

Worrall Moss Martin News

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Dispute Between Biological Parents about Teenager's Body

A recent dispute between the biological parents of a teenager who died was recently heard before Justice Robert Pearce in the Supreme Court in Launceston. The dispute arose about where the funeral was to be held, and the disposal of the teenager's ashes.

It has been reported that Justice Pearce declared it was "undignified" for this matter to be brought before the Court, and cleared the Court while he sought a compromise between the parties.⁽¹⁾ Justice Pearce later commented that an agreement had been reached, and the Court proceedings would not be pursued.

In [Issue 5 of WMM News](#), we discussed the recent decision of *Dragarski v Dunn* [2019] NSWSC 300, where the Supreme Court of New South Wales determined who had the right and responsibility for the disposal and interment of the deceased person's body.

In practice, disputes can arise between biological parents, in circumstances where their child died without a Will, about:

- the release of their child's body (from the Funeral Director, or the Coroner);
- their child's funeral arrangements;
- the disposal of their child's body;
- the disposal of the child's ashes (if the child's body was cremated); and
- subsequent arrangements to be made in relation to the administration of the estate (based on the Intestacy Provisions



Kate Moss
Director



Kimberley Martin
Director

in Tasmania).

Disputes are often amplified in circumstances where:

- the relationship between the biological parents is strained;
- one or both of the biological parents may have had a strained, or estranged relationship with the child;
- there is a question about whether there is someone (for example, the child's partner) who has a greater standing in making the decisions in relation to the child (in accordance with the Intestacy Provisions in Tasmania); or
- it is discovered that there is substantial wealth in the child's superannuation account, including life insurance that may be payable (despite the child only working part time, or having died in the early stages of their career).

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning and contentious estate administration. We can assist clients with completing proper estate planning, including matters that concern the children of separated parties. We can also assist in circumstances where disputes arise after a person has died. Please contact Kate Moss or Kimberley Martin if you have any questions about the matters set out in this article.

(1) Tim Martain, 'Dispute of teen's body', *The Mercury*, Tasmania, 2 September 2019.

Trusts and the Issue of the 'Vesting Date'



Kimberley Martin
Director

Although there is no register of trusts in Australia, and failure to lodge trust tax returns creates difficulties in acquiring accurate data, recent statistics highlight the extent of trust use in Australia:(1)

- the number of trusts in Australia has increased by almost 700% between 1990 and 2014, and is predicted to increase further, with numbers reaching more than one million by 2022;
- trusts in Australia held more than \$3 trillion in assets in 2015-16;
- trusts in Australia produced income of more than \$340 billion in 2013-14; and
- trusts in Australia shelter between \$672 million to \$1.2 billion of tax revenue annually.



Peter Worrall
Director

If you are considering setting up a trust, or if you have a controlling role in a trust, it is important that you consider, and plan for, when and how that trust will vest to ensure the best tax and succession planning is incorporated and undertaken. As long as action is taken before the vesting date, it is possible to explore strategies to minimise the taxation consequences of a trust vesting.

In a discretionary trust (a common trust structure), unless and until the trustee exercises their discretion, the beneficiaries are not entitled to the assets of the trust until that trust 'vests'. The uncertainties around when a trust vests, and the taxation implications of a trust vesting, are issues that have recently received significant attention.



Eve Hickey
Lawyer

A Ruling (2) released by the Australian Taxation Office in 2018 (**the Ruling**) provides guidance on the immediate income tax and capital gains tax ('CGT') consequences of a trust vesting. The following is a summary of the issues that were discussed in, or arise from, **the Ruling**.

Can a Trust Continue Forever?

A common question asked is: can a trust continue forever? The simple answer to the question (in Tasmania) is 'no'.

In all States and Territories of Australia (other than South Australia) there is a common law rule, supplemented by legislation, which prevents most trusts from continuing forever. This is called the 'rule against perpetuities' which exists to prevent assets being held indefinitely on trust.

Trusts that are based in South Australia, charitable trusts, superannuation funds, employee share schemes and bare trusts do not have limits on how long they can continue.

The common law rule forbids a person from creating a trust that continues after the expiry of '21 years after the lifetimes of those living at the time of creation of that trust'. The legislation (in most jurisdictions) provides an express limit of 80 years from the date that the trust is established.

What is the Vesting Date of a Trust?

Subject to the rule against perpetuities, a trust deed will usually specify a date on which the interests in the trust vest. The date is usually defined in the trust deed as the 'Vesting Date', 'Perpetuity Date', 'Perpetuity Day', 'Distribution Date', 'Termination Date', 'Trust Period' or 'Vesting Day'. This date may be:

- a specific date; or
- the date 80 years after the date of the Deed of Settlement; or
- a date when a certain event occurs (for example, the youngest beneficiary attaining a particular age or the date of death of a particular beneficiary); or
- the life of the descendant of a particular person alive at the time of the creation of the trust who lives for the longest period after this time, plus 21 years.

If the trust deed does not have an express vesting date, the statutory provisions in the relevant jurisdiction of the trust will dictate the vesting date.

Can the Vesting Date be Changed?

In **the Ruling**, the Commissioner confirms that, subject to the rule against perpetuities, it is possible to amend/change the vesting date of a trust, either by making a Deed of Extension or Variation ('a Deed'), or successfully applying to a relevant court to approve the amendment/variation, prior to the vesting date occurring.⁽³⁾

A Deed must be carefully drafted. It must comply with the terms of the trust deed, and there must be a relevant power to extend/vary the vesting date. If not, it will not amend/change the trust's vesting date and the vesting day will remain the same. In **the Ruling**, the Commissioner provides the following example of the importance of carefully considering the terms of the trust deed:

'Although a trustee may have a general power to amend the deed, there may also be specific exclusions from the scope of that power. The power might also be limited to permitting the trustee to bring forward the date on which the trust vests and not permit extending that date.'⁽⁴⁾

Importantly, the vesting date cannot be extended beyond the relevant perpetuity period.

What Happens When a Trust Vests?

A trust deed will usually specify the consequence of the vesting date being reached. Unless the trust deed expressly provides that certain powers continue, they will cease. This may result in the trustee no longer having the power to: classify amounts as income or capital; appoint the income certain beneficiaries; change investments; or sell property.

When a trust vests, the whole of the interests in the trust (both as to income and capital) become vested in interest and possession of the beneficiaries. The trust deed may (or may not) set out provisions for the administration of the trust property upon vesting, and it is those terms that govern the taxation consequences of vesting, and in particular whether a CGT event will occur.⁽⁵⁾

In **the Ruling**, the Commissioner clarifies the ATO's view on what CGT events can occur on the vesting date. These most commonly include:

- CGT event E1, which occurs when a trust is created over a CGT asset.⁽⁶⁾
- CGT event E5, which occurs when a beneficiary becomes absolutely entitled to a CGT asset of a trust.⁽⁷⁾
- CGT event E7, which occurs when the trustee of a trust disposes of a CGT asset of the trust to a beneficiary, in satisfaction of the beneficiary's interest, or part of it, in the trust capital.⁽⁸⁾

The transfer, disposal, vesting and/or subsequent distribution of trust property can amount to a number of other CGT events. Each transaction must be carefully considered to ascertain whether any other CGT events may more adequately or accurately give rise to a CGT liability. It is important for taxation purposes, and to avoid possible penalties, that CGT events are properly identified and disclosed to the ATO.

Does the Trust End on the Vesting Date?

For many years, it has been a common belief that a trust comes to an end on the vesting date, meaning that the trust must be wound up. This caused concerns, and requests for clarification, about the tax implications of reaching the vesting date, including the tax implications if, unknowingly, or mistakenly, the vesting date is missed.

The Ruling confirms that it is possible for the trustees of a trust to continue to hold assets, and generate trust income, after the vesting date. After the vesting date, the beneficiaries' rights to call for income and capital will also be governed by the terms of the trust deed. However, we urge caution against trustees continuing to act in that capacity without seeking specific and detailed advice about their obligations, and the rights of the beneficiaries.

Worrall Moss Martin Lawyers has specialist knowledge in the area of Trusts, including advising clients about the control and vesting of trusts as part of a comprehensive estate plan. Please contact Kimberley Martin, Peter Worrall, or Eve Hickey if you wish to discuss any matters relating to Trusts.

This material is taken from a detailed paper by Director, Kimberley Martin titled "*The Trouble with Trusts: Vesting Dates and Tax Consequences*" which she presented at the 10th Annual Wills & Estates Conference in Queensland on Thursday 22nd & Friday 23rd August 2019.

(1) Ashton de Silva et al, *Current Issues with Trusts and the Tax System: Examining the Operation and Performance of the Tax System In Relation To Trusts, With a Particular Focus on Discretionary Trusts Linked to High Net Worth Individuals* (RMIT, 2019) (Commissioned by the Australian Taxation Office).

(2) Taxation Ruling TR 2018/6 *Income Tax: trust vesting - consequences of a trust vesting*.

(3) Ibid

(4) ATO, Taxation Ruling TR 2018/6 *Income tax: trust vesting - consequences of a trust vesting* at [7].

(5) CCH 'Ruling on trust vesting finalised', CCH iKnow, Issue 8, August 2018, available

at: <https://iknow.cch.com.au/document/xatagnewsUio3008953sl978782302/ruling-on-trust-vesting-finalised>. Accessed 1 August 2019.

- (6) Income Tax Assessment Act 1997 (Commonwealth) s104-55.
- (7) Income Tax Assessment Act 1997 (Commonwealth) s104-75.
- (8) Income Tax Assessment Act 1997 (Commonwealth) s104-85.

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Contributions and suggestions from Worrall Moss Martin News readers are always appreciated. Email us at info@pwl.com.au

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