



Brett Davies

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Practice Alert

It is a war zone out there at the moment. In never seen before levels, taxpayers are suing the ATO in the courts – and winning. Sadly, the ATO is also suing taxpayers with equal gay abandon. On top of this, family law is getting nasty. Professional advisers are ending up in the negligence courts after the family matter unsuccessfully concludes (and they virtually always end up “unsuccessful” in the eyes of the couple). I have never seen such a desire to go to court. I wanted to bring to your attention 6 major problems that I have encountered recently.

1. Suing accountants that do family trust minutes after 30 June

The father gets wind that his son’s marriage is on the rocks. The accountant whispers:

“Better stop distributing to your boy through your family trust. The Family Court now has power to direct not only the couple, but other persons such as parents.”

Four years pass and his son leaves his wife. The accountant and father smile - the father’s family trust is untouchable. However, a month later, the family lawyer subpoenas a junior accountant at the accounting practice and the senior secretary and asks under oath about Trust Distribution Minutes:

- a) Are you aware that the ATO gives an extra 2 months to sign these minutes? This of course is neither sanctioned by the Trust Deed nor the law. Minutes dated after 30 June are therefore void with the default beneficiary (i.e. the son) getting the distribution.
- b) Is it a rule at your office that minutes are signed by 30 June each year?
- c) Has your Partner ever back dated or instructed you or a client to back date trust distribution minutes? Has it ever been hinted at in a jocular fashion?

In similar fashion, the ATO is using 264 notices to get the client and accountant in the same room and asking why the minutes were signed on a Sunday. Even the most loyal clients start singing, some cry first.

2. Dead dad’s Super goes to one child – other misses out

Dad died in the case of *Katz v Grossman* [2005] NSWSC 934. The daughter was the only other trustee of his Self Managed Super Fund. Dad’s non-binding nomination directed that both his daughter and son to get half each. Instead, mischievously, she appoints her husband as the 2nd trustee and gives 100% of dad’s Super to herself. The son got nothing.

Many people rushed to make binding nominations after *Katz* – which is nearly 4 years ago. These binding nominations are lapsing. In fact, over 75% of SMSFs we review either have a *Katz v Grossman* problem or lapsed binding nominations.

Our litigation lawyer, Nick Oud, is defending attacks by aggrieved beneficiaries against advisers, accountants and auditors who, allegedly, fail to advise on the problem or put protection in place.

We do a lot of Self Managed Super Fund Wills. These never lapse. However, that is not always the right answer. If you have to narrow down Estate Planning to one word it is: flexibility. You see, we don't know what the tax laws are when a client dies. For example, it is tax effective to leave the Death Benefit Superannuation to the under 18 year old son and avoid the 16.5% penalty tax. Through a hotchpotch clause in dad's Will, the 20 year old daughter gets equal payment to the value of the Superannuation. That works well. But what happens once the son turns 18? He now suffers the 16.5% non-dependency tax as well.

3. Family Court renders void Family Trust distribution minutes – 26 years worth

Dr Spry wrote the leading authority on trust law. He is a very clever man. After a fight with his wife he excluded himself and his wife as capital beneficiaries of his Family Trust. His 4 loving daughters took control. Years passed and the girls got journal entry distributions and paid tax. Mrs Spry was angry that she wasn't getting anything out of the asset rich Family Trust. The Family Court decided to ignore 26 years of variations to the Family Trust deed. They also ignored 26 years of the distribution minutes and the fact the girls had paid out a lot of tax. Instead, the court gave much of the Family Trust assets to the wife.

What isn't reported is what in tarnation are the girls going to do about getting the tax they paid back? Sure, they can get the ATO to reverse out the last 4 years – but distributions date back 26 years. The wife is getting the income of the trust - tax free - over the last 26 years. Can the girls sue mum to get back the tax they have paid? How are accountants to prepare Trust distribution minutes with any certainty going forward? (*Kennon v Spry*, 2008).

4. But it gets worse – Richstar

A client comes in. He wants to start a business. You followed the tried and true “man of straw and woman of substance”. You fax the Family Trust instructions to Brett Davies Lawyers: corporate trustee with mum holding the shares and dad being the sole director. Mum is the Appointor, until she goes bankrupt or dies, then dad and then their children. Straightforward. However, Richstar has made it much more difficult, in particular in the light of the decision of the High Court in *Kennon v Spry*.

The Family Court has looked behind the ‘veil’ of the Family Trust for a long time. This was extended to the commercial arena in Richstar. The veil is now lifted everywhere.

Richstar created the concept of ‘effective control’. If somebody is in effective control of the trust, then it could be possible to ‘freeze’ the asset of the trust for a period of time. That happened in Richstar.

Be careful on how you now set up Family Trusts. The standard approach no longer works.

5. Estate Planning

In your Family Trust, you have the farm and the factory. The daughter wants the farm. The son wants to be a city slicker and take the factory. Sadly, the viability of trust splitting and cloning is under question. Families want to plan ahead and pass control and assets in the family trust to the next generation. They are stymied unless they wish to pay CGT on the “asset transfer”. The recent ATO ID 2009/86 catches the widest situation. This is where the trustee decides to split the family trust by simply appointing a new additional trustee and Appointor. Assets are then allocated to the control of the new trustee. Now CGT is assessed (event E 1) on the transfer of the assets to the new trustee. The ATO deems a new trust is created as the trust relationship is altered. But doesn't section 104-55(5)(b) ITAA 1997 allow this? This section is supposedly not met as the test of sameness is a strict one. So, what activities fail the sameness test? This is appointing a new trustee or Appointor, allocating assets or setting up separate accounts. But this is something that accountants and tax lawyers do everyday. We can fix up this problem.

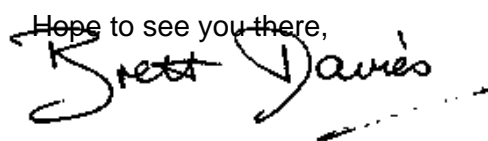
6. Any hope?

This year, the Full Federal Court in *Bamford* confirmed that the trustee has the power to define what is 'income of the trust estate' for section 97 purposes and make a tax effective distribution of this income. However, the court makes it clear that this is only possible as long as there is the appropriate power in the trust deed and an appropriate distribution minute was made.

The ATO does not like this decision. It blatantly and illegally refuses to follow the court's decision (see *Practice Statement PSLA 2009/7*). It has now got special leave to hear this matter in the High Court. This takes six months to two years.

"Answers, you want answers" – We give the answer at our workshop – Keeping Out of the Courts. Numbers are limited so please RSVP to Ashlee@taxlawyers.com.au or fax back to (08)9325 5999 by 30 November 2009.

I am also running an Estate Planning course later on the same day. I thought you may be interested so I have enclosed some information.

Hope to see you there,


Brett Davies, Brett Davies Lawyers

Brett Davies Lawyers Registration Form

Brett Davies
LAWYERS

Workshops (please tick)

- I would like to attend **Keeping out of the Courts**; 9:00 am – 1:00 pm; \$695
- I would like to attend **Estate Planning – an untapped revenue source**; 2:00 pm – 5:00 pm; \$695
- I would like to attend **both** workshops; 9:00 am – 5:00 pm; \$1,200

Date: 3 December 2009

Venue: The Athenaeum Club, 87 Collins Street, Melbourne

RSVP: Ashlee@taxlawyers.com.au or (08) 9325 7999 by 30 November 2009

Name: _____

Company: _____

Email: _____

Telephone: _____

Facsimile: _____

Address: _____

Additional Attendees: _____

Please debit my **Credit card** Visa / MasterCard (\$695 for one workshop; or \$1,200 for both)

Card Number: ____ / ____ / ____ / ____

Name on Card: _____ Expiry Date: ____ / ____

Fax back to 08 9325 5999

Seminar 1: Keeping out of the courts



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Date: Thursday, 3 December 2009

Time: 9:00 am – 1:00 pm

Venue: The Athenaeum Club, 87 Collins Street, Melbourne

RSVP: Ashlee@taxlawyers.com.au or (08) 9325 7999 by 30 November 2009

Cost: \$695 or \$1,200 for the full day (includes "Estate Planning - an untapped revenue source" workshop).

Family Trust minutes and deeds after Bamford, Spry and Richstar

- What do you need to say and do for the clients before 30 June? How do you do minutes without knowing the income?
- Family Law v's the accountant. We explain the rules of engagement. It isn't pretty, but we put in your hands the defence and fortress your client needs.
- Child Maintenance Trusts - getting adult rate tax rates for divorced parent's children.

Estate Planning in Superannuation

- How do you claim a tax deduction for paying off capital in an Instalment Warrant?
- How do you set up seminars for your local Real Estate Agents on Instalment Warrants?
- How do the "Superannuation Testamentary Trusts" wash out the 16.5% tax? How do you set up "dependants"?
- Who can challenge Superannuation distributions?

Estate Planning out of Super

- Why Mutual Power of Attorney and Cascading Power of Attorney preserve your client base.
- 3G Testamentary Trusts – why permissive and how do they work?
- Setting up Charitable Trusts, Special Disability Trusts and Capital Only Trusts in Wills.
- Business Succession Planning and Key Person Insurance. Can trauma now go into Super?

Tax litigation (argy barge with the ATO) - David & Goliath

- We share our dealings with the ATO. The ATO falls fast when the adviser, accountant and tax lawyer stand shoulder to shoulder with the client. The ATO often goes early to find an easier win. Remember, even when the ATO pushes the matter to court, the ATO loses half of its cases in the Administrative Appeals Tribunal.
- Serious tax fraud.
- Don't be daunted when you are hit with an amended assessment. Litigation with the ATO can be easy and fun – and your client often wins.
- Getting small Business CGT relief when you are worth over \$6m - New tricks for an old problem.

Asset Protection – fire proofing your practice

- Terms of trade that make your licensing body happy, yet fire proof your practice.
- Cash flow protection. Suing bad payers.
- Applying for a tax ruling.
- Man of straw and women of substance that work against the new Bankruptcy laws – every time.

Seminar 2: Estate Planning – an untapped revenue source



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Time: 2:00 – 5:00 pm

Venue: The Athenaeum Club, 87 Collins Street, Melbourne

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Cost: \$695 or \$1,200 for the full day (includes “Keeping out of the Courts” workshop).

Estate Planning is not about lawyers making Wills. It is about the accountant and adviser providing holistic support to the client. At death, what happens to the family home, business assets, insurance and children?

From the training seminar, you walk away with answers to:

How to review the client's current Will and Power of Attorney

How to complete the initial instructions for the Estate Planning documents using our Inheritance Tax Planner

How to discuss what happens to assets on death

How Capital Gains Tax affects the family home

How a 3 Generation Testamentary Trust saves tax

Dealing with minors and children with disabilities tax effectively

Protecting alcohol and drug addicted children

Strategies in Wills to wash out the 16.5% Non-dependency death duty for Super

Why a Mutual Power of Attorney is better than a Cascading Power of Attorney

Some clients are running around like headless chooks. Research shows that if the client does their Estate Planning through their Accountant or Financial Planner, then they are 63% more likely to stay with you. If you show love, you get love in return.