Best interests of the estate

WHERE A PERSON MAY RECEIVE A SUPERANNUATION DEATH BENEFIT AND IS THE LPR OF AN ESTATE, THERE MAY BE A CONFLICT. RECENT CASES HAVE LOOKED AT THAT CONFLICT AND PROVIDE GUIDANCE FOR PRACTITIONERS.

BY CLARE SUNDERLAND

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LPR duties

Among the fiduciary duties of an executor or administrator (LPR) are those to call in the assets of the estate and to avoid a conflict between personal interests and the interests of the estate. The potential for conflict should be addressed as soon as possible to ensure that the applicant follows the correct course of action.

McIntosh v McIntosh [2014] QSC 99

James McIntosh died intestate, survived by his parents, Elizabeth McIntosh and her former husband, John McIntosh, who were to take equally on intestacy. There was considerable acrimony between John and Elizabeth McIntosh. When applying for letters of administration, Elizabeth McIntosh deposed that she would collect the assets, pay any liabilities and distribute the residuary estate between herself and John McIntosh.

The estate was valued at around $80,000 but the superannuation death benefit was $453,748. Elizabeth McIntosh applied for and was paid the superannuation benefits (from three different funds) on the basis that she was in an interdependent relationship with the deceased.

Elizabeth McIntosh applied to the Court for advice as to whether there was a fiduciary obligation to request that the funds' trustees pay to the estate[1] and whether she was required to account to the estate.

Atkinson J said there was a clear conflict of duty and interest and breach of her duties as administrator.[2] Elizabeth McIntosh had favoured her own interests over the estate's and failed to disclose that she intended to apply for the benefits to be paid to herself personally. While the trustee of a fund has discretion to determine the recipients of the death benefit, an administrator of an intestate estate has a duty to apply for payment of superannuation funds to the estate.

Brine v Carter [2015] SASC 205

In this case[3] Professor Brine died leaving three sons and a de facto partner, Ms Carter, all four of whom were executors. Professor Brine had two superannuation pension accounts.[4]

Ms Carter told the sons that she was intending to apply for the death benefit, that the benefit "fell outside the Will"[5] and was only payable to a "spouse, dependent and disabled child".[6] Eventually the sons made their own inquiries and submitted applications that the benefit be paid to the estate. However, the trustee determined to pay the benefit to Ms Carter as de facto spouse. A complaint was made to the Superannuation Complaints Tribunal[7] but was unsuccessful.

SNAPSHOT

- Fiduciary duties are strictly imposed on an LPR, including the obligation to call in assets to the estate.
- An LPR cannot prefer their own interests when applying for payment of a superannuation death benefit.
- If an LPR receives a death benefit personally they may be in breach of their duties and required to account to the estate.

An LPR has a duty to identify, secure and collect the assets of the estate[8] and to avoid conflict transactions. However, there is an important distinction in the methods of appointment of an LPR.[9] An executor is appointed as a result of the choice of the testator who may appoint someone who has a known conflict, such as a creditor or debtor or a potential death benefit beneficiary.[10] This exception cannot apply to an administrator appointed by the court.

Blue J found that, from the time she had accepted her appointment as executor, Ms Carter was subject to duties to disclose the benefit could be an asset of the estate and not to pursue her personal benefit.[11] Blue J found that Ms Carter had:

- misled the sons into thinking there was only one superannuation account
- deliberately failed to disclose the value of the benefits
- deliberately failed to disclose that the estate or adult children were eligible beneficiaries.

It was noted that "if Ms Carter had disclosed what she knew about the superannuation benefits, recused herself from acting as executor in relation to them and left the other three executors to act alone on behalf of the estate in relation to them . . . she would not have acted in breach of her fiduciary duties . . ."[12] The exception allowing an executor to act where there may be a pre-existing conflict (above) cannot apply where the executor has failed to disclose fundamental information. However, from the time the sons had ascertained the relevant information and permitted Ms Carter to continue her application without resigning as an executor, they had consented to her pursuing her own interests.

The question then became whether Ms Carter was liable to account to the estate for the benefit she received. Importantly, Blue J decided there was no causal connection between Ms Carter's breach of duty and the benefit she received; the trustee of the fund only exercised its discretion after it had received claims from Ms Carter and the sons on behalf of the estate. Therefore, Ms Carter was not liable to account.

Burgess v Burgess [2018] WASC 279

Brian Burgess was a member of four different superannuation funds[13] when he died intestate leaving a wife, Denise, and two minor children.[14] The relevant intestacy provisions in Western Australia provide that the estate is to be distributed between the spouse and the children[15] and Denise was

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2/2/2021 Law Institute Journal Jan/Feb 2021 - Flipbook by Law Institute of Victoria | FlipHTML5

appointed administrator of his estate.

Prior to her appointment one of the funds paid a superannuation death benefit in the amount of $85,017.73 to Denise as dependent spouse. A second fund paid a death benefit of $338,607.33 to Denise after her appointment as administrator.[16] Payment of the final death benefit in the amount of $160,000 had yet to be determined.

Denise sought guidance from the Court regarding her obligations as administrator and whether she was obliged to account to the estate. The Court noted that she had not acted inappropriately at any stage[17] and had used the funds received for the benefit of herself and the children in acquiring a home and motor vehicle and establishing modest trust funds for each of the children.

It was held that there was no conflict in relation to the first payment to Denise which was made four months before her appointment as administrator.

Martin J emphasised the fiduciary obligations and "sacred obligation of total and uncompromised fidelity required of a trustee".[18] Those obligations go beyond mere duties to provide necessary information and disclose to the trustee of the fund that the applicant is also administrator of the estate.

"The interests of a deceased estate require a 'champion' who cannot be seen (even if they are not) to be acting half heartedly, or with an eye to achieving outcomes other than an outcome that thoroughly advances the interests of the estate – to the exclusion of other claimants."[19]

Denise was required to account to the estate for the second payment[20] and (although not explicitly stated in the reasons) required to apply for the final death benefit to be paid to the estate.

Gonciarz v Bienias [2019] WASC 104

Mr Bienias died intestate leaving his wife, Ms Gonciarz, his mother and his brother as beneficiaries entitled upon intestacy pursuant to s14 of the *Administration Act 1903* (WA).

The net value of the estate was around $140,000 and there was a superannuation death benefit of around $541,412.20, with a non-binding nomination, signed prior to the date of marriage, in favour of the deceased's brother. Ms Gonciarz applied for both letters of administration and payment of the death benefit to herself personally.

There was a dispute between the parties and eventually the trustee of the fund determined to pay the benefit to the estate, upon which Ms Gonciarz sought revocation of the grant of administration and the appointment of an independent administrator so that she could pursue her personal claim to the superannuation.

Tottle J held that Ms Gonciarz was in a position of conflict between her personal interest in challenging the decision of the trustee and her duty to the estate not to do so. By her appointment she was "obliged to subordinate her claim . . . to that of the estate".[21] To compel Ms Gonciarz to continue as administrator in the circumstances, considering the animosity involved, would be "inimical to the due and proper administration of the estate" and the interests of the beneficiaries.[22] The grant was revoked and an independent administrator appointed.

The position in Victoria

In Victoria, the recent Appeal Court case of *Wareham v Marsella*[23] considered the obligation of a self-managed superannuation fund trustee to exercise its discretion on real and genuine consideration. While the circumstances and considerations differ from the aforementioned cases, the decision highlights that the Victorian courts will also strictly interpret and impose trustee duties.

Conclusion

Trustee duties will be strictly imposed.

"The rigour of the fidelity required of trustees and those who discharge equivalent positions by courts of equity over centuries has never diminished . . . what on the face of it might otherwise be regarded as a harsh result taken against the actions of a trustee, [is] necessary to preserve the integrity of the office of trustee."[24]

In *Burgess* it was noted that "[t]he nature of an administrator's fiduciary position is such that it requires the fiduciary's undivided loyalty in pursuing exclusively the interests of beneficiary parties – to the exclusion of all other rival interests".[25]

Unless there is a valid binding death benefit nomination, an LPR should apply for payment to the estate of any superannuation death benefit.[26]

The cases highlight the importance of estate planning for superannuation interests. The decisions in *Burgess* and *Gonciarz* both expressly noted the desirability of making wills and binding death benefit nominations. The possibility for conflict should be considered in the appointment of executor, attorney or, indeed, trustee of a self-managed superannuation fund. Where a testator

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wishes to authorise an executor to receive a death benefit this should be expressly stated in the will.

When advising a client who is a named executor or potential administrator and is eligible to receive a superannuation death benefit payment, practitioners should consider:

- who are the death benefit dependents?
- who are the beneficiaries of the estate?
- what is the value of the superannuation death benefit?
- what is the value of the estate?
- who should apply for a grant of representation?
- who should apply for the superannuation death benefit?
- can an application for the death benefit be made prior to any application for administration of the estate?

With the increased occurrence of blended families, practitioners are likely to see an increase in estate-superannuation conflicts. It is worth bearing in mind that a superannuation dependent and LPR cannot have their cake and eat it too. ■

Clare Sunderland is a senior lawyer at Johnstone and Reimer Lawyers, an LIV accredited specialist in wills and estates and a member of the LIV Succession Law Committee.

1. *McIntosh v McIntosh* [2014] QSC 99, at [27].
2. Note 1 above, at [70].
3. A cross claim on a different issue by Ms Carter was decided in *Carter v Brine* [2015] SASC 204.
4. One account was a defined benefit pension that could only be paid to Ms Carter so it was only the "Flexi Pension" death benefit that was at issue.
5. *Brine v Carter* [2015] SASC 205 at [31].
6. Note 5 above, at [33].
7. Now the Australian Financial Complaints Authority.
8. Note 5 above, at [123]-[124] citing references therein.
9. Note 1 above, at [62]; note 5 above, at [143].
10. See *Mordecai v Mordecai* (1988) 12 NSW LR. Although the exception does not extend to permitting the trustee to voluntarily enter into a new position of conflict: at [64].
11. Note 5 above, at [137].
12. Note 5 above, at [139].
13. Each of which included insurance benefits.
14. Who were represented by the Public Trustee.
15. See *Administration Act 1903* (WA), s14.
16. A third fund paid the benefit to the estate on 26 October 2016 but it was of a small value and was disregarded.
17. Contrasted with the decisions in both *McIntosh* and *Brine v Carter* where there was an element of "non-disclosure or quasi-deceit (equitable fraud)": *Burgess v Burgess* [2018] WASC 279 at [66].
18. *Burgess v Burgess* [2018] WASC 279 at [84].
19. Note 18 above, at [85].
20. The Court imposed a constructive trust over real property acquired by her, but also recognised by way of equitable charge the mortgage debt she had assumed in relation thereto.
21. *Gonciarz v Bienias* [2019] WASC 104 at [39].
22. Note 21 above, at [40]. Ms Gonciarz's application for further provision from the estate was also considered relevant: at [43].
23. [2020] VSCA 92.
24. Note 18 above, at [83].
25. Note 18 above, at [83].
26. See Note 1 above, at [75].

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