

## Article Information

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## SMSF Death Benefits - Exercising Real and Genuine Trustee Discretion - Wareham v Marsella [2020] VSCA 92

**In the recent Victorian Supreme Court case, the Court of Appeal has made it clear that trustees of an SMSF must give “real and genuine consideration” to the exercise of their discretion as to whom a superannuation death benefit should be paid.**

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### Facts

A superannuation fund was established in 2003 on behalf of Mrs Swanson, who was its only member until her death on 27 April 2016. At the time of Mrs Swanson’s death, she had been married to her husband Mr Marsella for some 32 years. The trustees of the fund were Mrs Swanson and her daughter from a previous marriage, Mrs Wareham.

When Mrs Swanson passed away, Mrs Wareham appointed her own husband as a second trustee of the fund to comply with the SIS Act requirement that there be two individual trustees. The two trustees then exercised their discretion to exclude Mr Marsella and pay the whole of the death benefit to Mrs Wareham.

Under the terms of the fund, both Mrs Wareham and Mr Marsella were included in the definition of “dependant”.

Mr Marsella commenced proceedings seeking orders removing Mr and Mrs Wareham as trustees of the fund, and the appointment of a substitute trustee. He also sought an injunction restraining the distribution of the fund.

At trial, the judge held that Mr and Mrs Wareham had exercised their discretion as trustees without giving real and genuine consideration to the interests of the dependants of the fund. Her Honour held that the exercise of discretion should be set aside, and the trustees removed.

This result was upheld on appeal.

### Grounds of Appeal

Mr and Mrs Wareham advanced many grounds of appeal, but there was considerable overlap between them. Their primary complaint amounted to an objection to the trial judge’s conclusion that they as trustees had failed to give real and genuine consideration to the interests of those who might potentially benefit from the exercise of the discretion regarding payment of the death benefit.

In deciding this issue, the Court of Appeal applied the following passage from *Karger v Paul* [1984] VicRP 13, holding that it remains the guiding principle applicable to superannuation trusts:

*“Apart from cases where trustees disclose their reasons, the exercise of an absolute and unfettered discretion is examinable only as to good faith, real and genuine consideration and absence of ulterior purpose, and not as to the method and manner of its exercise”*

Interestingly, in examining whether there had been real and genuine consideration, the Court (and the trial judge) referred in detail to the content and tone of the correspondence between the parties’ solicitors.

In particular, it was found to be significant that Mr and Mrs Wareham’s solicitors had asserted in correspondence

(incorrectly) that Mr Marsella was not a beneficiary or dependant and had no interest in the fund. Further, they had generally adopted a “dismissive” tone in responding to Mr Marsella’s concerns. This was held to support the conclusion that Mr and Mrs Wareham had not genuinely considered the interests of Mr Marsella as a dependant under the terms of the fund.

It was also held that minutes of the trustees which recorded “*due consideration having been made... of the possible interests of all dependants of the deceased member*” did not assist the trustees, as it did not contradict the express assertion in the solicitor’s correspondence that Mr Marsella was not a dependant.

### **Insight - Requirement for real and genuine consideration**

- If a trustee does not undertake a real and genuine consideration of the interests of potential beneficiaries when exercising their discretion, then there has not been a proper exercise of the discretion. It is not enough that there might be good grounds for a trustee (of a SMSF or otherwise) to exercise their discretion in a certain way, in the absence of such a real and genuine consideration.
- If discretion has been improperly exercised, the fact that the trustee relied on incorrect advice in acting in that way will not relieve them of liability (though of course, the trustee may subsequently have a claim in negligence against their advisors).
- It is not necessary that a trustee acted in bad faith to find that the trustee failed to give real and genuine consideration to the interests of a beneficiary.
- While the Court noted that “*the decision to pay no part of the death benefit to the deceased’s husband of more than 30 years was, at least, remarkable*”, Mr and Mrs Wareham would have been much better placed to defend the exercise of their discretion had they acknowledged the interests of Mr Marsella as a dependent, and sought information about his financial and personal circumstances so as to be in a position to make a real and genuine consideration of his interests.
- It is interesting to contrast the result in this case with *Katz v Grossman* [2005] NSWSC 934, another case involving the trustee of a SMSF preferring their own interests. In that case, the surviving trustee was also the daughter of the deceased, who also appointed her husband as an additional trustee, who then also resolved to pay the entire death benefit to the daughter, to the exclusion of the son of the deceased. The son sought to impugn the appointment of the husband as trustee, but was ultimately unsuccessful, and the entirety of the death benefit passed to the daughter.
- In light of the findings in *Wareham*, an approach by trustees based upon *Katz v Grossman* considerations to exercise their discretion so as to prefer their own interests above others must be considered vulnerable to challenge.