



COOPER GRACE WARD
LAWYERS

How to die correctly in an SMSF

ASF Audits Technical Seminar



Scott Hay-Bartlem
Partner

8 October 2021





1. Who gets your super?
2. How do they get it?
3. Reviewing!

Spoiler alert!





COOPER GRACE WARD
LAWYERS

Be prepared!

Super and estate planning – the starting point!

- Super death benefit does not automatically go under a Will
- Trustee discretion (SIS Reg 6.22)
 - “dependants”
 - spouse
 - children
 - financial dependants
 - interdependency relationship
 - estate
- Trust Deed!





Is discretion good?

Benefits of discretion

- We can make the decision we want at the time of making it
- Life changes!
 - Starting/ending relationships
 - Children/grandchildren
 - Liability issues
 - Tax rule changes

Example

- Victoria comes to see you about death benefit planning
 - Married to David
 - Children
 - Brooklyn 21
 - Romeo 18
 - Cruz 15
 - Harper 9
 - \$2 million in SMSF
 - Liability issues from businesses
- Concerns
 - Brooklyn's on again off again girlfriend Chloe
 - David's roving eye

Example

- Benefit of leaving discretion for Victoria's death benefit
 - Where is best?
 - It depends!
 - David has other children
 - David and Victoria have split up
 - Brooklyn is going through a family law settlement
 - One child has died leaving children
 - Estate has liability issues
 - Age of children when she dies
 - Risk of estate challenge!



Should we limit discretion?



1. Things that can go wrong with discretion
2. Things that limit the discretion
3. How we remove discretion

Issues with discretion

- Will the right person control the SMSF?
- Will they make the decision we want them to?
- Will something completely unexpected happen?
- Discretion is effectively limited by
 - Conflicts
 - Process



Trustee control

Death benefits



How does
control of the
trustee pass?

Who is the
decision maker?

Will they
exercise their
discretion as we
want them to?

Example

- When Victoria dies, who controls her SMSF?
- David?
 - Other trustee/director/member
- If David controls Victoria's SMSF after her death...
- But she doesn't want him to get her super!



SIS and trustee/member death

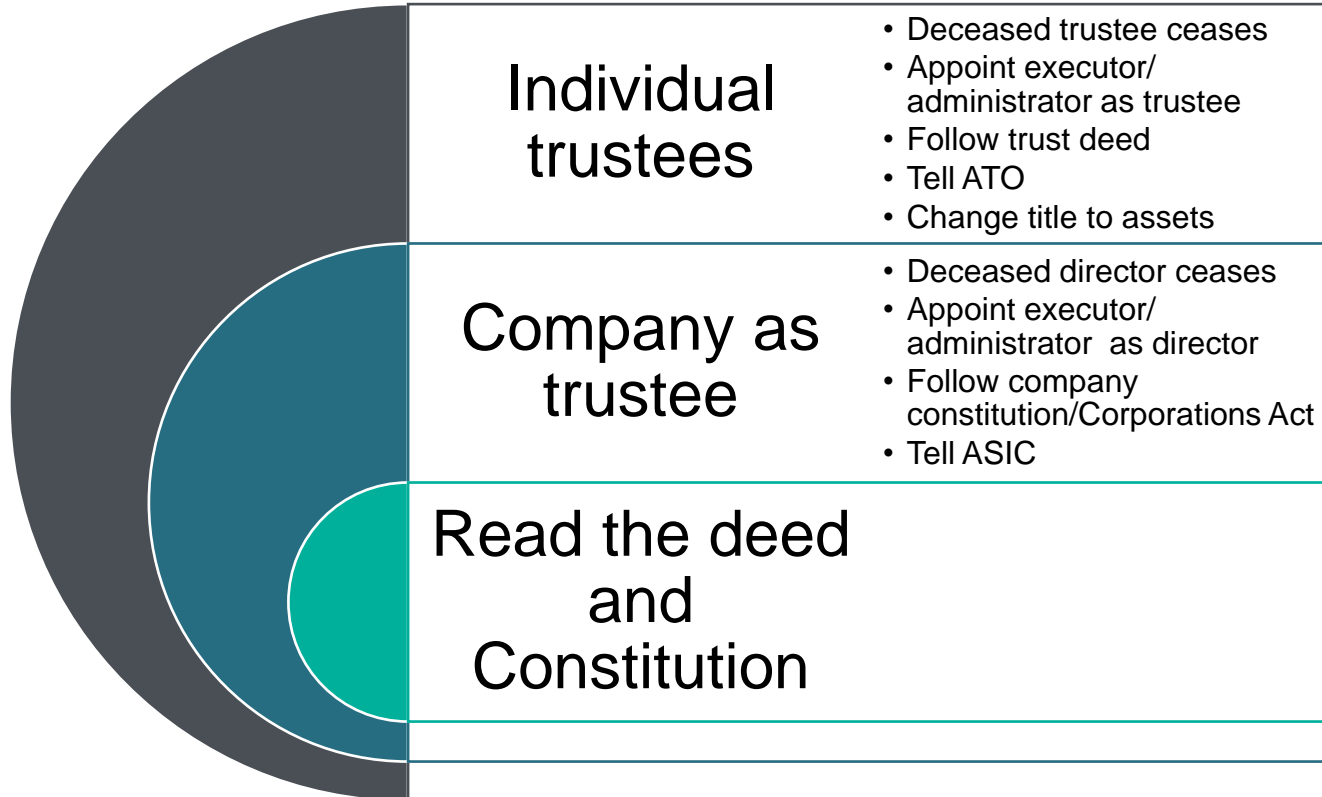
s17A –
trustee/member
rules

S 17A(3)(a)

- Executor/administrator as trustee/director in place of dead person
- From death until death benefit commences to be payable
- 6 month rule

Compliance, does
not make
appointment
happen

Mechanics...



If relying on trustee control

Consider how
trustee/director
is appointed

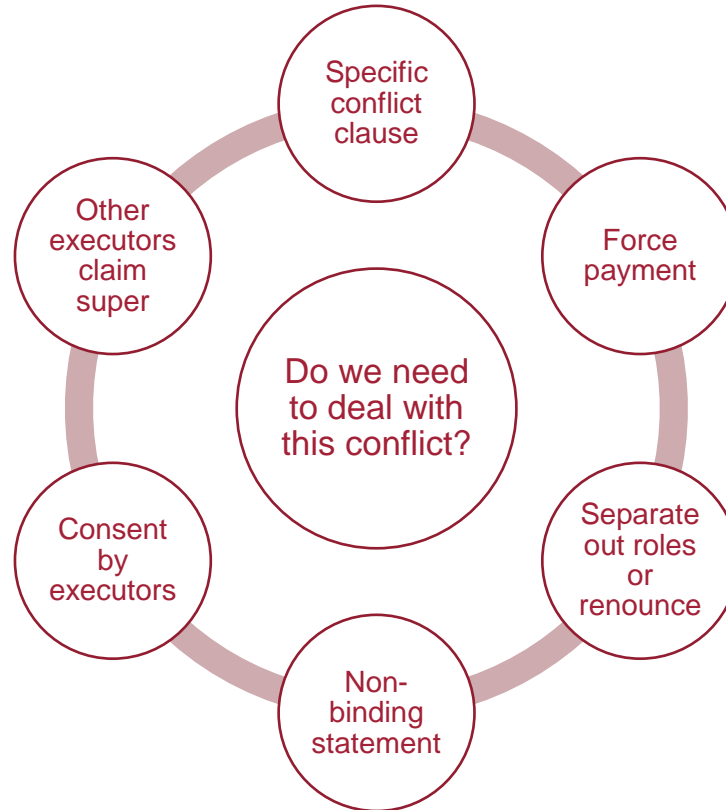
- Effect of section 17A
- Trust deed for trustees
 - Majority of members?
 - Who is a member?
- Constitution for companies
 - Majority of shareholders?
 - Director fill casual vacancy?
- Often need involvement of other member/trustee/director
- Change mechanisms to hardwire rules
- Automatic appointments – do they work?

Conflicts

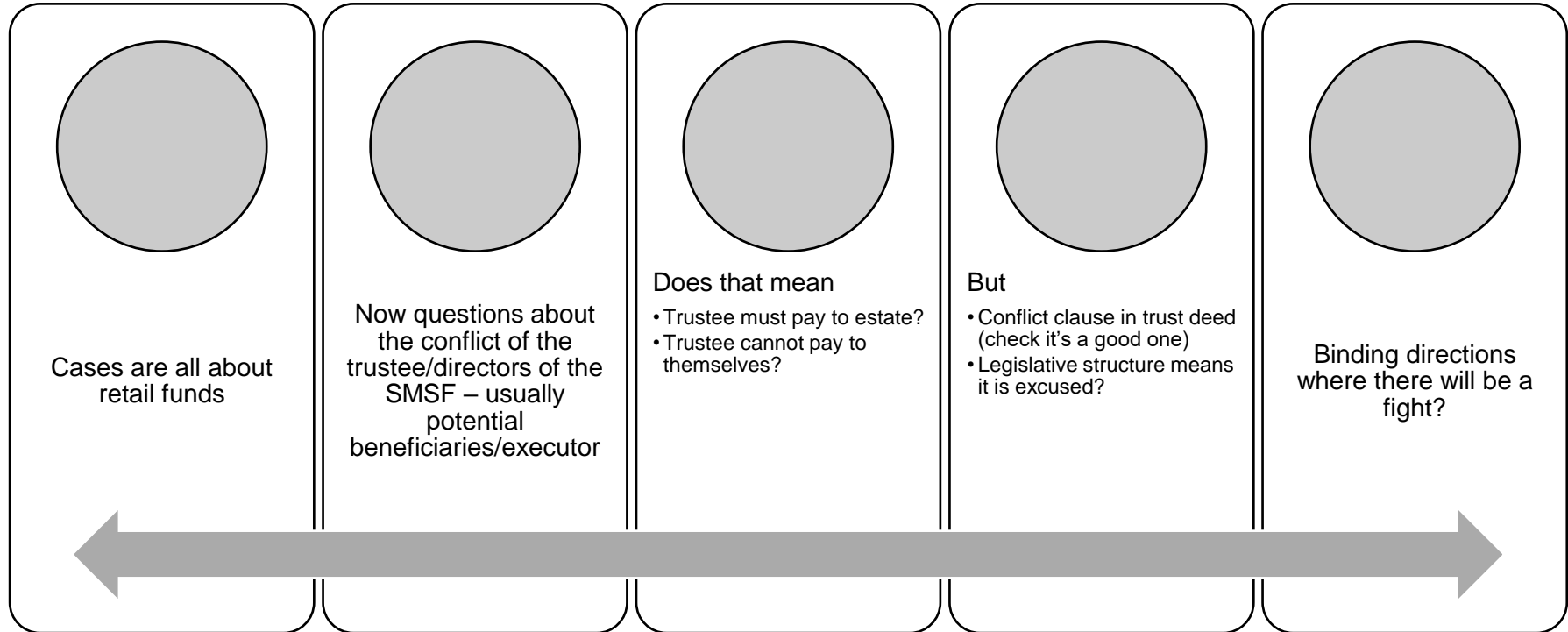
Conflicts

- *McIntosh v McIntosh*
- *Brine v Carter*
- *Burgess v Burgess*
- Legal personal representative cannot claim super for themselves personally
 - Executor
 - Administrator

Executors/administrators and conflicts



But wait we are not done yet...



Process

Process of making death benefit payment decisions

- Difficult to challenge
- But trustees have duties and obligations in making decisions
- If trustee follows the wrong process, decision can be overturned



Re Marsella (no 2) [2019] VSC

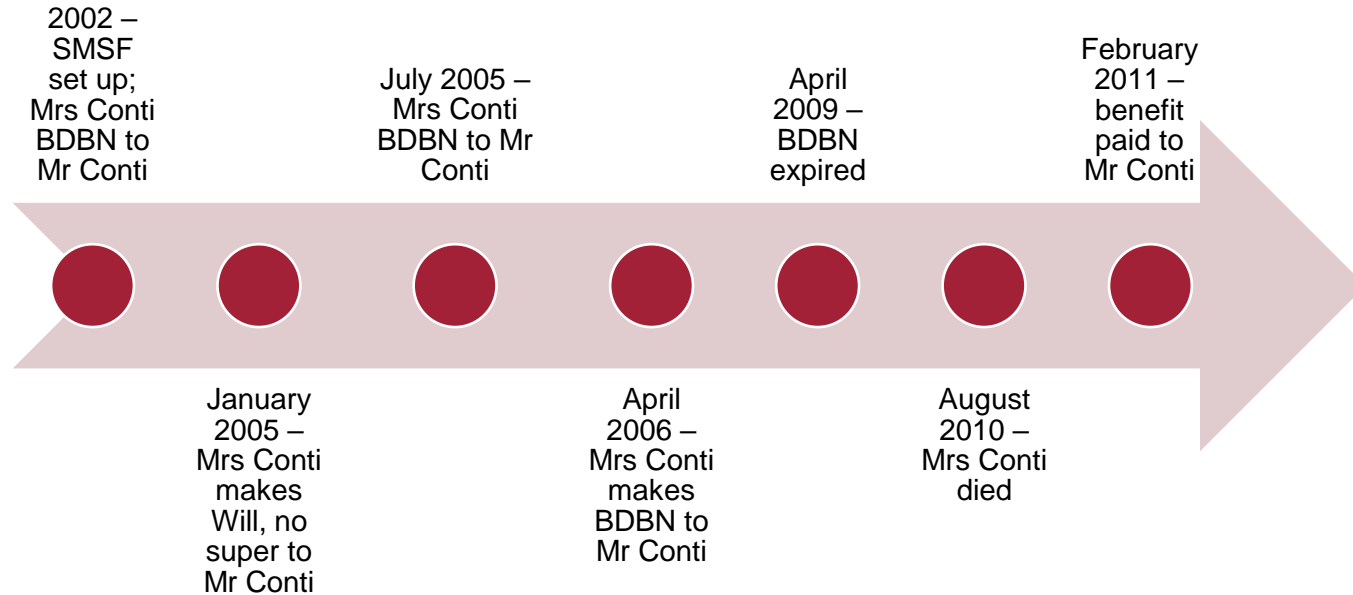
65

- Mrs Marsella died
- She and her daughter Caroline trustees of her SMSF
- Caroline appointed her husband as co-trustee and paid death benefit to herself
- Lapsed BDBN to grandchildren
- Tone and content of correspondence from Caroline's advisers to Mr Marsella
- Mr Marsella challenged death benefit payment decision
 - Caroline had a conflict
 - Trustee not exercised discretion in good faith and giving proper consideration to the interests of all beneficiaries

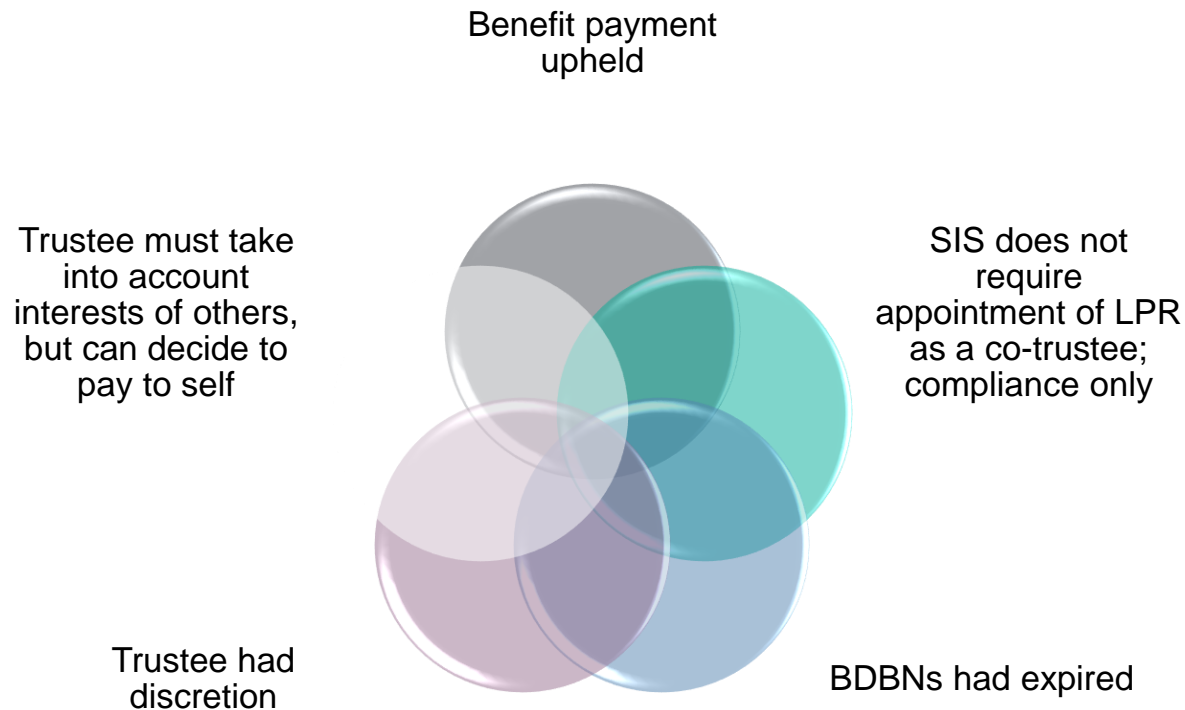
Re Marsella

- Court decided
 - Trustee must exercise its discretion in good faith
 - Trustee must give real & genuine consideration to interests of beneficiaries
 - In making decision, relied on irrelevant information and incorrect information
 - Trustee was removed and order to pay back the money

Ioppolo appeal – WA Supreme Court



loppolo appeal



So...



Do it right and
very hard to
challenge

Do it wrong
though...

Paying death benefits now

Discretion is not absolute

Search for reversionary pensions, binding nominations and non-binding nominations

Determine who are the potential beneficiaries

Must consider:

- Intention of deceased
- Relationship with deceased
- Financial circumstances and needs of beneficiaries

Do not need to give reasons

- Provided trust deed does not require

Extreme care must be taken when writing/talking to potential beneficiaries

Careful preparation of resolution required

If follow proper process, Court cannot change decision



Locking in death benefits decisions

Locking in decision

- Benefits

- Removes disputes
- Makes decision simpler
- Means people cannot be influenced

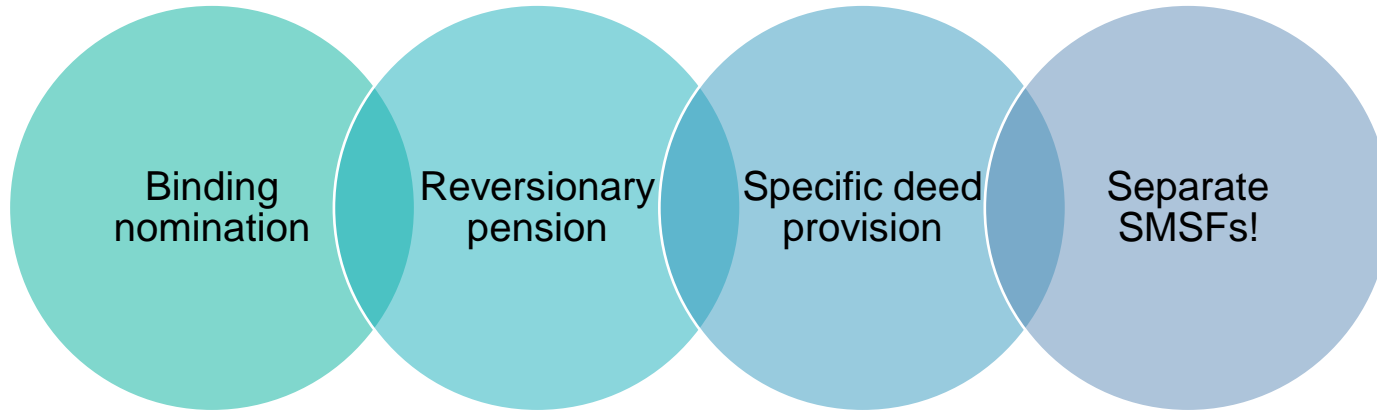
- Downsides

- Doesn't mean there won't be a fight
 - Validity
 - Value
 - For the sake of it
- What if it turns out to be the wrong decision?
 - Things change
- Getting documents right

Example – Victoria locks in decision

- Yes and
 - Removes some potential for dispute
 - Makes her wishes clear
 - Makes controllers' life easier
- BUT
 - Who does she choose?
 - Something changes?
 - Ages of children
 - Splits with David
 - Estate challenge
 - Control not dealt with as well so the wrong person does the wrong thing anyway
 - They just all want to fight

How do we 'lock-in' a benefit



BDBNs

Allows member to lock in decision



Useful in the right situation



Dangerous in others

- Trust deed contains, not SIS
- Regulation 6.17A and section 59 do not apply to SMSFs
- Always follow trust deed
- Is there any room for argument?
- Amend so is certain
- Read it like you are trying to undo it
- Don't just assume the trust deed will allow

Is your BDBN binding?

Donovan

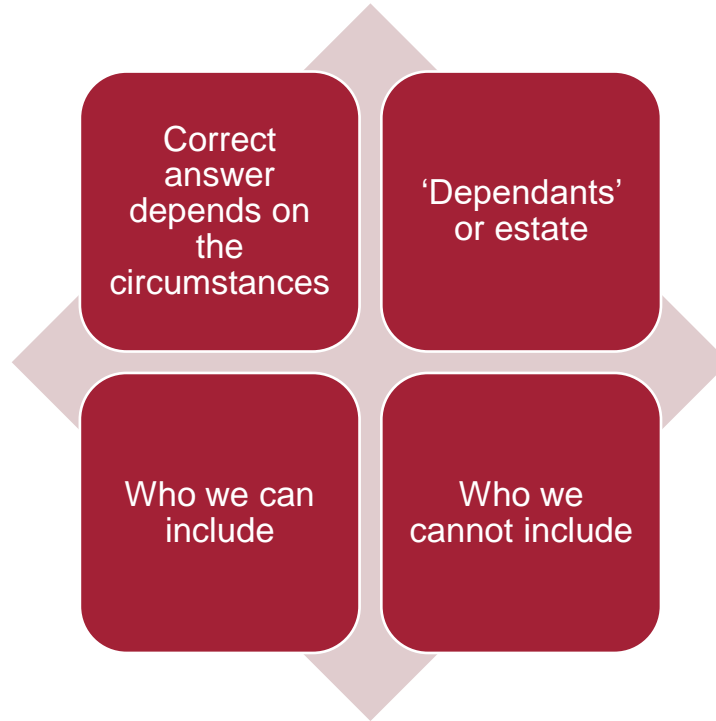
Ioppolo & Hesford v Conti

Wooster v Morris

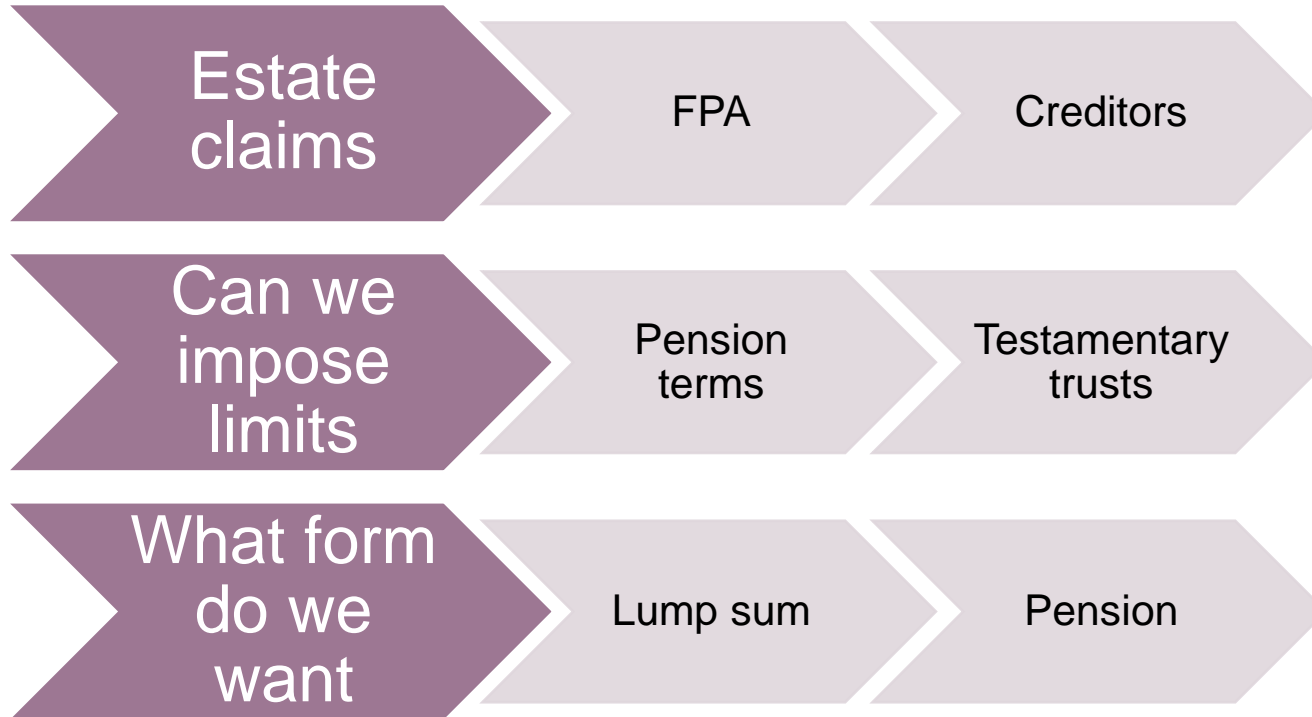
Munro v Munro

Cantor Management v Booth

Issues in choosing BDBNs



Issues in choosing BDBNs



Does the Will deal with super properly?

- Consistent/compatible with the BDBN
- Tax issues
- Does it equalise the estate if super goes astray?
 - Can it equalise (super v estate assets)



Reversionary pensions

Death benefit pensions – 2 types

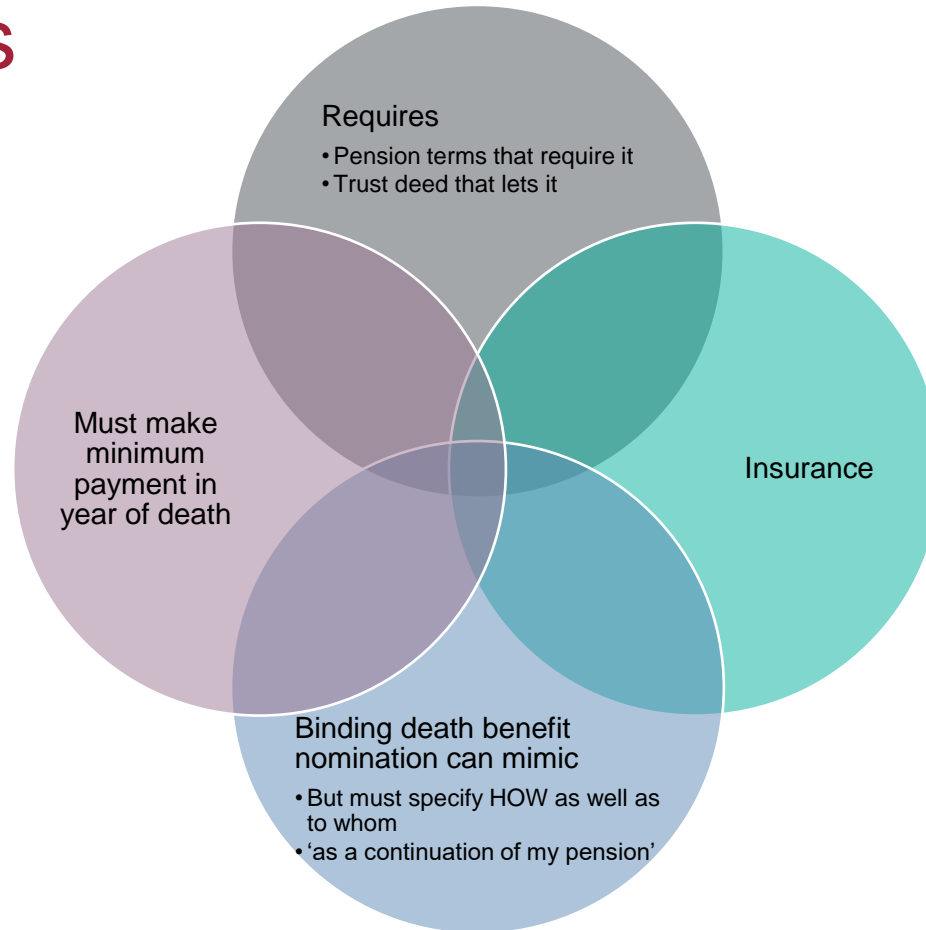


Auto-reversionary (automatically continue)

Choose to pay as a pension

- Spouse
- Child
 - Under 18
 - Under 25 and dependant
 - Disabled
- Financially dependant
- Interdependency relationship

Reversions



The difference...

- Reversionary

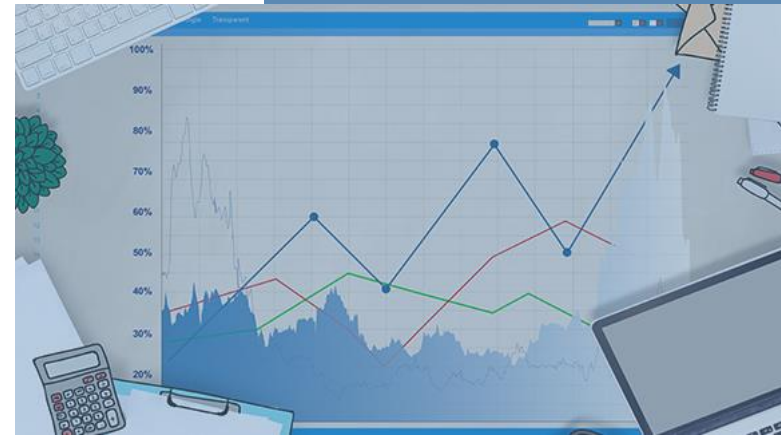
- Automatically continues to the reversionary beneficiary
- Transfer balance account credit
 - Value at death
 - 12 months after death
- Must make minimum payment in year of death

- Not reversionary

- Pension stops at death
- Trustee/member agree on whether pension or not
- Transfer balance account credit
 - Value at date of decision
 - At time of making decision
- Need not make minimum payment in year of death

Reversions – can we change?

- Stop and restart
- Without?
 - ATO No I mean Yes
 - Arguably if pension terms and trust deed allow



BDBNs v reversionary pensions

- BDBN

- More flexible
- Easily revoked and changed without adverse consequences
- BDBN can be prepared in contemplation of a member receiving a pension
- Can be modified to include contingency events and tailored provisions
- Transfer balance cap


- Reversionary pensions

- Change while pension is current? Could cause a components issue if pensions are stopped and re-started
- Can only be prepared if the member is actually receiving a pension
- Limited ability to tailor
- Ensure can produce pension documents to prove reversion
- Transfer balance cap



Some other options

Death benefits - guardian




Where no
reversionary
beneficiary or BDBN



Death Benefit Guardian:

- Appointed by member
- Power to direct death benefit
- Death benefit payment only with consent



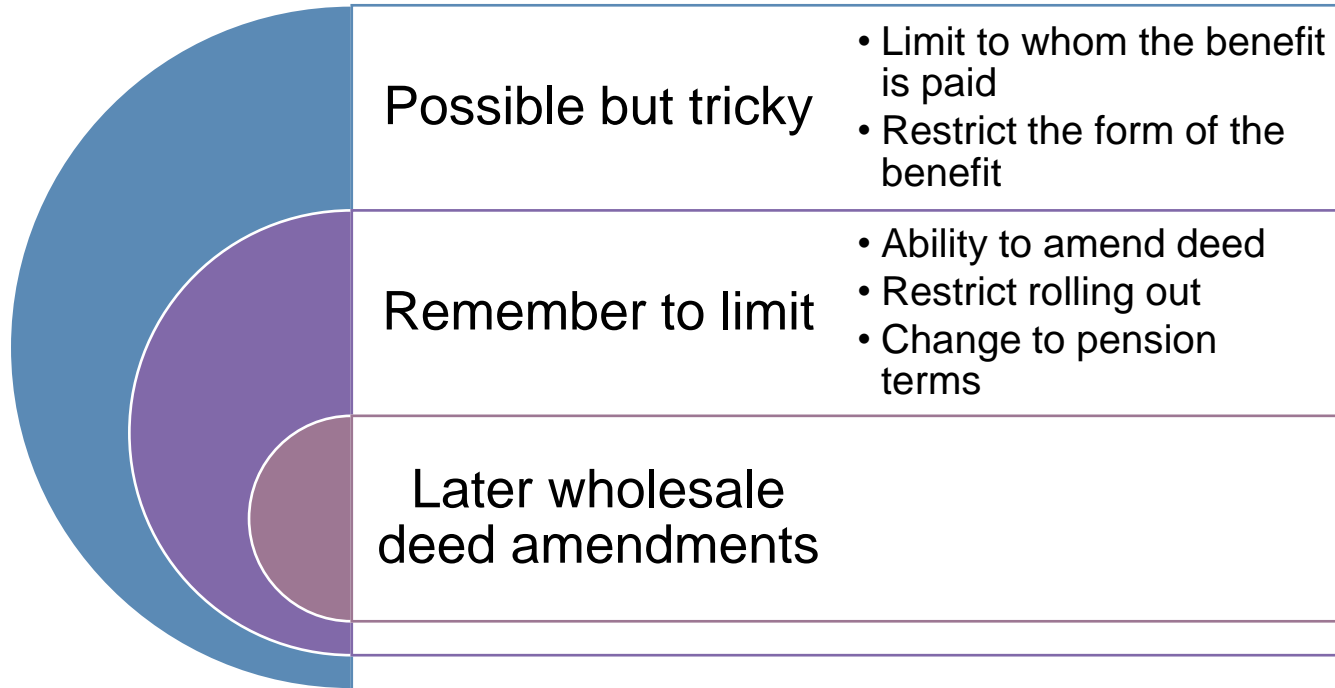
Time gap! Who
controls in the
meantime?

Example

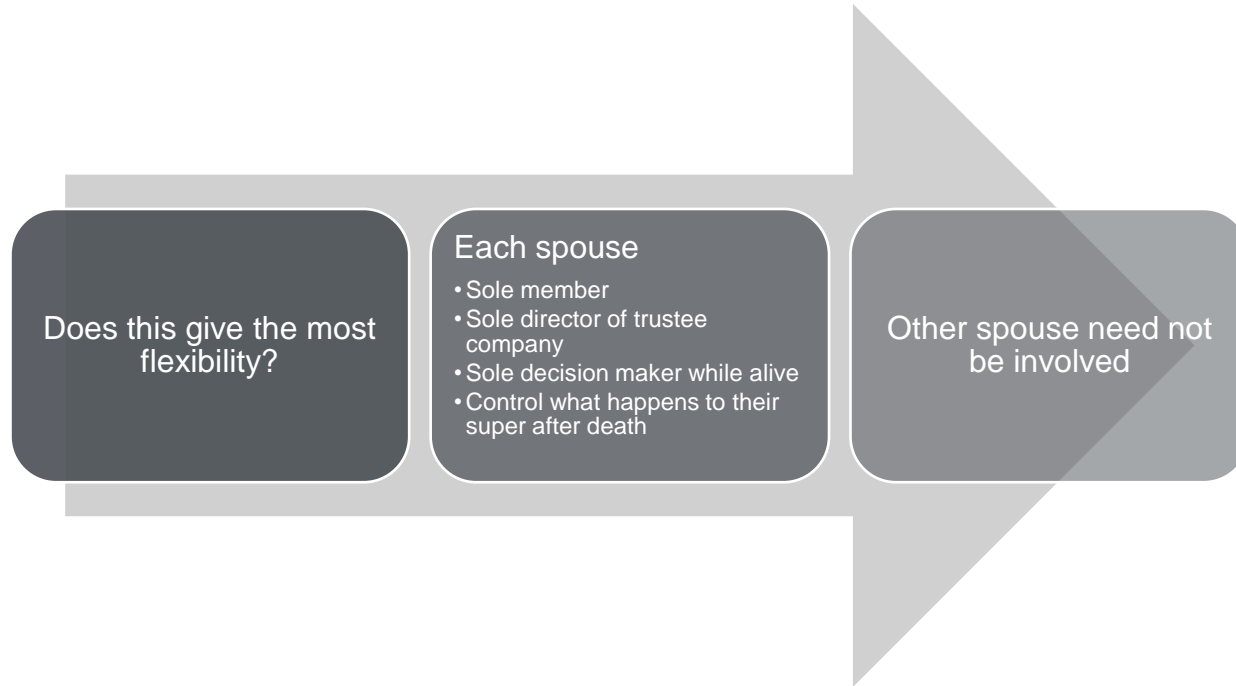
- Victoria and David are in the same SMSF
- Victoria dies
- Appoints Gerry as her executor and Death Benefit Guardian
- David cannot pay out Victoria's death benefit without Gerry's consent



Hardwiring trust deeds



Separate SMSFs



Example

- Victoria has her SMSF
 - David is not a member/trustee/director
- David has his SMSF
 - Victoria is not a member/trustee/
• director
- Victoria can make arrangements for her SMSF death benefit without involving David





COOPER GRACE WARD
LAWYERS

Review!

Victoria decided...

- BDBN to all children equally

Example – 5 years later

- Separated from David
- Children
 - Brooklyn 26
 - Romeo 23
 - Cruz 20
 - Harper 14
- Brooklyn separated
- 1 grandchild to Cruz
- Sole director/shareholder trustee company
- BDBN to children no longer appropriate
 - Grandchildren
 - Divorce risk
- Decides
 - Appoint Gerry to replace her as director/shareholder
 - Discretion with some guidance

Example – 5 years later again

- Partnered with Tom
- Children
 - Brooklyn 31
 - Romeo 28
 - Cruz 25
 - Harper 19
- Brooklyn repartnered with 2 children, not settled with first wife
- Cruz pre-deceased with 2 children
- Tom is a member, director and shareholder
- Wants super to children still
- Must update
 - Tom controls after Victoria's death
 - Estate change risk
 - Brooklyn risk
 - Pay Cruz' share to his children

Conclusion



Conclusion

Always been
lots of issues in
death benefits

To lock in or not
is always a
question

BDBN?
Alternatives?

Post death
control is still an
issue

Review
regularly

The answer is
different for
everyone

Tax?

Lots at stake –
are you the
next case?

Any questions?



COOPER GRACE WARD
LAWYERS





COOPER GRACE WARD
LAWYERS

This presentation is a general overview and is not legal advice. Cooper Grace Ward have the expertise to advise you on any specific questions you have in this area of law.