacity, and the proceedings were brought and defended by their adult children.

The General Editors aim to have an in-depth article on this topic in the next issue (15.7) of the newsletter.

When does a superannuation income stream commence and cease: TR 2011/D3

In issue 15.4 of *Retirement and Estate Planning Bulletin*, we drew the reader's attention to this draft ruling which was expected to be finalised in August, but which the ATO had put on hold.

By way of a reminder, the draft ruling proposed that, in the absence of a reversionary pension, an income stream automatically ceased on a member's death and did not recommence until the trustee resolved to commence it in favour of a beneficiary. This could have had significant adverse tax consequences as the deceased member's account would have reverted to accumulation phase.

In the Mid-Year Economic and Fiscal Outlook 2012–13, released in late October, the government indicated that it intends to allow the tax exemption to continue until the member's benefits have been paid out of the fund.

The effect of this will be that superannuation fund trustees will be able to dispose of pension assets on a tax-free basis to fund the payment of death benefits to estates.

Victorian Duties Act 2000 amended

With effect from 1 July 2012, the Duties Amendment (Landholder) Act 2012 made significant changes to this Act. The Act introduces "landholder duty" provisions replacing the land rich duty provisions.

Briefly, acquisitions of interests in landholders (companies and trusts with land holdings in Victoria with an unencumbered value of $1 million or more) are now dutiable at the rates applicable to land transfers. There are also other changes.

More information can be found at www.sro.vic.gov.au.

Legislation update

Western Australia: stepchildren right to further and better provision

On 8 November 2012, WA passed its Inheritance (Family and Dependants Provision) Amendment Bill 2012. The Bill is to be known as the Inheritance (Family and Dependants Provision) Amendment Act 2011 (WA). It is yet to commence.

Currently, WA is the only state or territory that does not entitle stepchildren to raise a claim for further and better provision upon an estate. This Act will now permit stepchild to make claim in limited circumstances. Generally, where a stepchild was being maintained wholly or partly or was entitled to be maintained wholly or partly by the deceased immediately before the deceased's death, the stepchild is entitled to make a claim.

International wills

- South Australia: On 17 October 2012, the South Australian House of Assembly tabled its Wills (International Wills) Amendment Bill 2012.
- Tasmania: On 13 November 2012, Tasmania enacted its Wills Amendment (International Wills) Act 2012. It awaits a commencement date.
- Western Australia: As of 14 November 2012, Wills Amendment (International Wills) Act 2012 awaits assent.

The object of introducing international will legislation is to give effect to the 1973 UNIDROIT Convention, providing a uniform law on the form of an international will. Queensland is yet to introduce legislation to give effect to the convention. The Commonwealth is expected to accede to the convention once all of the states and territories have the implementing legislation in place.

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