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LAWYERS

# Navigating the challenges of getting money out of an SMSF before and after death

SMSF Adviser Technical Strategy Day



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October 2023



1. Missing/incomplete fund documents
2. The impact on incapacity on control
3. Member benefits v death benefits
4. BDBN as a reversionary pension
5. Trustee discretion?



# Missing/incomplete fund documents



# Trust deeds

- Set out the rules, including
  - Trustee changes and variations
  - Trustee powers
    - Borrowing
    - Reserving
  - Member rights
  - Benefit payments
    - Death
    - Pensions

# *Application by Ellasil Pty Ltd [2023] VSC 69*

- Originally 2 member SMSF – both deceased
- 3 surviving adult children
  - Separate FPA proceedings settled
- Net assets of \$775k
- SMSF controlled by lawyer for deceased members
- Trustee applied for directions to confirm:
  - It was validly appointed as trustee
  - Whether later variation deed effective
  - Validity of BDBNs from members

# *Application by Ellasil Pty Ltd [2023]*

## *VSC 69*

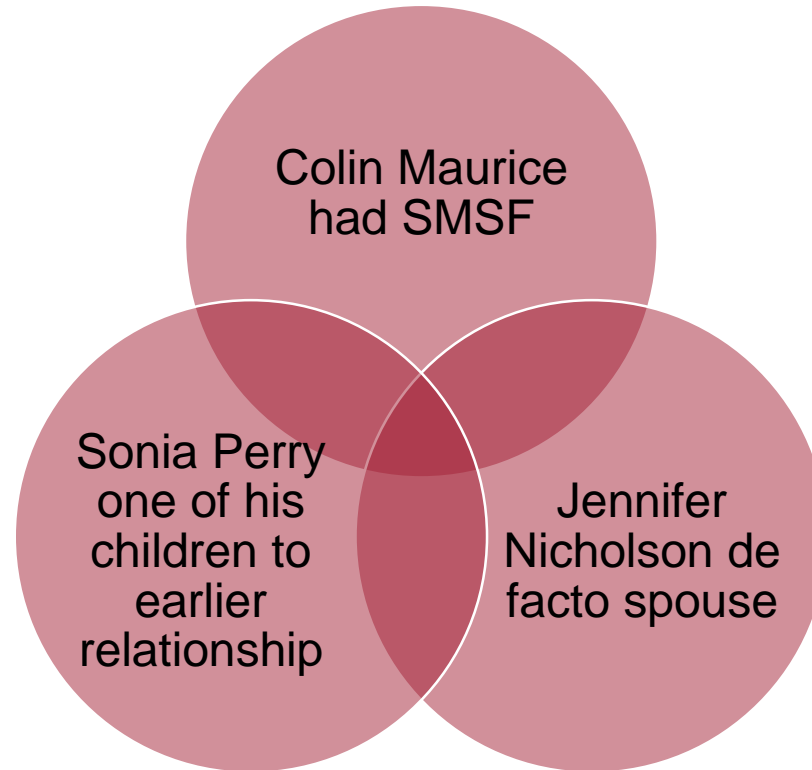
- SMSF likely established in 1979
  - Original deed could not be found
- Some amending documents available
  - Many gaps in chain
  - Earliest from 1989
  - Most recent likely from 2015
- Other documents relating to administration of SMSF
  - Minutes of meetings, financial statements
  - 4 sets of BDBNs prepared by members over years (undated, 2006 x2 and 2017)

# Court determined:

- Original deed signed around 1979 and (even though cannot be located) included:
  - Variation power
  - Power for principal employer to change trustee
- Weight of evidence suggests Ellasil validly appointed as trustee and justified in continuing to act as trustee
- Most recent BDBN (from 2017) applies even though suggests only the member's "wish"
  - All remaining entitlements to one child
  - Court "comforted" as reflects terms of Will



# *Perry v Nicholson* [2017] QSC 163



# *Perry v Nicholson*

April 2015 change  
of trustee minutes  
removing daughter  
and appointing  
spouse prepared  
by accountants

January 2017  
BDBN to spouse

Colin dies March  
2017

Late 2016 Colin  
diagnosed with  
melanoma

February 2017  
accountants  
prepared change  
of trustee deed,  
dated April 2015



# *Perry v Nicholson*

- Daughter challenged change of trustee in April 2015
  - She was still trustee (and made death benefit decision)
  - BDBN invalid
- Court upheld change of trustee (just)
- If not, death benefit planning would not have worked

# *Re Narumon*

- Original deed + several variations
- Unclear which variations were effective (if any)
- Varied trust deed using powers in all deeds
- Original deed and final variation upheld

# So...

Make sure the chain  
of trust deeds and  
trusteeship cannot  
be broken

## Or else

- Who is the trustee?
- Who can make decisions?
- Death benefit documents done effectively?
- Have decisions been made?

## If there is a problem...

- Fix it now
- Confirm what has happened before
- If cannot fix?
- If going to be an argument?
- Roll to a different fund



# Incapacity

# Implications of incapacity on control

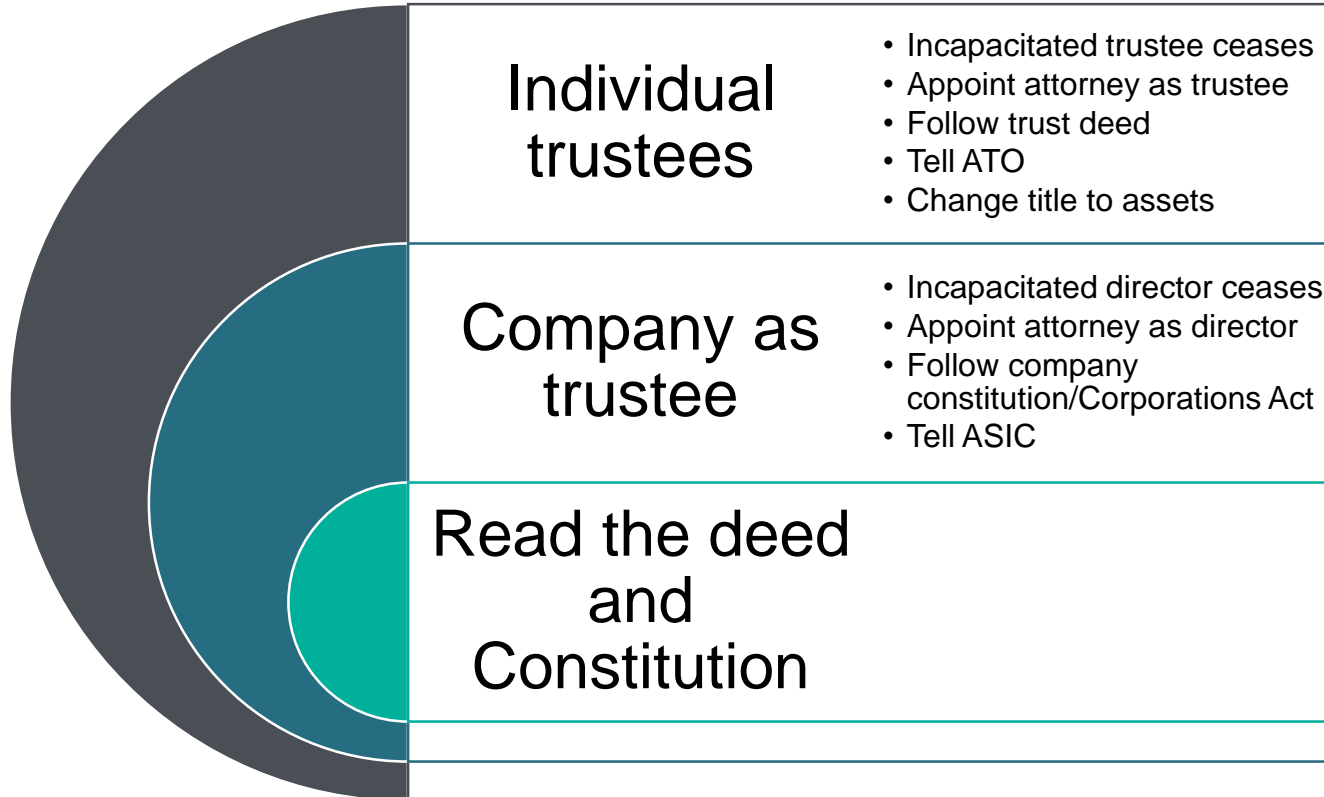
- Once someone has lost capacity, cease as a trustee/director
- Under s17A
  - Attorney under an EPOA can become the trustee/director in their place
  - But does not do the appointing

# Example

- Don appoints his son Don Jnr as his attorney
- If Don loses capacity
  - Don is removed as trustee/director of his SMSF
  - Don Jnr becomes trustee/director in his place



# 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?

# Example

- Don appoints his son Don Jnr as his attorney
- If Don loses capacity
  - Don is removed as trustee/director of his SMSF
  - Don Jnr becomes trustee/director in his place
- BUT
  - Do documents automatically remove Don?
  - If Melania is a member too, do we need her consent/involvement
- If Melania blocks Don Jnr's appointment, what can we do?

# Example

- What if
  - Melania is an attorney too?
  - The trustee is a company and Melania is an equal shareholder with Don?
  - The trustee is a company and the constitution allows each shareholder to appoint a director?
  - The trust deed removes someone who is no longer a director/trustee as a member?

# Attorneys and conflicts

- Attorneys cannot enter into conflict transactions
  - Court/Tribunal authorisation
  - EPOA allows
- EPOAs should have appropriate conflict provisions
  - Allow common transactions
  - But not everything!

# Example

- Don's EPOA to Don Jnr and Melania contains no conflict provisions
  - Issues around
    - How much to draw out
    - How SMSF funds are used – joint assets? Entry to nursing care arrangements?
- Don's EPOA to Don Jnr and Melania contains complete conflict allowances
  - Issues around
    - Can Don Jnr and Melania do whatever they want to with Don's money?
    - What happens to Don's BDBN?

# Death benefits

Who will be the decision maker for death benefits?

Will it be the other trustee

Or their attorney?

# Example

- Don as lost capacity and Don Jnr is now the director in his place
- Melania dies
- The decision about her death benefit is made by ...
  - Don Jnr!
- Consider as part of death benefit planning



# Summary

Be aware of what must happen if a member/trustee/director loses capacity

Be prepared – what is the process?

Will control change as we intend?

Are the arrangements set up properly for conflicts?

What is the impact on death benefit payment decisions?

# Member benefits v death benefits

# Why do we care?

## Member benefit

- Payment to you
- Because you are member

## Death benefit

- Payment to you
- After another person's death
- Because other person member

# Member benefit or death benefit?

- Don member and director of trustee of Top Trumps SMSF
- Large cash balance in Fund
- Don given days to live
- Transfers cash from the SMSF to Don's personal account while Don is still alive

Member benefit

# Member benefit or death benefit?

- Same facts but this time....
- No benefit payment or benefit payment occurs after death

Death benefit

# Why do we care?

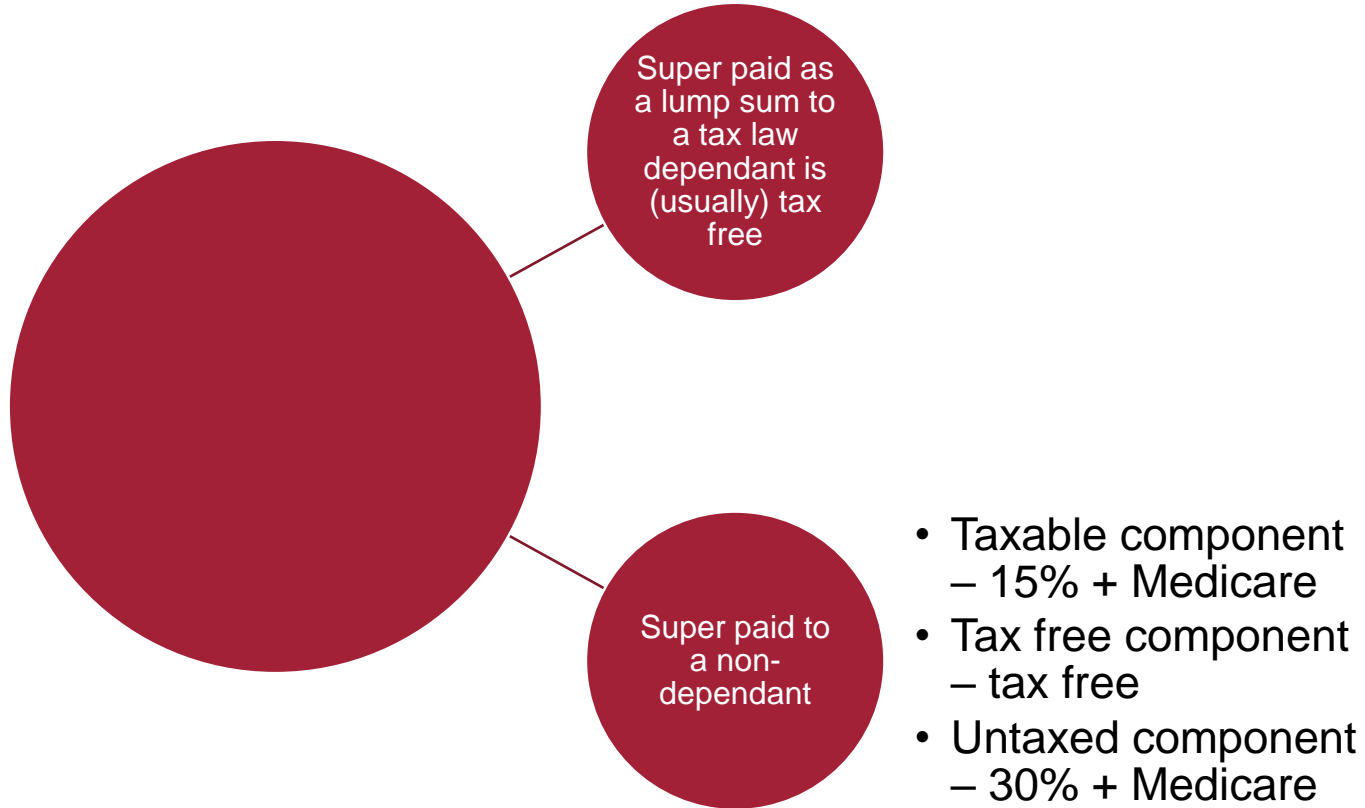
If member aged 60 and 'retired'  
then:

- can access super tax free

If member aged 60 and retired  
dies with member balance then

- tax could be payable on death benefits

# Tax on death benefits



# Why do we care?

## We don't if:

- Beneficiary is tax dependant
- High tax free component (low taxable)

## We do if:

- Beneficiaries not tax dependants
- High taxable component

Super is low  
tax  
environment



# PBRs – ATO old position!

## Death benefit

- 1011912974150 (2011)
- 1051918745226 (2021)

## Member benefit

- 1051437446368 (2018)
- 1051598540809 (2019)
- 1051754180223 (2020)
- 1051914995135 (2021)

SMSFA discussion with ATO:

*ATO settled position is that a benefit payment should be treated as a member benefit where the member has requested the benefit payment prior to their death, despite the benefit being paid after their death*

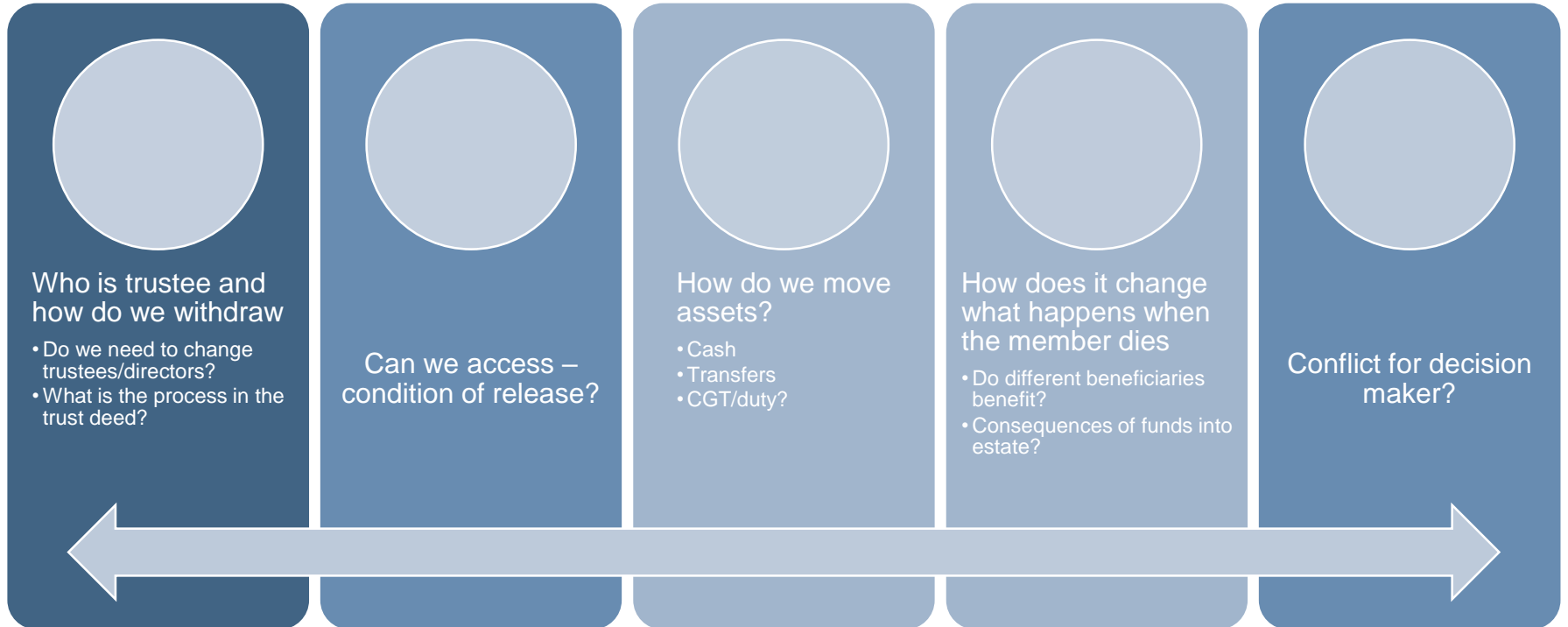
# ATO current position

- Once the trustee knows the member has died, becomes a death benefit
- Difficult in SMSFs to have a member benefit if paid after member's death

# What needs to happen?

- Member benefit
  - Assets/cash transferred to member before death
- It depends
  - Withdrawal triggered before death and completed shortly after death – scope to argue in some cases?
- Death benefit
  - Journal entry used to ‘transfer’ benefits
  - Undated withdrawal request found after death
  - Did not follow trust deed process so ineffective
  - Trustees had lost capacity so no one to make benefit payment decision

# Considerations



# Example

- Don's BDBN is to his wife Melania
- Don's estate leaves his assets between his 5 children
- If Don withdraws his superannuation immediately before his death...
  - BDBN to Melania is ineffective/useless as no longer any super
  - Super instead forms part of estate and goes to the children

# Example

- Don has a stroke and is in a coma
- His daughter Ivanka withdraws all his super from his SMSF using an enduring power of attorney
- Don recovers...
- Who benefits?

# Example

- Don requests a full commutation of his pensions
- Then sell assets – CGT liability
- No longer in pension phase – no more ECPI
- Must either
  - Trigger CGT events before request commutation
  - Request part commutation only of pensions

# Checklist

1

Who is requesting?  
Who is the decision maker?  
Will they do what we want?

4

Accumulation / pension  
accounts – timing!

2

What do our documents say,  
allow us to do or not do?

5

Are there other tax / duty  
considerations?

3

What are the assets we are  
dealing with / transferring?

6

What can we do now?  
What is the effect on estate  
planning?



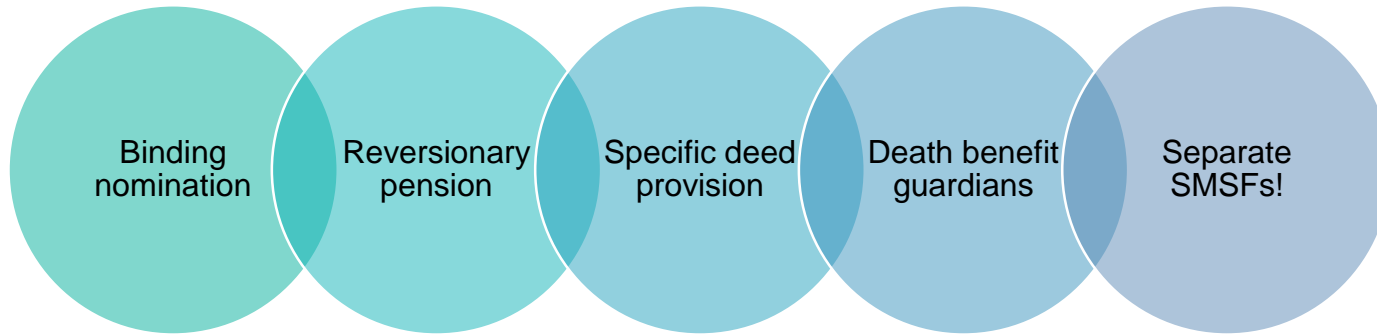
# BDBNs as reversionary pensions

# 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
- BDBNs are a common way of removing the discretion



# How do we 'lock-in' a benefit



Allows member to lock in decision



Useful in the right situation



Dangerous in others

# BDBNs

- Trust deed contains, not SIS
- Regulation 6.17A and section 59 do not apply to SMSFs
- *Hill v Zuda* (recent High Court decision)
- 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

# Death benefit pensions – 2 types

Auto-reversionary (automatically continue)

- No trustee discretion

Choose to pay as a pension

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

# Can a BDBN = a reversionary pension?

- ATO

- No!
- BDBNs only say to whom
- Leaves trustee discretion as to how

- BUT

- BDBNs can say to whom AND how
- Carefully worded
  - ‘as a continuation of my existing pension’
- Trust deed terms?

# 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

# Example

- Don is about to draw a pension
- Relationship with Melania is um rocky
- Wants to be able to revert/unrevert as necessary
- Use a BDBN
  - To Melania
  - As a continuation of his pension
  - Can change if necessary

# Example

- Don is about to start a pension
- Adviser does not ask Don whether it is to be reversionary or not
  - Makes it reversionary to Melania
- Don goes to see estate planning lawyer
  - Wants all assets to go to their son Barron
  - Nothing to Melania
- But what about the reversionary pension?
- Easier to unrevert if a BDBN

# Summary

Trustee discretion  
for death benefits  
can be  
challenging

BDBNs and  
reversionary  
pensions are both  
good answers

Sometimes!

Consider a BDBN  
as an alternative  
to a reversionary  
pension



# Trustee discretion?

# So trustee discretion for death benefits...

- Can be great
  - Choice at the time
  - Make the best decision
  - Flexibility in choosing who and how
- BUT
  - Must have control of the SMSF post death correct
  - Conflict in claiming the death benefit payment – *McIntosh* etc
  - Must follow claims staking process - *Marsella*

# Conclusion

Is the trust deed  
chain intact?

Must plan for  
incapacity, and  
consequences if a  
member dies

Paying benefits  
before death – ATO  
current view

Paying benefits  
before death – pros  
and cons

BDBNs can mimic  
and be more flexible  
than a reversionary  
pension

Pros and cons of  
trustee discretion

# Any questions?







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