Regarding the establishment of a 'standardised' family trust deed in Australia – Can you appoint a sole trustee and sole named beneficiary?

February, 2019 – Darius Hii

1 Proposition

1.1 This discussion paper looks to consider the following statement:

A trust is a legal relationship between a trustee and the beneficiary or beneficiaries.

If a sole trustee was also a sole named beneficiary, then this would be an agreement that a person had with themselves. The law says that no trust can exist in these circumstances.

1.2 The statement is made in the context of establishing a general discretionary family trust deed in Australia where a broad beneficiary class is included, which can include the following:

(a) The named beneficiary;

(b) Direct family members of a named beneficiary (spouse, children, siblings, parents);

(c) Wider family members of a named beneficiary (nieces, nephews, uncles, aunties);

(d) Related entities (such as trusts and companies); and

(e) Charities.

1.3 The typical general power to distribute income and capital to the beneficiaries in such proportions and manner as the trustee decides are included in the trust terms. The beneficiaries able to be in receipt of such distribution will be referred to as the **discretionary beneficiaries**.

1.4 Clauses will also be included stating that where a trustee:

(a) Fails to distribute income by midnight 30 June of a financial year; or

(b) Fails to distribute the income and capital of the trust on the vesting of the trust,

the named beneficiary will be the taker in default of such income and/or capital provided that if the named beneficiary is not living, then their children will benefit. The beneficiaries able to be in receipt of these distributions will be referred to as the **default beneficiaries** (in the case where there is only one named person, the **default beneficiary**).

1.5 The author does not look to endorse the use of an individual as a sole trustee of the trust in making this paper – there are various reasons why it is recommended that a company should act as a trustee for the trust.

1.6 The author, however, looks to consider if a trust exists where the same individual is named as the sole trustee and sole **named** beneficiary of a standard discretionary trust where the general class of beneficiaries of the discretionary trust includes a general family class.

1.7 The author will not look to discuss equitable entitlements in detail as he will not be able to do justice to the complexity in this area of law.

2 Basis for the statement

2.1 It is well settled trust law that a trust is a relationship between a person who holds trust property for the benefit of a group of identifiable 'objects'.

2.2 The often-cited case of DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties [1980] 1 NSWLR 510 provides a modern (in the context that trust relationships have been around for centuries) on the general rule. The full extract of the relevant quote in question is provided for in the Annexure, however key extracts will be replicated in this paper.

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2.3 It goes without saying that '*an absolute owner in fee simple does not hold two estates, a legal estate and an equitable estate. He holds only the legal estate, with all the rights and incidents that attach to that estate.* ***If he were to execute a declaration that he held the land in trust for himself absolutely, the declaration would be of no effect; it would give him no separate equitable rights; he would remain the legal owner with all the rights that a legal owner has***. – *DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 per Hope JA.

2.4 Put simply (as Hope JA goes on to say):

(a) ..'*a man cannot be a trustee for himself*' (referring to Goodright v Wells)*;* and

(b) *'you cannot have a legal estate in trust for yourself'* (referring to Harmood v Oglander).

2.5 Where there is a trust, the trustee will in that case have:

'*all the rights of the absolute owner in fee simple,* ***but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons*** *– DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 per Hope JA

2.6 Alternative reasons for this position to be adopted may lay:

(a) In the doctrine relating to '**sham trusts**'. Although this paper will consider the doctrine surrounding sham trusts briefly, it is the author's opinion that such an arrangement cannot be relied on if objectively and commercially it was always intended for there to be a discretionary trust (e.g. by way of obtaining a trust tax file number and administering as if a trust existed).

(b) In relation to 'trust-busting' cases such as *Richstar* and *Kennon v Spry*, whereby Courts have looked through trust barrier to attach interests to beneficiaries in the context of 'property' for bankruptcy law or family law purposes. It is the author's opinion that such an approach does not suggest there is no trust in place. Rather, under an interpretation of the respective legislation, a discretionary beneficiary's entitlement has been held to be 'property' (depending on certain circumstances).

3 Who are the persons which the trustee owes an equitable obligation to?

3.1 In relation to discretionary trusts, trustees are bound "*to consider at all times during which the trust is to continue whether or not they are to distribute any and if so what part of the fund, and, if so, to whom they should distribute*".[1]

3.2 The flipside of the coin is that beneficiaries have the right to compel a trustee to administer the trust

3.3 *Gartside v Inland Revenue Commissioners* (1986) AC 553 at 606 reiterates this notion in relation to discretionary beneficiaries of the trust:

"[n]*o object of a discretionary trust has, as such, any legal right to or in the capital. His sole interest, if it be an "interest" within the scope of these provisions is with regard to the income:* ***he can require the trustee to exercise, in bona fide, their discretion as to how it shall be distributed,*** *and he can take and enjoy whatever part of the income the trustee choose to give him"*

3.4 Although this statement is often referred, the following statement by Owen J in *R and I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd* [1992] 10 WAR 59 at 79 further adds (in the extract) that a trustee must administer the trust **bona fide** and that the Court will enforce at the behest of the beneficiary:

[1] *Re Gestetner Settlement* [1953] Ch 672 at 688 per Harman J

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The trustee has a duty to administer the trust bona fide having regard to the purpose for which it was established. This is a duty which the court will enforce at the behest of the beneficiary. In this way, the remedy defines the nature of the interest of an individual beneficiary.

3.5 In answering this section's heading in a general manner – a trustee owes an equitable obligation to the beneficiaries of a discretionary trust to the proper exercising of the trustee's discretion under the trust deed.

3.6 The follow-up question/s, therefore, include:

(a) Who are the beneficiaries of a discretionary trust in which a trustee owes an equitable obligation?

(b) Are discretionary beneficiaries owed this equitable obligation (or another)?

(c) Are default beneficiaries owed this equitable obligation (or another)?

3.7 *Yazbek v Commissioner of Taxation [2013] FCA 39* is a modern authority on what the ordinary legal meaning of being a "beneficiary" of a discretionary trust is:

I accept that the common use of "beneficiary" includes a person who is the object of a discretionary trust, including a person who has received no income or benefit from the trust in a given year – at [24]

3.8 It was argued (using *Gartside's* case as authority) that a discretionary beneficiary had no beneficial interest in the trust fund and therefore discretionary beneficiaries were not beneficiaries of a discretionary trust.

3.9 This line of reasoning was rejected with consideration from *Kafataris v Deputy Commissioner of Taxation* [2008] FCA 1454. In that case, Lindgren J considered the ordinary legal meaning of "beneficiary" (although it considered it in the context of a sole beneficiary):

42. *According to the ordinary meaning of the word,* ***a beneficiary is any person for whose benefit a trust is to be administered and who is entitled to enforce the trustee's obligation to administer the trust according to its terms.*** *It is trite that for every trust there must be a "beneficiary" so understood (see, for example,* Re Denley's Trust Deed *[1969] 1 Ch 373 at 382-384). A beneficiary is not simply a person who as a matter of fact obtains some practical benefit from the existence of a trust:* Sacks v Gridiger *(1990) 22 NSWLR 502 at 508.*

43. ***The word "beneficiary" reaches beyond a person who has a beneficial interest in the trust property.*** *It is possible for the legal estate in land to be vested in "trustees" without equitable ownership being vested in someone else.* ***The trustees must, however, owe fiduciary obligations in respect of the trust property to persons who, although they may have no interest in the trust property and may never have an interest in the trust property, are called "beneficiaries"****. In* CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic) *[2005] HCA 53; (2005) 224 CLR 98, the High Court rejected (at [25]):*

> *a "dogma" that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations which may be called ownership.*
>
> ***That is to say, there can be a trustee who owes fiduciary obligations in respect of trust property to "beneficiaries" without any of the latter having a beneficial interest in the property****.*

44. ***Although the discretionary objects do not have a beneficial interest in any property the subject of a "discretionary" trust prior to a distribution or appointment of income or capital, they are freely referred to as "beneficiaries";*** *see for example,* Gartside v Inland Revenue Commissioners *[1967] UKHL 6; [1968] AC 553 at 617-618;* R & I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd *(1993) 10 WAR 59 at 79;* Australian Securities and Investments Commission v Carey (No 6) *[2006] FCA 814; (2006) 153 FCR 509 at [25]- [28]. Provided it can be said with certainty that any particular person is or is not within the class of discretionary beneficiaries, there is a trust, due administration of which can be enforced by discretionary beneficiaries: see* Re Gulbenkian's Settlements *[1970] AC 508;* McPhail v Doulton *[1970] UKHL 1; [1971] AC 424.*

3.10 Lindgren J concluded at [52] in *Kafataris'* case:

> *… the applicants' submission wrongly assumes that in order to be a "beneficiary" according to the ordinary meaning of that term, a Relative must have become entitled to an interest in trust property. On the contrary,* ***it is enough that the Relative has an expectancy and is entitled to compel the due administration of the trust by the Trustees****.*

3.11 That is, so long a discretionary beneficiary is entitled to compel the trustee to administer the trust under its equitable obligations, the discretionary beneficiary will be a beneficiary of the trust.

3.12 The Commissioner in Yazbek's case at [23] also relied:

> *on Leedale v Lewis [1982] 1 WLR 1319, where Lord Scarman characterised the term "beneficiary" as: 'a term which everyone is agreed includes persons who are the objects of the discretionary trusts'. Leedale was considered by the Full Court in Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Elliott (2009) 174 FCR 387.* ***The Full Court ultimately distinguished Leedale on the question of whether objects had an "interest" in the trust but, as the Commissioner notes, the Full Court in its reasons repeatedly referred to the objects of a discretionary trust as "beneficiaries****".*

3.13 The above case law has been built on the basis that DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties [1980] 1 NSWLR 510 is good law. The author knows of no cases that have rejected the rationale of the above statements under heading 2 (replicated in full in the Annexure).

(a) Commissioner of State Revenue v Rojoda Pty Ltd [2020] HCA 7 per Gageler J at [44] accepts that 'a trust involves the creation of new equitable obligations, which are **"annexed to the trust property"**', adopting the line of reasoning in DKLR that a trust deals with equitable obligations imposed on a trustee in relation to trust property, not the 'transfer' of an equitable interest.

(b) McRobert Superannuation Pty Ltd v Cranston [2019] WASC 376 per Smith J at [200] accepts that 'from the time the Giorgi Trust Deed was executed, the trustee held the trust property subject to the obligations imposed by equity' (quoting Chief Commissioner of Stamp Duties (NSW) v Buckle [1998] HCA 4 which applied DKLR).

(c) *Hui v Champion* [2019] FCA 111 per Jagot J states:

> *[72] Starting from first principles, the legal position is that the registered holder of shares is the owner of the shares****. The law does not recognise any distinction between legal and beneficial ownership****.* ***Equity****, which acts in personam,* ***recognises that the beneficial interest can be separate and distinct from the legal interest and does so by the mechanism of a trust****. However,* ***that recognition by equity does not create, of itself, any entitlement in rem to the property. What it allows is for a Court of equity to make orders in personam compelling the assets to be dealt with consistent with that beneficial ownership****. In other words, to enforce a beneficial*

interest at equity, one needs to go to a Court of equity and seek orders giving effect to that right.

[73] In Commonwealth Bank Officers Superannuation Corporation Pty Ltd & Anor v Beck & Anor [2016] NSWCA 218, Macfarlan JA at [195] observed that a beneficiary of a discretionary trust had "a right to have his interest [in the trust] protected by a court of equity" citing Gartside v Inland Revenue Commissioners [1968] AC 553 at 617-8 per Lord Wilberforce and Kennon v Spry [2008] HCA 56; 238 CLR 366 at [161] [See also Jacob's Law of Trusts in Australia, 8th ed at [23-03]].

[74] A similar and important reference point can be found in the judgement of Hope JA in DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties [1980] 1 NSWLR 510 where he states at [(16)] " … although the equitable estate is an interest in property, its essential character still bears the stamp which its origin placed upon it. Where the trustee is the owner of the legal fee simple, the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him."

[75] It is clear from the authorities that the proper avenue for a beneficiary to enforce rights is not by exercising 'self-help remedies' but by making an application to the Courts to compel the legal owner to act in accordance with the trust instrument.

(d) Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth [2019] HCA 20 per the full Court at [27]

By contrast, other than as permitted by rules of law or the terms of the trust, the trustee owes a "personal obligation to deal with the trust property for the benefit of the beneficiaries, and this obligation must be annexed to the trust property" (referencing *DKLR*).

(e) *Boensch as trustee of the Boensch Trust v Pascoe* [2018] FCAFC 234 per Besanko, McKerracher and Gleeson JJ at [102]:

Mr Pascoe submitted that this reasoning is correct. The definition of property as including any estate or interest arising out of or incidental to real property, the fact that before his bankruptcy Mr Boensch held the legal estate in the property subject to equitable obligations to use his legal rights in a particular way for the benefit of other persons (DKLR Holding Co (No 2) v Commissioner of Stamp Duties (NSW) [1980] 1 NSWLR 510 at 518-520 per Hope JA (with whom Glass JA agreed); on appeal to the High Court DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW) (1982) 149 CLR 431)

3.14 The above cases are just a few of the recent cases in the past 2 years of writing this paper that supports the general premise outlined in *DKLR*. I do not know of any cases that contradicts such a position.

3.15 To elaborate on the nature of the interest of a discretionary beneficiary under a discretionary trust, the following extracts from the extrajudicial writing of Justice Mark Leeming entitled "Chameleon-Hued Words: A Note on Discretionary Trusts" (2015) 89 *Australian Law Journal 371* where he refers to the following passages in academic literature, are of importance:

A typical example of a discretionary trust in the wider sense (particularly in the context of offshore trusts) is one under which the trustees have various mere powers of appointment, and of distribution or application of capital and income, among a class of beneficiaries during the trust period, subject to which income is to be accumulated during the trust period, and at the end of the trust period the trust fund and its income, so far as not disposed of, is held on fixed trust … [T]he trust is described as a discretionary trust though none of the discretions

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are imperative and none of the default trusts themselves involves the exercise of any discretion.

*"**The term 'beneficiary' may on occasion be used in contradistinction from 'discretionary object', but very often it used to include discretionary objects**. **Lord Scarman said that it was 'a term which everyone is agreed includes persons who are the objects of the discretionary trusts'**. Lindgren J said in Kafataris v Deputy Commissioner of Taxation (2008) 172 FCR 242 at [44] that although discretionary objects 'do not have a beneficial interest in any property the subject of a "discretionary" trust prior to a distribution or appointment of income or capital, they are freely referred to as beneficiaries'."[11] (footnotes omitted)*

3.16 Further, it has been agreed at a superior Court level in the UK that the rationale of Kirby P and Sheller JA in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, is good law regarding a beneficiary's right under a trust (and their ability to claim disclosure of trust documents). In *Schmidt v Rosewood Trust Ltd (Isle of Man) 26* at [50] – [51]:

"But the Board cannot regard it as a reasoned or binding decision that a beneficiary's right or claim to disclosure of trust documents or information must always have the proprietary basis of a transmissible interest in trust property.

*The more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. **The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest**. **The object of a discretion <u>(including a mere power)</u> may also be entitled to protection from a court of equity**, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion."*

3.17 In considering the extent of a default beneficiary's interest in the trust, it is established law expressed in *Ramsden v FCT* [2005] FCAFC 39 at [37] that a '*taker in default of appointment is ordinarily regarded as having a vested interest in the property to be taken, though liable to be divested by an exercise of the trustee's power to appoint elsewhere: Hardingham & Baxt Discretionary Trust (2nd Ed). The interest although vested, is defeasible.*

3.18 That is, although a default beneficiary may have an interest in the trust fund, that interest is **defeasible** by a prior exercise of a trustee's power.

3.19 This is not to say that a discretionary beneficiary does not have an interest in the trust fund. Although any interest may not be one that is immediately identifiable, the discretionary beneficiary's right to due administration has been considered by Ford and Lee: The Law of Trusts at [1.8510] to be an equitable chose in action:

The right to due administration is itself a form of property, namely, an equitable chose in action. In some cases the beneficiary's chose in action may not be assignable as where the beneficiary is a discretionary object of a trust power: where the trust gives the trustee a discretion to choose distributees from a range of persons, beneficiaries to whom the trustee might make a distribution cannot substitute other persons as potential distributees although they can release their rights: Re Gulbenkian's Settlements (No 2) [1970] Ch 408; [1969] 3 WLR 450.

3.20 This equitable interest, however, should not be considered as making the beneficiary a 'beneficial owner' of the subject matter of the trust – *Lygon Nominees Pty Ltd v Commissioner of State Revenue* [2007] VSCA 140; 66 ATR 736 at [75].

3.21 Regardless, the concept of people needing to have a beneficial interest in a trust fund has been rejected by the following phrase (see full extract in paragraph 3.9):

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That is to say, there can be a trustee who owes fiduciary obligations in respect of trust property to "beneficiaries" without any of the latter having a beneficial interest in the property.

3.22 In other words, the trustee's duty, nor a beneficiary's right of due administration is capable of making the object of a power of appointment into a 'beneficial owner' of the trust.

3.23 The above statements not change, even if a person is in a position to control the exercise of the trustee's power (whether directly or by being in a position to change the trustee).

108 In my view, on orthodox principles, neither the fact that Dr Ward was in a position to control the exercise of the trustee's powers, and was in any event entitled to remove the trustee and appoint a new trustee, nor the fact that she could cause the trustee to appoint the income or capital of the trust to herself, would mean that she was the beneficial owner of the trust property prior to causing the trustee to appoint the property to herself. Even a donee of a general power of appointment is not the beneficial owner of the property prior to the exercise of the power, although for many purposes such a donee will be treated as if he or she were the beneficial owner. As Fry LJ said in Ex Parte Gilchrist; Re Armstrong (1886) LR 17 QBD 521 at 530-531:

> *"The question is, whether the general power of appointment given to the bankrupt is her 'separate property' within the meaning of sub-s. 5 of s. 1 of the Act of 1882. To my mind the question is one of the most elementary description, and, if it had not been argued as it has, I should have thought it unarguable. No two ideas can well be more distinct the one from the other than those of 'property' and 'power'. ... A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. ... Not only in law but in equity the distinction between 'power' and 'property' is perfectly familiar'*

3.24 At this point, I want to acknowledge that there are very few of the cases relate directly to an individual trustee who is also the only specified beneficiary.

3.25 That said, the intention of outlining the above extracts from cases is to set out what fundamentally a trust is. That is, a trust is a relationship between a person who acts as trustee for the 'benefit' of others (by administering the trust pursuant to its terms).

3.26 To respond to my earlier questions:

(a) Who are the beneficiaries of a discretionary trust in which a trustee owes an equitable obligation?

Adopting the extract from *Kafataris'* case: ***a beneficiary is any person for whose benefit a trust is to be administered and who is entitled to enforce the trustee's obligation to administer the trust according to its terms***

(b) Are discretionary beneficiaries owed this equitable obligation (or another)?

Yes.

Various case law has confirmed that discretionary beneficiaries are owed the protection of equity.

(c) Are default beneficiaries owed this equitable obligation (or another)?

Yes.

Further default beneficiaries are owed an equitable obligation to benefit from the trust assets where the trustee chooses (in a bona fide manner) not to distribute income or capital from a trust.

3.27 In the context of a standard 'discretionary family trust', a trustee will owe an equitable obligation to – any person whose benefit a trust is to be administered for (being the named

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beneficiary, and the broader beneficiary class of persons) and who is entitled to enforce the trustee's obligation to administer the trust according to its terms (as per cases referred to above, this can include discretionary beneficiaries.

3.28 Where the trustee is a sole individual, that individual owes an equitable obligation to that sole individual (who is named); **and** the other 'discretionary beneficiaries' of the trust including:

(a) Direct family members of a named beneficiary (spouse, children, siblings, parents);

(b) Wider family members of a named beneficiary (nieces, nephews, uncles, aunties);

(c) Related entities (such as trusts and companies); and

(d) Charities.

3.29 It, therefore, cannot be said that a sole individual holds the trust fund for that sole individual. This is because the sole individual will also have an equitable obligation to the above discretionary beneficiaries to administer the trust pursuant to the trust terms.

3.30 The question therefore turns away from whether the statement is correct at law, to *why* the initial statement would be repeated.

3.31 Before turning to the *why*, I note the following from Australian Taxation Office Taxation Ruling 2006/14: Income tax: capital gains tax: consequences of creating life and remainder interests in property and of later events affecting those interests:

(a) This ruling contemplates a distinction between two different equitable interests that can be held by a trustee:

(i) Life interests – [6] *an interest in the income of a trust for life* [of a person/s]; and

(ii) Remainder owners – [6] *an interest in the capital of the trust…(In this Ruling, a remainder should be read as including a reversion unless the context suggests otherwise*.

(b) You can somewhat analogously consider:

(i) discretionary beneficiaries as persons with a life interest; and

(ii) default beneficiaries as the remainder owner.

(c) In relation to the statement amount, you can have a sole trustee;

(i) with a broad class of discretionary beneficiaries; and

(ii) the sole trustee as the default beneficiary.

(d) [Paragraph 17] mentions that '[I]*f the trust is created inter vivos, the trustee acquires the original asset when the trust is created'*.

(e) This is followed by the fact that [Paragraph 31] states – *if the life interest is disclaimed the CGT consequences arising from the creation of the trust may need to be reconsidered if the original owner is the* [only] *owner of the remainder interest. That is, CGT event E1 will not happen if the original owner purported to create the trust by declaration (because there can be no trust if the trustee is the sole beneficiary).*

(f) The combination of the two paragraphs can suggest that the ATO accepts that a trust can exist where the trustee is also the sole default beneficiary (remainder owner), provided there are discretionary beneficiaries (persons with life interests).

(g) This is based on the fact that paragraph 31 follows on from the statement that a trust can be created inter vivos.

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(h) There would be no need to contemplate paragraph 31 in such a circumstance if the ATO did not believe a trust could exist in such a scenario.

(i) Please note, it is accepted, that where the trustee is also the only remainder owner, there is no trust (and hence CGT event A1 applies) – which will only be the case if all discretionary beneficiaries disclaim their interest.

(j) Until then, a trust exists on foot (which is supported by the fact that a CGT event won't occur until all persons with a life interest disclaims their interest in the trust).

(k) Finally, it is noted that this ruling relates to life interests and remainder owners, however, they have contemplated a scenario to consider what happens when the trustee is also the sole remainder owner from an equitable interest perspective. So this sheds some light in relation to the ability for a trust to exist.

4 Reasons for repeating the statement

4.1 It is difficult to dissect and rebut a view when no supporting arguments or case law is presented.

4.2 The author, however, wishes to consider the following potential arguments.

Influence of trust-busting cases

4.3 Two commonly referred to 'trust-busting' cases in Australia is:

(a) For the purposes of determining if trust property is 'property' able to fall within the ambit of the *Bankruptcy Act 1996 – Australian Securities and Investments Commission (ASIC) v Carey (No 6)* [2006] FCA 814 (**Richstar**)

(b) For the purposes of determining if trust property can be included in the division of assets on a property settlement within the ambit of the *Family Law Act 1975* (Cth) – *Kennon v Spry* (2008) 238 CLR 366.

4.4 The above two cases have brought a rise of cases whereby Courts have effectively 'looked through' the trust relationship. Neither case, however, straight out states that there is no trust.

4.5 *Kennon v Spry* resulted in a widening on what assets could be made subject to orders under section 79 *Family Law Act 1975* (Cth). The case was not one in relation to whether there was a trust or not.

4.6 All parties to the case accepted there existed a trust, but they were considering whether a discretionary beneficiary's interest in a trust could be considered as property to be included in a property settlement.

4.7 Nothing further will be discussed in relation to *Kennon v Spry* as there is much to discuss in terms of structuring a trust to fall outside of 'property' and into a 'financial resource'.

4.8 *Richstar* resulted in Justice French looking through a trust and seeing that discretionary objects of the trust having an interest justifying the appointment of receivers to the trust.

4.9 Again, this case did not affect whether there was a trust in existence, but it rather questioned the 'asset protection' merits of utilising a discretionary trust.

4.10 Specifically, the main issue of consideration was whether the definition of 'property' in the *Corporations Act 2001* (Cth) included property held in a discretionary trust.

4.11 The conclusion, as suggested above, is that his Honour adopted the position that a beneficiary who controls a trustee's power of distribution can be considered as holding an expectancy to receive assets (influenced from the Family Courts).

4.12 The issue, however, is the outcome of *Richstar* means that even company trustees, and combination of individual trustees where co-trustees could be said to act in accordance with

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a 'main trustee' could still be looked through in terms of whether the trust assets forms part of property accessible under bankruptcy.

4.13 In Queensland, a case has explicitly rejected the outcome of *Richstar*. *Fordyce v Ryan* [2016] QSC 307 per Jackson J at [37] stated:

It is difficult to accept as a principle of reasoning that a beneficiary's legal or de facto control of the trustee of a discretionary trust alters the character of the interest of the beneficiary so that it will constitute property of the bankrupt if the beneficiary becomes a bankrupt. ***To the extent that Richstar might be thought to support such a principle, it has not been followed or applied subsequently and it has been criticised academically****. See J Glover, "A challenge to established law on discretionary trusts? – Re Richstar Enterprises ".* ***In my view, there is no general principle of law of that kind****.*

4.14 *Fordyce* has been followed since:

(a) At a Federal Court level – *Pleash, in the matter of Equititrust Limited (In Liquidation) (Receiveds and Managers Appointed) (No 3)* [2017] FCA 1074, per Reeves J at [13].

(b) At a Full Federal Court Level – *Pleash (Liquidator) v Tucker* [2018] FCAFC 144, at [17] and [43].

4.15 Again though, this line of argument to support the original statement does not make sense as the 'trust-busting' cases relied on arguing that a beneficiary's interest in a trust could transpire to property that can fall within the ambit of the relevant Family Law and Bankruptcy Law provisions.

4.16 For completeness, it should be noted that the decision of *Deputy Commissioner of Taxation v Wang* [2019] FCA 1759 accepted the rationale in *Richstar* in the context where freezing/restraining orders were put in place to prevent an accused taxpayer from liquidating their trust position. Context needs to be considered and appreciated, however, as there was a lack of detailed analysis in overturning established or accepted principles.

Rise sham trusts

4.17 The idea of having a sole named individual trustee, and a sole named individual beneficiary as not having a trust would not ordinarily make sense when there are wider general beneficiaries.

4.18 However, if it could be suggested that the naming of an individual as the only trustee and only named beneficiary could be a 'sham trust', then the effect is that there was never a trust at all.

4.19 The idea of a 'sham trust' relates to a situation where:

'a Court holds that a trust instrument executed by a settlor (S) in favour of a beneficiary (B) is null and void on the basis that the 'true' intention all along has been that S's property would be dealt with in a wholly different manner; and instead, that legal effect should be given to that 'true' intention. Typically, S would attempt such an elaborate scheme with the intention of shielding his or her property from others – the taxman, creditors, a soon-to-be ex-spouse, etc – while simultaneously attempting to retain maximum control over the property; and the pejorative phrase 'sham trust' is employed to reflect the typical deception attending S's employment of such a scheme.'

4.20 The above extract comes from the article 'Sham trusts' and ascertaining intentions to create a trust' (2018) 12 Journal of Equity, Ying Khai Liew (Senior Lecturer in Law, University of Mebourne).

4.21 Justice Pagone provides the following guidance on what it means to have a 'sham' in his article titled 'Sham Trusts', Trusts Symposium, Scoeity of Trust and Estate Practitioners, Adelaide, 9 March 2012:

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For something to be a sham what must be established therefore, is the presence of an intention that what was created was not intended to have its legal effect. The shamming intention must be that the device not be effective according to its terms and that it not have the legal effect it is designed to appear to have. In Snook v London and West Riding Investments Ltd Diplock LJ said:

> …[sham]…*means acts done or documents executed by the parties…which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.*

The application of these observations requires, therefore, an inquiry into the actual intentions of the parties.

4.22 Without knowing a parties' intentions prior to establishing a trust, we are unable to deduce or consider whether such a trust would in fact be a sham.

4.23 That said, where all parties undertook actions that can be seen as consistent as intending for there to be a trust (i.e. through the filing of relevant documents such as tax form), that may assist in suggesting a trust was always intended to exist.

4.24 Further, evidence about a trust as the alter ego of its controllers may not be enough to establish that it is a 'sham' – consider reading 'Dealing with the Emerging Popularity of Sham Trusts' (2007) 1 *New Zealand Law Review* 81,90 by Jessica Palmer.

Technical definition of a 'trust power'

4.25 In an attempt to simplify old and complicated trust law, a trustee of a trust will generally yield a power of appointment.[2]

4.26 A power of appointment is relevant in a trust as it may dictate how the trust fund may be exercised (or disposed of) by a trustee in favour of a range of 'objects',[3] and should be differentiated from administrative powers that a trustee may possess such as the power to insure, mortgage or invest trust property.

4.27 A trustee may have any one of the following powers of appointment:

(a) a general power of appointment (i.e. a power allowing the trustee to distribute to any person it chooses (including themselves));

(b) a specific or special power of appointment (i.e. a power allowing the trustee to distribute to an ascertainable class of persons such that it is possible to decide whether an individual forms part of the class or not); and

(c) a hybrid power of appointment (i.e. a power allowing the trustee to distribute to any person apart from those included in an excluded class).

4.28 From each power of appointment, such power can be further categorized as either a 'mere' power or 'trust power'.

4.29 The difference between the two powers was described by the Right Honourable Sir George Farwell in A Concise Treatise on Powers[4] by referencing Lord Eldon's judgment in Brown v Higgs 8 Ves.Jr. 561:

'Where there is a mere power of disposing and it is not executed, the court cannot execute it; but wherever a trust is created and the execution of that trust fails by the death of the

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[2] Described by Lord Jessel M.R. in *Freme v Clement* (1881) 18 Ch D 499, 504, a power of appointment: '*is a power of disposition given to a person over property not his own by some one who directs the mode in which that power shall be exercised by a particular instrument.'*

[3] Please note a reference to 'objects' is effectively a reference to those persons who may benefit from the trust).

[4] C.J.W. Farwell assisted by F.K. Archer, *A Concise Treatise on Power* (Stevens & Sons 3rd ed 1916).

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trustee or by accident, the court will execute the trust. But there are not only a mere trust and a mere power, but there is also known to the court a power which the party to whom it is given is intrusted and required to execute; and with regard to that species of power, the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed on him does not discharge it, the court will to a certain extent discharge the duty in his room and place. The principle is that if the power is one which is the duty of the donee to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and has not a discretion whether he will exercise it or not. The court adopts the principle as to trusts, and will not permit his negligence, accident or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it.'

4.30 The above judgment is summarised by stating that mere powers may or may not be exercised (i.e. the discretionary beneficiaries fall within this as they may have a power exercised in their favour)), whilst a trust power must be exercised if not by the trustee then by the court, or a trustee appointed by the court (i.e. the default beneficiaries may benefit at this point as they can compel court to force the trustee to pay default amounts to them).

4.31 The confusion where the original statement may have relevance is due to the fact that often it is the specifically named person who will be the default beneficiary.

4.32 The trustee of a trust has an equitable obligation to the default beneficiary to distribute such income and assets to the default beneficiary at certain points in time if the trustee chooses not to exercise an earlier discretion.

4.33 It could therefore be argued that the default beneficiary (or a solely named beneficiary who would often be considered the default beneficiary) is the only beneficiary of a **trust** power (as discretionary beneficiaries are only objects of a 'mere' power).

4.34 Therefore, as a sole trustee is also the sole beneficiary of a trust power, the rights will merge and there will be no trust.

4.35 The author cannot accept such a position, as adopting such a position would reject the notion established in *DKLR* that:

(a) ***The trustee**, in such a case, has at law all the rights of the absolute owner in fee simple, but he **is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way** for the benefit of other persons* – at [16]; and

(b) *although **the beneficiary has an interest in the trust property**, the content of **that interest is essentially a right to compel the trustee to hold and use his legal rights in accordance with the terms of the trust**.*

4.36 Cases mentioned above confirm that discretionary beneficiaries are entitled to exercise the right to compel the trustee, and are therefore beneficiaries of the trust.

4.37 Further, it has been accepted that in *McPhail v Doulton; Re Baden's Deed Trusts* [1971] AC 424 per Lord Wilberforce at [449]:

A trustee of an employees' benefit fund, whether given a power or a trust power, is still a trustee and he would surely consider in either case that he has a fiduciary duty…Any trustee would surely make it his duty to know what is the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to other possible claimants, a particular grant was appropriate.

4.38 The above extracts states that a trustee's obligations exist regardless of whether it is a 'mere' power or a trust power.

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4.39 The trustee and beneficiaries are therefore not identical (again, because the discretionary beneficiaries will often include the named beneficiary's broader family).

4.40 Despite the distinction between a 'mere' and trust power, the equitable remedies available for objects of both types of powers have made the treatment of both to be similar, and from cases mentioned above, Courts have been treating objects of a discretionary trust to include those objects arising from a mere power of appointment and those objects arising from a trust power of appointment.[5]

4.41 Further, ATO TR 2006/14 can support the claim that argument that a trust exists where a person holds property on trust for some beneficiaries (**life interests**) and for that same person as a remainder beneficiary.

4.42 See paragraph 3.31 for more information.

5 Concluding points

5.1 Having considered the fundamental cases relating to trust law and what it means to have a trust relationship, the author holds the view that an individual can be both the sole trustee and only specified beneficiary in a discretionary trust **provided** the discretionary trust includes a wider class of beneficiaries able to benefit from the trustee's discretionary powers.

5.2 Such a structure will not magically make a discretionary trust to cease to exist unless there is a level of 'sham' involved.

5.3 Such a structure may also not be recommended for the majority of discretionary trust uses as it lacks any consideration as to any of the following (not an exhaustive list):

(a) The liability the individual trustee will take on.

(b) The dispute that may arise if the individual trustee is bankrupted.

(c) Commercial issues when arranging for a trustee to change.

(d) Family relationship breakdown considerations.

5.4 In fact, a majority of discretionary trusts should utilize a special purpose corporate trustee (i.e. a company does not undertake transactions in its own right) for many of the above reasons.

5.5 Finally, prior 'trust-busting' cases do not state that a trust does not exist. Those cases look to expand statutory definitions to include trust assets in the ambit.

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[5] Consider the article 'Discretionary Trusts and Powers of Appointment: Progressive Assimilation' by Nigel P Gravells, Professor of English Law, University of Nottingham

Annexure 1

DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties [1980] 1 NSWLR 510 at 518 to 521 per Hope JA

[14] [After discussing the origin of equitable estates and interests] … After some hesitation, a trust interest in respect of land came to be regarded, not merely as some kind of equitable chose in action, conferring rights enforceable against the trustee, but as an interest in property. The fact that equitable estates were not enforceable against everyone acquiring a legal title to the property did not prevent them from being so regarded; a legal owner of land could lose his estate in, or become unable to enforce his rights in respect of, land in a number of ways. Although there has long been a controversy whether trust interests are true rights in rem … there can be no doubt that the interest of the cestui que trust is an interest in property …

[15] These essential features of interests arising under private trusts are thus described in Jacobs' Law of Trusts, 3rd ed, p 109: "…the trustee must be under a personal obligation to deal with the trust property for the benefit of the beneficiaries, and this obligation must be annexed to the trust property. This is the equitable obligation proper. It arises from the very nature of a trust and from the origin of the trust in the separate of the common law and equitable jurisdictions in English legal history. The obligation attaches to the trustees in personam, but it is also annexed to the property so that the equitable interest resembles a right in rem. It is not sufficient that the trustee should be under a personal obligation to hold the property for the benefit of another, unless that obligation is annexed to the property. Conversely, it is not sufficient that an obligation should be annexed to property unless the trustee is under the personal obligation."

[16] Several consequences follow. Firstly, [sic] an absolute owner in fee simple does not hold two estates, a legal and an equitable estate. He holds only the legal estate, with all the rights and incidents that attach to that estate. If he were to execute a declaration that he held the land in trust for himself absolutely, the declaration would be of no effect; it would give him no separate equitable rights; he would remain the legal owner with all the rights that a legal owner has. At least where co-extensive and commensurate legal and equitable interests are concerned, "… a man cannot be a trustee for himself.": Goodright v Wells, per Lord Mansfield. "You cannot have a legal estate in trust for yourself.": Harmood v Oglander, per Lord Eldon. Secondly, although the equitable estate is an interest in property, its essential character still bears the stamp which its origin placed upon it. Where the trustee is the owner of the legal fee simple, the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons …

[18] This position can be analysed in a similar way in respect of all rights given to a trustee who holds property at law in trust absolutely for a beneficiary. In some cases the rights vested in the trustee may be such that he cannot be compelled to allow the beneficiary to exercise it except (unless, because of the nature of the right, it is not permissible to do so) in his, the trustee's, name. If this analysis be correct, although the beneficiary has an interest in the trust property, the content of that interest is essentially a right to compel the trustee to hold and use his legal rights in accordance with the terms of the trust. Where the trustee holds absolutely for the beneficiary, the beneficiary has a right in equity to be put, so far as practicable and generally subject to appropriate indemnities being given, into a position where directly, or indirectly, or for all practical purposes, he enjoys or exercises the rights which the law has vested in the trustee …

[20] What then is the result of the actions of the plaintiff [B, the putative trustee] and of 29 Macquarie [A, the registered proprietor], and of the instruments executed by them; or, rather, what will their effect be when the transfer has been registered? Before the passing of the resolutions and the execution of the instruments, 29 Macquarie was the registered proprietor of the land for an

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estate in fee simple. It can, no doubt, be said that it was the beneficial owner of that land, but it held no separate equitable interest in the land; the statement means merely that it was the legal owner, and there was no equitable right in anyone to regulate or control the way in which it might exercise the rights which the legal ownership gave to it. The passing of the resolutions and the execution of the instruments, have not yet changed that position. When the transfer is registered, the plaintiff will undoubtedly be the registered proprietor of the land for an estate in fee simple, and will have, at law, all the rights and powers in respect of the land which the ownership of the fee simple will give. However, consequent upon its becoming entitled to these rights and powers, there will be created, at the same time as it become so entitled, an equitable estate in the land in 29 Macquarie, an estate which will entitle 29 Macquarie to require the plaintiff to hold and exercise its rights and powers, so far as practicable, as 29 Macquarie shall direct. Although it may not matter, the interest so arising in 29 Macquarie will not flow from the simple circumstance that the transfer was made without valuable consideration; it will arise (so far as it appears in the state case) because of the intention of the parties evidence by the resolutions and the declaration of trust. The interest will arise only because the rights and powers which were previously vested in 29 Macquarie have been transferred to the plaintiff. It would not have been possible for 29 Macquarie to have acquired its equitable interest by some kind of exception from the transfer of the legal title. In a loose or popular sense, it may be said that 29 Macquarie transferred a bare legal title to the plaintiff and retained for itself the beneficial ownership, but that is not a correct description of what the memorandum of transfer, and the resolutions and declarations of trust achieved. They achieved a transfer of the estate in fee simple and, thereupon, the create of an equitable state in 29 Macquarie

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