



Complex Matters: Commissioners' Claims



J Van der Velde
TEP FCPA CTA FTIA

Harry

2



- Harry
- Ron - friend
- Dudley – first cousin
- Minerva - lawyer

- Lija Pty Ltd
- Potter SMSF
- Potter Trust

VdV Legal

Harry

3

- Domiciled in Australia and a tax resident
- No spouse
- No children

- Gave instructions for will
- Named Ron as executor
- Signed instructions before 2 witnesses
- Died that afternoon

The Facts – see handout

VdV Legal

Estate

4

- Signed Instructions
 - Residence
 - Holiday house - Privet Drive, Encounter Bay
 - Investment property - 9½KW
 - Shares in Lija Pty Ltd – 2 \$1 shares
 - \$1 million in term deposits

 - *Share portfolio (held by Lija atf SMSF)*
 - *Investment property - Somerton Park (held by Lija atf Trust)*

VdV Legal

Estate

5

- Signed Instructions
 - Ron
 - Ron's adult children
 - Dudley
- Intestacy
 - Dudley
- Advice is obtained and negotiations take place meanwhile

VdV Legal

Commissioner #1



Australian Securities and Investment
Commission

Company 7

- Harry was sole director and shareholder
 - ASIC notification re change shareholder/director
 - Annual filing and fees to ASIC
 - Public officer for ATO
- Duties as trustee of the SMSF
- Duties as trustee of the Trust

VdV Legal

Company 8

- There is no director of Lija
- A replacement director can be appointed by:
 - Harry's LPR; or
 - Shareholders
- shares in Lija - part of Harry's deceased estate

VdV Legal

LPR 9


- Letters of administration ad colligenda bona
- Limited interim grant

The administration is limited for the purpose of protecting and preserving the asset and may be granted to any fit person

In the Estate of Rowell

VdV Legal

Commissioner #2



Commissioner of Federal Taxation

SMSF 11

- Indefinitely continuing legal trust
- Annual obligations
 - Preparation of financial statements and regulatory return
 - Appointment of auditor
 - Lodge returns and pay any tax due
 - Payment of levy
- Obligation to pay out a death benefit as soon as practicable after death

VdV Legal

SMSF 12

- Beneficiaries ≠ members
- Death Benefits can go to
 - Superannuation dependants

Spouse
(de facto or de jure)
Child (adopted & step)
Financial dependant
Interdependent

- LPR

VdV Legal

SMSF

13

- **Assets**
 - Listed shares
- **Income**
 - Dividends (franking credits)
- **SMSF Tax**
 - 15% on income (franking credits)
 - CGT if sell shares
 - CGT discount 1/3 if asset held over 12 months

VdV Legal

SMSF

14

- **Death Benefit**
 - Must go from fund to LPR
 - From LPR – ?
- **Death benefit Tax**
 - Harry had no tax dependants
 - Harry had no tax free portion
 - Taxable portion – lower of 15% or recipients marginal rate
 - Untaxed portion – lower of 30% or recipients marginal rate

VdV Legal

Trust

15

- **Somerton Park property**
 - Signed instructions – give this to Ron
 - Trust deed defines the class of beneficiaries
 - Harry
 - Harry's relatives including cousins
 - Companies Harry controlled – excluding the trustee
 - Various charities
 - Only possible income beneficiaries are Dudley or charities

VdV Legal

Trust

16

- **Somerton Park is rented out**
 - Lija derives net rental income each year
 - Lija is required to lodge a tax return atf
 - Choices:
 - Distribute to a beneficiary – resolution on or by 30 June
 - Accumulate – top tax rate
 - Distribution to Dudley
 - Non resident tax rates so no tax free threshold
 - Tax paid by Lija as trustee on Dudley's behalf

VdV Legal

Trust

17

- **Lija is required to lodge a tax return atf**
 - FTL penalties
 - Currently up to \$1,110.00 per return (discretion)
 - No penalty if not taxable
 - Commissioner will not generally pursue if small value
 - Potential criminal offence
 - offence of *absolute liability*
 - intention, knowledge, recklessness, negligence need not be established

VdV Legal

Trust

18

- **Vesting**
- On vesting – individual persons in the class
- Only possible taker on vesting is Dudley
 - Somerton Park has to go to Dudley
 - Sale by trustee or distribution in specie
 - Non resident tax rates
 - Tax paid by Lija as trustee
 - No CGT discount available to non resident

VdV Legal

Estate 19

- LPR must:
 - Lodge Harry's tax return to date of death
 - Lodge any outstanding returns Harry has not yet lodged
- LPR personally liable indemnified by estate
 - Tax
 - Interest
 - Penalties
- Liability if knew or reasonably should have known
- Distribution will not affect liability

VdV Legal

Estate 20

- Income derived by the estate
 - No beneficiary presently entitled until administration complete
 - LPR is a trustee for tax purposes
 - All income taxed to the trustee
 - Concessional rates at discretion of Commissioner
 - Tax free threshold for first 3 returns lodged by estate
- Special rule for deceased estates where income actually paid to or on behalf of a beneficiary

VdV Legal

Main Residence 21

- Signed instructions – Ron
- Intestacy – Dudley
- CGT
 - Exemption if end ownership interest within 2 years of Harry's death
 - LPR can self assess extension for a further 18 months if:
 - Reasons beyond control of LPR in first 2 years
 - Complexity of estate
 - Potential claims made by Dudley
 - After 3½ years can make private ruling request

VdV Legal

K3 22

- Dudley is not a tax resident of Australia
 - Therefore a tax advantaged entity
 - If assets not real property pass to Dudley
 - Affects Harry's tax return for the date of death
 - CGT applies as if Harry had sold the asset immediately before death

VdV Legal

K3 23

- Cash is not a CGT asset
- Not applicable to real property as location keeps it in Australian tax net
- If Dudley took everything on intestacy this might include assets in specie
 - Harry's date of death return lodged
 - Open for 4 years as Harry beneficiary of Trust
 - Indefinitely if fraud or evasion

VdV Legal

Commissioner #3



Commissioner of State Taxation

Land Tax

25

• Notices

- LPR must lodge a written notice within 1 month of:
 - Obtaining probate/letters
 - Completion of administration, or
 - 3 years from date of death (unless discretion granted)

NB: A testamentary trust is not an administration trust

- If LPR takes land as a beneficiary must lodge notice of change in holding

VdV Legal

Land Tax

26

• Harry's estate is an administration trust until

- End administration
- 3rd anniversary of his death
- Longer period at discretion of the Commissioner
 - No published guidance
 - Similar criteria to those published by Federal Commissioner for extending main residence concession seem to apply
- General land tax rates apply to administration trust
- Trust rates apply otherwise
- Assume property in estate is worth \$2 m difference c\$9,250 pa

VdV Legal

Stamp Duty

27

• Exempt Transfers

- Transmission to LPR exempt
- Shares are not dutiable property in SA
- Distribution from estate under will/intestacy exempt
- 9½KW is not primary production or residential – qualifying land
- Transfer of Somerton Park not exempt as not in estate

VdV Legal

Resolution

28

• Dudley consents to an application for probate of the signed instructions

- Negotiates Deed of Family Arrangement
 - Shares in Lija to Ron
 - Dudley forgoes all claims to Privet Drive
 - Privet drive to Ron and his adult children
 - 9½KW and Residence to Ron
 - Share portfolio sold by Lija as trustee of SMSF
 - Death Benefit half to Dudley and half to Ron's Children
 - All cash in term deposits to Dudley

VdV Legal

CGT on Deed of Family Arrangement

29

• Free of CGT if

- Deed to settle claim
 - Claim needs to be made to LPR
 - No need to institute proceedings
 - Issue: conflict with duty to court
- Only consideration is variation or waiver of entitlements under will or intestacy

VdV Legal

Stamp Duty on Deed of Family Arrangement

30

• Exempt from duty only if

- Pursuant to will or intestacy
- Deed
 - Privet Drive
 - designated to Dudley
 - goes to Ron and Ron's Children - dutiable
 - Residence
 - designated to Ron
 - goes to Ron – no stamp duty

VdV Legal

Questions

31

Julie Van der Velde
VdV Legal
L2 70 Hindmarsh Square
Adelaide SA 5000
Tel 7009 4855
Julie@vdvlegal.com.au

VdV Legal