Unrest in Peace –
Post-death disputes about superannuation

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Presented by:

Caite Brewer
Barrister
Hemmant's List
SMSF Specialist Advisor
(SSA®)

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Introduction

In recent years, there has been exponential growth in cases relating to superannuation death benefits. As more people hold more of their wealth in super the trend is unlikely to slow down.

Practitioners involved in estate planning will always be required to consider the terms of trust deeds, tax law, and the interrelationship between superannuation law and state-based legislation relating to trusts and succession, in attempts to minimise the potential for post-death disputes.

Even so, the typical disputes remain, such as:

- the validity of Binding Death Benefit Nominations (**BDBN**s);
- whether a proposed recipient is in fact a "spouse" of, or in an "interdependency relationship" with the deceased at the time of their death;
- where an executor or administrator attempts to make a claim for the death benefit themselves personally, often creating a conflict of interest between their personal interest and their fiduciary duty to the beneficiaries of an estate;
- whether the trustee has properly exercised its discretion in relation to payment of the death benefit.

One emerging area of dispute with marked divergence across jurisdictions is the role of attorneys and administrators in the BDBN process.

This paper will discuss some of the recent cases in the above categories that highlight the increasingly litigious superannuation environment and how the courts have attempted to reconcile some of the more complex and novel disputes.

1 Superannuation law – a refresher of the important concepts

Common to all super funds are the following sources of law:

- the trust deed (and therefore, trust law)
- the Superannuation *Industry (Supervision) Act 1993* (Cth) (***SIS Act***)
- the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (***SIS Regs***)

The majority of disputes arise in the exercise of the trustee's discretion where there is no BDBN directing who to pay the death benefit to.

No matter what the trust deed says, the *SIS Act* and *SIS Regs* apply to limit the class of persons to whom death benefits can be paid. Under *SIS Regs* 6.22 the trustee can pay to either:

- the legal personal representative (**LPR**); or
- the member's dependant.

A dependant of a member is defined in the *SIS Act* s10(1) and "includes":

- spouse (including de facto and registered relationships);
- child (including adopted children and stepchildren); and
- any person with whom the member has an interdependency relationship.

Because of the "inclusive" definition of dependant, it also includes someone who is financially dependant on the deceased, in the ordinary sense of that word.[1] However, it is not so broad as to encompass "emotional dependency" alone, without financial dependency.[2]

For an interdependency relationship to exist, the member and the person:

- must have a close personal relationship; and
- must live together; and
- one of them must provide the other with financial support; and
- one of them must provide the other with domestic support and personal care.

However, an interdependency relationship may also exist where two persons have a close personal relationship, but they do not satisfy the other elements of an interdependency

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[1] *Reeves v Nulis Nominees (Australia) Limited (Trustee)* [2022] FCA 627
[2] *Wan v BT Funds Management Limited* [2022] FCA 302

relationship because either or both of the people suffer from a physical, intellectual or psychiatric disability.

Whilst most trust deeds are broad, some trust deeds might provide that the death benefits can only be paid to a spouse or a child in the first instance. If this is the case, the trustee could not pay the death benefits to the LPR or to someone in an interdependency relationship, if there is a spouse or child, even though the *SIS Act* allows payments to such persons.

2 Binding death benefit nominations (BDBNs)

For the BDBN to be effective, it must comply with the requirements in the trust deed. A failure to do so will likely render it invalid. Practitioners should always check the deed and comply with the formal requirements set out in the trust deed.

Further, if it is a non-SMSF (an APRA regulated fund), or if the terms of the trust deed for a self-managed fund (**SMSF**) require it[3], the BDBN must also comply with the *SIS Regs*.

If there is no BDBN in effect at the date of death of a testator, the trustee must act "in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred".[4]

More often than not, the litigious matters I see arise in circumstances where there are competing interests between spouses (sometimes more than one), children (often of more than one relationship), an LPR, interdependency relationships, all over-laced with a trustee who is in a position of conflict because they personally are entitled to receive the payment (and usually wish to pay it to themselves), or a combination of any (or all) of the above.

2.1 The *SIS* Regulations

The SIS Regs require that a BDBN:[5]

- be in writing;[6]
- the person or persons mentioned in the notice are the legal personal representative (**LPR**) or a dependant of the member;[7]
- the proportion of the benefit that will be paid to that person or persons is certain and readily ascertainable from the notice;[8]
- is signed and dated by the member in the presence of two disinterested, adult witnesses;[9]
- contains a declaration signed and dated by the witnesses stating that the notice was signed in their presence;[10] and
- the notice is in effect.[11]

[3] *Donovan v Donovan* [2009] QSC 26
[4] *Karger v Paul* [1984] VR 161; *Re Marsella (No 2)* [2019] VSC 65
[5] *SIS Regs* 6.17A
[6] *SIS Regs* 6.17A(6)(a)
[7] *SIS Regs* 6.17A(4)(a)
[8] *SIS Regs* 6.17A(4)(b)
[9] *SIS Regs* 6.17A (6)(b)
[10] *SIS Regs* 6.17A (6)(c)
[11] *SIS Regs* 6.17A(4)(d), (7)

The SIS Regs only apply to non-SMSFs (APRA regulated funds), unless the trust deed for the SMSF incorporates the SIS Regs into its BDBN requirements.[12]

2.2 Three-year period

Again, only in relation to APRA regulated funds, not SMSFs...[13]

A BDBN ceases to be "in effect" at the end of the period of three years after the day it was first signed, or last confirmed or amended by the member.[14]

A BDBN can be confirmed by giving the trustee a written notice, which is signed and dated.[15]

A BDBN can be amended or revoked, but only in the same way that one can be made (as in, it must comply with the formal requirements set out above).[16]

The governing rules of the fund can fix a shorter period than three years, in which case a BDBN ceases to be in effect at the end of that period.[17]

2.3 Capacity and unconscionability - *van Camp v Bellahealth Pty Ltd*[18]

This was a case involved a BDBN which directed the trustee of an SMSF to pay death benefits (of $4.7m) to the member's de facto partner, Lindy van Camp, in the event of his death.

The BDBN was signed by the deceased in hospital on the same day he died from cancer.

Prior to his death, the deceased was the sole director and secretary of the corporate trustee. Following his death, the trustee did not pay the $4.7m to Ms van Camp, initially claiming the BDBN was invalid has it had not been executed in accordance with the *SIS Act* and the *SIS Regs*. This argument was not pressed at the hearing.

Instead, the trustee raised concerns about the deceased's capacity at the time of executing the BDBN and whether the BDBN was procured by unconscionable conduct by Ms van Camp.

In late October 2019, the deceased had been diagnosed with inoperable pancreatic cancer. Following that diagnosis, the deceased had taken immediate steps to get a new will drafted by getting in contact with Piper Alderman lawyers.

The deceased had a telephone call with Ms Benge of Piper Alderman and, amongst other things, requested the superannuation be paid into his estate. At that time, Ms Benge was not provided

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[12] *Donovan v Donovan* [2009] QSC 26
[13] *Donovan v Donovan* [2009] QSC 26 - unless the trust deed for the SMSF incorporates the SIS Regs into its BDBN requirements
[14] *SIS Regs* 6.17A(7)(a)
[15] *SIS Regs* 6.17A(5)(a)
[16] *SIS Regs* 6.17A(5)(b)
[17] *SIS Regs* 6.17A(7)(b)
[18] [2024] NSWSC 7

with a copy of the fund deed and did not receive this until 24 July 2020 (two days prior to his death).

The deceased also engaged a financial advisory firm to assist him with accounting and advice about his business structures, including the SMSF. At some stage, the financial advice he received recommended against payment into his estate due to unfavourable taxation consequences it would receive.

The deceased was admitted to hospital with a bowel obstruction in June 2020 and remained in hospital for treatment until his discharge on 6 July 2020. He was later re-admitted on 15 July 2020 where he remained until his death on 26 July 2020.

The deceased executed the Will, in the presence of Ms van Camp at the hospital on 23 July 2020. Following the execution of his Will, the deceased stated to Ms van Camp that he needed to "*sort out his super fund*".

During this period, there was a lot of evidence about exchanges between the deceased and Ms van Camp. Ms van Camp had raised numerous concerns about her ability to fund her lifestyle following the deceased's death which was recorded by way of email and text message with the deceased.

Ms van Camp had also read the terms of the deceased's Will. The exchange between Ms van Camp and the deceased was described as "hostile".

On 24 July 2020, Ms Benge (the solicitor) received a phone call from the deceased about the BDBN, requesting that Ms van Camp be made the sole recipient of the super benefit.

At the time of the phone call, Ms Benge's contemporaneous note states *"Concerned re capacity → sounded drugged up"*.

In her oral evidence, Ms Benge stated that she was concerned as the direction was inconsistent with his previous instructions. Relevantly, Ms van Camp gave evidence that she was present at the time of the phone call from the deceased to Ms Benge and the deceased appeared to her to be of sound mind. On the same day, the trust deed was provided by Ms van Camp to Ms Benge using the deceased's email address.

At 12.06pm on 26 July 2020, on the day of the deceased's death, Ms van Camp sent a further email to Ms Benge using the deceased's email address requesting the BDBN urgently.

At 12.30pm on 26 July 2020, Ms Benge sent an email in response to the deceased with the BDBN. The BDBN came with advice from Ms Benge which was not printed out and given to the deceased. It noted this was contrary to his instructions given at the time of the drafting of his will.

The BDBN was witnessed by two doctors. Neither medical practitioner conducted a cognitive assessment.

The medical evidence demonstrated that at the time of the signing of the BDBN, the deceased was on a significant quantity of painkillers. However, the Court did not accept the deceased lacked the mental capacity to understand the nature and act of making the BDBN in favour of Ms van Camp and the general effect it would have, finding that he had capacity to sign the BDBN.

The Court also found the BDBN was not procured by unconscionable conduct on the part of Ms van Camp.

In making this finding, the Court relied heavily upon the fact the deceased made the call and instructed Ms Benge to prepare the BDBN. In that discussion with Ms Benge, she had also confirmed with the deceased that this was contrary to his previous instructions.

The outcome of the decision was also not improvident. There were favourable taxation consequences that arose in paying the benefits directly to Ms van Camp and the Court was not persuaded by the trustee's submission the BDBN undermined the executors' ability to achieve the testamentary objectives in the Will, or to cover the private school tuition costs of both of his children.

The Court ultimately stated:

> 273 The concern of the unconscionable conduct doctrine is whether advantage is taken of another who is vulnerable and has a special disadvantage that is known to that person: *Johnson v Smith* [2010] NSWCA 306 at [5]. While relief against unconscionable conduct may, in some circumstances, be justified by a donee accepting a transaction and its benefits, albeit at the invitation of the donor (*Bridgewater v Leahy* at [76]), this case was run (and pleaded) on the basis that the BDBN was procured by Ms van Camp allegedly taking advantage of Dr Nespolon in a manner that was unconscientious.
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> 274 For the above reasons, I am not satisfied that the BDBN was the result of Ms van Camp taking advantage of any known special disadvantage of Dr Nespolon in circumstances that were unconscionable.

The Court declared the BDBN was valid.

2.4 *Hill v Zuda Pty Ltd*[19]

This was a decision of the High Court, which finally settled the question of whether any part of regulation 6.17A of the *SIS Regulations* applied to SMSFs. The answer is that it does not.

The Holly Superannuation Fund (a SMSF) was created by trust deed dated 14 June 2000. On 13 December 2011, the trust deed was amended to insert a clause described as a BDBN, which provided that, if either the deceased or the third respondent died, the trustee was required to distribute the whole of the deceased member's balance in the Fund to the surviving member.

The appellant challenged the validity of the BDBN clause in the deed, on that basis that it amounted to a BDBN within the terms of regulation 6.17A(4) of the *SIS Regulations*, but it did not

[19] (*as trustee for the Holly Superannuation Fund) and Others* (2022) 401 ALR 624

comply with regulations 6.17A(6)(b) or (c) (not signed or witnessed), or regulation 6.17A(7)(a) (the three year limitation).

The appellant argued that regulation 6.17A(1) makes the standard set out in regulation 6.17A(4) applicable to the operation of all regulated superannuation funds (including SMSFs).

The High Court held that it did not.

2.5 Is notice to one trustee enough? *Williams v Williams*[20]

The applicant widow, Mrs Williams, sought a declaration as to the validity of a BDBN made by her late husband in respect of a death benefit payable from a SMSF.

The original trustees of the SMSF were the Deceased and his first wife. Following the death of the Deceased's first wife in 2014, the deceased's son Paul Williams (**Paul**) was appointed as trustee in her place.

The Deceased died on 28 December 2021 and his other son, Mark Williams (**Mark**) was the executor of his estate. There was also a question over whether Mark validly became the second trustee of the SMSF.

The BDBN directed 50% of the death benefit to Mrs Williams and 50% to the estate. Mrs Williams sought to enforce the BDBN. Mark and Paul contended the BDBN was not valid.

The trust deed provided:

> *"If <u>the Trustees are given a written notice</u> by Member requesting that benefits be paid following the death of that Member to a person or persons or other permitted payees then the Trustees must …"*
>
> [underlining added]

At the time of the purported BDBN there were two trustees, the deceased and Paul. No notice was given to Paul of the deceased having made the BDBN.

Mrs Williams contended the Deceased, as one of two trustees at the relevant time, clearly had notice of the BDBN, as he had executed the document. She argued there was no requirement to provide it to both of the "trustees" as the interpretation clause in the deed provided that words importing number include the singular number and the plural number.

The Court considered the terms of the trust deed and found the provisions could not be read in the manner advanced by Mrs Williams. Martin J stated:

> *"The machinery provisions of the Deed envisage the giving of notice to all of the trustees. Notice to one of the trustees is not notice to all of them. The provision cannot be read in the way advanced by the applicant. It would be contrary to the intention of the Deed*

[20] [2023] QSC 90

> *to allow one beneficiary (who happens to be a trustee) to make a binding nomination and for that, without anything further, to create a binding obligation upon the other trustees and the Fund itself. Nor could it be said that the knowledge of the deceased affects his co-trustee with knowledge of the transaction."*[21]

If the applicant's submission were accepted, that would mean a trustee would be bound even if the trustee knew nothing of the BDBN, or the actions of the other trustee.

2.6 BDBN "given to trustee" - *Cantor Management Services v Booth*[22]

This was a decision of the Full Court of the South Australian Supreme Court.

The deceased was a single member of an SMSF. The trustee denied that it had been given a copy of a BDBN executed by the deceased directing the trustee to pay his member benefits to his estate. The executor instituted proceedings seeking a declaration that the trustee is to pay the death benefits to the estate. The Judge at first instance found in favour of the executor. The appellants appealed to the Full Court, who upheld the decision.

In issue was whether or not the BDBN had been "given to the trustee".

The clause relating to BDBNs did not expressly provide that a BDBN must be served on the trustee, let alone prescribe any particular form of service. Notwithstanding this, the Full Court held that the clause "plainly presupposes" that the BDBN will be "given to the trustee" and therefore it must be so given for it to be effective.

Factually speaking, the corporate trustee's registered office was at its accountant's office. At the time of execution of the BDBN, the deceased's brother, as his attorney, was the director of the corporate trustee. The BDBN was signed at the accountant's office, witnessed by two employees of the accounting firm. The BDBN was then left there (being the registered office of the company).

The brother argued that he, as the director of the company, never received the BDBN, and therefore, it had not been "given to the trustee" as required by the deed. He argued that simply leaving it at the registered office of the corporate trustee was not enough, and that it must be shown that the accountants "took possession of it for and on behalf of" the trustee.

In rejecting that contention and upholding the trial judge's decision that the BDBN had been given to the trustee, Kourakis CJ held:

- it was not necessary for the executor to show how or where the accountants filed the form
- there can be no objection, other than a sematic one, to the proposition that a document executed before, and then left with, a person, is 'given' to him or her

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21 Ibid, [19] (Martin J)

22 [2017] SASCFC 122

- the practice of serving a corporation at its registered office is now so well established, as is the practice necessitated thereby of having systems in place to bring documents left there to the attention of the relevant company officers, that a document so left will, generally, have been given to the corporation
- the accountants were duty bound to keep the BDBN safe for, and to bring it to the attention of their client, the trustee
- leaving the BDBN at the registered address with the accountants engaged by the trustee "puts the question beyond doubt".

3 Conflict issues

3.1 *McIntosh v McIntosh*[23]

This case involved the question of whether the administrator of an estate had breached her fiduciary duty to the beneficiaries by seeking payment of death benefits to herself personally, rather than to the estate.

James McIntosh died intestate on 14 July 2013. He was survived only by his parents, who were divorced.

The parents had an acrimonious relationship. The deceased was closer with his mother and lived with her at the time of his death.

The mother was appointed Administrator for her son's estate on 26 November 2013. Upon the grant being made, she became his LPR and as such, she assumed fiduciary duties to the beneficiaries of the estate, who in this case were herself and her ex-husband.

The estate was valued at around $80,000 (primarily the proceeds of a life insurance policy).

Outside of the estate, the deceased was a member of three superannuation funds that had combined death benefits totalling $453,748.69. There was no BDBN in relation to any of the funds.

On a date after she had been appointed Administrator of the estate, the mother applied to each of the superannuation funds for the death benefits to be paid to her personally (on the basis that she was in an interdependency relationship with the deceased).

As Administrator, she could have also applied for the funds to pay the death benefits to the estate.

All three funds paid the death benefits to the mother personally.

The Court had to decide whether the mother could keep the super money paid to her, or whether she should account to the estate for it, in other words, share it with her ex-husband.

She conceded that as administrator of the estate, she was in a fiduciary relationship with the beneficiaries of the estate. However, she argued that the duty expressed in s52(1)(a) of the *Succession Act 1981* (Qld) to collect and get in the real and personal estate of the deceased did not include the right to compel the trustee of the superannuation fund to exercise its discretion according to the superannuation deed. Therefore, neither the superannuation benefits nor the right were assets of the estate to which the duty in s52 would attach.

The father argued that the mother should account for the funds to the estate, so that they could be divided equally between the deceased's parents under the rules of intestacy.

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[23] [2014] QSC 99

The father submitted that the applicant had a positive duty under s52 of the *Succession Act* to get in the estate assets, and further, that the mother had a fiduciary duty to not allow a conflict between that duty and her personal interests. The father argued that in seeking payment of the superannuation death benefits to herself personally, the mother had breached both of these duties.

Atkinson J referred to the general rule that no one who has a fiduciary duty may enter into engagements that conflict with the interests of those whom the fiduciary is bound to protect. She then referred to an exception to this rule that applies where a testator imposes a duty on a personal representative that is inconsistent with a pre-existing interest or duty that they have in another capacity. Or in other words, an authorised conflict.

Her Honour drew an important distinction between executors and administrators.

The appointment of an executor is made by a will, which involves the testator imposing a duty on that executor that is inconsistent with the executor's personal interests (being the right to claim the superannuation benefits personally). In other words, the testator has authorised the executor's conflict.

However, the appointment of an administrator is made by the Court. It is not an appointment that is made by the testator. It is an application that is made by the administrator themselves.

Her Honour held that the exception does not extend to a trustee who voluntarily puts themselves into a new position of conflict.

In her application for Letters of Administration, the mother did not disclose that she intended to apply for the superannuation to be paid to her personally. There was no sufficient disclosure by her for the Court to infer that she would be placed in a position of conflict or for the deceased's father to consent to that conflict.

Additionally, the mother did not apply for the superannuation until after she had been appointed as administrator. Upon that appointment, she acquired fiduciary duties in the role of administrator to act in the best interests of the estate.

Atkinson J held that the case involved a clear conflict of duty and interest by the mother, contrary to her fiduciary duties as administrator. In applying for the superannuation to be paid to her personally, the mother was preferring her own interests to her duty as LPR to apply for the superannuation to be paid to the estate.

She was in a situation of conflict and she favoured her own interests. In doing so, she acted in breach of her fiduciary duty as administrator to act in the best interests of the estate and her statutory duty under s52 of the *Succession Act 1981*.

Atkinson J ordered that the mother to account to the estate for the superannuation benefits that were paid to her personally as a result of her breach of duties.

3.2 *Brine v Carter*[24]

This case involved a de facto partner of the deceased seeking payment of the deceased's superannuation death benefits personally, whilst acting as co-executor of the estate with the deceased's sons.

Professor Brine died on 14 December 2012 and was survived by his three sons and his de facto spouse (Ms Carter). The three sons and the spouse were also his executors.

On 10 January 2013, Ms Carter telephoned UniSuper, enquiring about the deceased's superannuation accounts. She was told that the deceased had two superannuation accounts and that both had benefits payable upon his death.

The first was an Indexed Pension where a percentage of the original pension was payable only to a surviving spouse, a dependent child or a disabled child.

The second was a Flexi Pension lump sum benefit, which could be paid to children, whether or not they were dependent, the deceased's estate or a surviving spouse.

On 16 January 2013, all four executors engaged solicitors to act on behalf of the estate.

Ms Carter subsequently telephoned UniSuper on 18 January, 22 January and 24 January 2013 requesting that they send the relevant forms to her, telling them the matter was urgent. She received the forms on 24 January 2013.

On 12 February 2013, Ms Carter and one of the sons met with the estate's solicitors. At this meeting, Ms Carter told them that she proposed to apply for the deceased's superannuation and that she believed it fell outside the will.

On 13 February 2013, Ms Carter emailed the sons in relation to her proposal to claim the deceased's superannuation and stated that:

> *The Trustees of the fund have discretion as to whom it should be paid, but as John's spouse it appears that I am the only person with a right to make a claim. It is payable only to 'spouse, dependent and disabled children.*

Ms Carter then asked the sons to make Statutory Declarations that the deceased had no other dependents other than her to assist with her claim for the superannuation. The sons were reluctant to sign the Statutory Declarations.

On 16 February 2013, Ms Carter emailed the Brine brothers and the estate's solicitor, re-affirming her belief that only spouses or dependent or disabled children could apply for the benefits and again requested that the sons sign the Statutory Declarations.

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[24] [2015] SASC 205

Later, Ms Carter sent an email to the sons stating that the superannuation was in two parts: the first had no residual value but a portion was to be paid to a surviving spouse; and the second, the Flexi Pension, had a residual value that was only payable to the spouse or financially dependent or disabled children.

On 27 February 2013, Ms Carter submitted her application for the superannuation benefits to be paid to her.

On 4 March 2013 (this date is important), one of the deceased's sons telephoned UniSuper and was told that the deceased held a Flexi Pension worth $556,463, in which a non-binding preferred nomination was made by the deceased in favour of his estate, but that the trustee would exercise its own discretion here. He was also told that the deceased held an Indexed Pension that was only payable to a surviving spouse.

He disclosed this information to his brothers.

On the advice of the estate's solicitor, on 24 March 2013, the sons made a claim for the Flexi Pension to be paid to the estate in accordance with the deceased's preferred beneficiary nomination.

On 6 August 2013 UniSuper resolved to pay 100% of the Flexi Pension to Ms Carter as the deceased's de facto spouse.

The sons, as executors, objected to the decision on behalf of the estate. The estate's solicitor told Ms Carter that she could make her own submission in her personal capacity and Ms Carter adopted this position by writing to UniSuper in her capacity as the deceased's spouse, rather than as an executor.

The decision was affirmed by UniSuper. The Superannuation Complaints Tribunal dismissed an appeal.

The sons brought an application to court that Ms Carter misled them by representing that only spouses, dependent or disabled children were eligible beneficiates for the Flexi Pension and that she breached her fiduciary duty by pursuing her personal interests in conflict with her duties as executor.

Ms Carter denied that she failed to disclose information misleading her fellow executors, denied that she breached her fiduciary duty, contended that her acting in conflict was authorised, or that the sons had consented to her conflict, and contended that there was no causal connection between any breach and the benefit received.

In relation to whether Ms Carter had breached her fiduciary duty as executor, Blue J distinguished between Ms Carter's conduct up to 4 March 2013 and after that date. 4 March 2013 was significant because on that day, one of the sons had a telephone conversation with UniSuper where he became aware of the amount of the Flexi Pension superannuation benefit and was told that both the estate and adult children of the deceased were eligible beneficiaries.

Blue J found that Ms Carter knew that the estate was an eligible beneficiary of the Flexi Pension benefit, and as an executor, owed a duty to disclose this information to her fellow executors. She also owed a duty not to pursue a personal benefit in circumstances where there was a conflict between her duty and her personal interest.

However, Ms Carter failed to disclose this to the estate, made positive representations that the only eligible beneficiaries were spouses and dependent or disabled children, and advanced her own interests by obtaining information from UniSuper, expressing urgency and lodging a claim for her own benefit.

Therefore, it was held that Ms Carter had acted in breach of her fiduciary duty prior to 4 March 2013.

Ms Carter's argument that the conflict was authorised because the deceased had appointed her as executor with full knowledge of the potential conflict was rejected. Blue J found that on no construction of the circumstances when the deceased made his will did he authorise Ms Carter to act in conflict of her duties.

The other executors had also not manifested any consent to Ms Carter's conduct prior to 4 March 2013.

However, Blue J did not come to the same conclusion in relation to Ms Carter's conduct after 4 March 2013.

He found that from around mid-March 2013 onwards, by their conduct, it was effectively agreed that the sons would act as if there were three executors and Ms Carter would recuse herself from acting as executor, entitling her to pursue her own interest in seeking payment of the benefit to her.

The other executors had claimed the super on behalf of the estate (without Ms Carter), the estate's solicitor took the view that Ms Carter was not precluded from advancing her personal claim without resigning as executor, and the estate's solicitor advised that Ms Carter could make her own submissions about the sons' objection to the decision of UniSuper to pay to her in her personal capacity.

Therefore, Blue J held that after 4 March 2013, Ms Carter did not act in breach of her fiduciary duty for continuing to pursue her claim for payment of the superannuation.

Additionally, it was held that from mid March 2013, by their conduct, the sons consented to Ms Carter pursuing her own interests by allowing her to claim payment of the benefit in her personal capacity without resigning as executor.

As a result, Blue J held that Ms Carter was not liable to account to the estate for the benefit she received.

Although she had breached her duties up until 4 March 2013, she did not thereafter. UniSuper did not exercise their discretion until after it had received competing contentions from Ms Carter and the remaining executors acting on behalf of the estate. Therefore, there was no connection between Ms Carter's breach of duty and the benefit she received.

The action by the sons to recover the superannuation benefits to the estate was dismissed.

3.3 *Burgess v Burgess*[25]

This matter involved an application as to whether a widow, who was appointed as administrator of her late husband's intestate estate, had acted in conflict in applying to receive her late husband's superannuation benefits personally.

Here, the deceased died without a will and was survived by his wife, Mrs Burgess, and two young boys aged eleven and seven. Mrs Burgess was appointed as the administrator of the estate.

The deceased was a member of four different superannuation funds, each of which had associated death benefits. None of them had binding nominations.

Mrs Burgess applied to all four funds to receive the proceeds personally.

One fund paid the death benefit to the estate. So no question of a conflict arose in that case.

Two of the funds paid the death benefits to Mrs Burgess personally. The fourth had yet to make a determination at the date of the hearing and was awaiting the outcome of the decision.

Of the two funds who paid directly to Mrs Burgess, the first of these funds, Prime Super, made payment to Mrs Burgess prior to her appointment as administrator of the estate. The second of these funds, REST Super, made the payment six months after she was appointed as administrator.

It was held that because the first payment by Prime Super was made four months before Mrs Burgess was appointed as administrator, no basis for any conflict had arisen and Mrs Burgess did not breach her fiduciary duty when she applied to have the funds paid to her personally.

However, it was held a conflict did arise in relation to the second payment by REST Super and the unpaid amount that was held by AMP.

Mrs Burgess attempted to distinguish *McIntosh* on the basis of differences in the WA intestacy legislation, but Martin J held it made no difference.

She also argued that the extent of her duty as administrator, was to disclose to the fund that she was also the administrator of the estate, and the two children were also entitled to be considered as dependent potential payees. Martin J dismissed this argument. In doing so, he said:[26]

[25] [2018] WASC 279
[26] at [84]

> *In an age of increasing moral ambivalence in western society the rigour of a court of equity must endure. It will not be shaken as regards what is a sacred obligation of total and uncompromised fidelity required of a trustee. Here, that required the administrator not just to disclose the existence of the (rival) estate interest when claiming the superannuation moneys in her own right from the fund trustee. It required more. It required her to apply as administrator of the estate for it to receive the funds in any exercise of the fund trustee's discretion.*

His Honour found that the approach of Atkinson J in *McIntosh* "cannot be faulted as a matter of law". He further held that the interests of a deceased estate required a "champion" who could not be seen to be acting half-heartedly, or with an eye to achieving outcomes other than getting the money for the estate.

Mrs Burgess then asked that she be excused from the breach on the basis of s75 of the *Trustees Act (WA)*, which allows a court to excuse a trustee for a breach if they acted "honestly and reasonably". The basis was that unlike *McIntosh,* Mrs Burgess had not acted with any deceit, had involved the Public Trustee at an early stage, deposited $90,000 into trust accounts for her children, purchased a family home in Camillo which clearly benefited her children, and provided ongoing care for them.

Despite sympathising with Mrs Burgess, his Honour refused to excuse the breach.

The result was that Mrs Burgess had to account to the estate for the REST funds.

In addition, it was held she could not seek the AMP funds (that had not yet been paid) to be paid to her personally.

It is interesting to note what Martin J said[27] were two ways this whole situation could have been avoided if the deceased had done two things differently prior to his death.

First, if he had executed a will, he could have appointed Mrs Burgess as executor and expressly authorised her to apply for the super benefits personally. Secondly, if he had signed a binding nomination, rather than leaving the decision wholly to the trustee's discretion.

3.4 *Gonciarz v Bienias*[28]

This matter involved an application by an administrator of an estate for the revocation of the grant of Letters of Administration so that she could challenge a decision of REST Super to pay to the estate.

The deceased died intestate on 4 August 2017. Those entitled to his estate on intestacy were the deceased's wife, the plaintiff, and the deceased's two children from an earlier marriage, who were

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[27] at [15-16]
[28] [2019] WASC 104

the first and second defendants. The plaintiff obtained a grant and thereby became administrator of the estate.

There was no binding nomination. However, prior to marrying the plaintiff, the deceased had made a non-binding beneficiary nomination in favour of the second defendant.

The net estate was approximately $140,000. The REST Super death benefit was $541,412.50.

The plaintiff initially claimed the super personally and identified herself as the only claimant. REST resolved to pay to her.

The defendants objected to this decision, and REST subsequently resolved to pay it to the estate.

The plaintiff then applied to the Court to revoke the grant of Letters of Administration, to discharge her of the conflict of interest so that she could challenge the decision. She proposed a suitable substitute administrator in Mr England, a solicitor experienced in the administration of estates.

She also proposed to bring a family provision application if the funds were paid to the estate.

The defendants opposed her application to have the grant revoked, arguing that the application was motivated purely by self-interest and that, as the plaintiff had been administrator for an extended period, it was in the best interests of the estate for her to continue as administrator.

Tottle J considered that the plaintiff faced a dilemma as the deceased's estate required an administrator and, practically, she was the only person able to assume the role. However, as the deceased's widow, the plaintiff had a strong claim to the payment of the death benefit.

His Honour referred to this as a position of conflict of interest and duty as it was in her interest to challenge REST Super's decision to pay the death benefit to the estate, but not her duty to do so.

It was considered that refusing the application for the plaintiff to resign as administrator would compel her to continue to administer the estate when she no longer wished to do so. In doing this, it would be inimical to the due and proper administration of the estate and the interests of the parties beneficially entitled to it. The proposed family provision application was another reason in her favour.

Therefore, it was held that she could resign as administrator, meaning that she could challenge REST Super's decision to distribute the deceased's death benefits to the estate. Mr England was subsequently appointed as administrator.

Tuttle J commented "This case once again highlights the importance of making wills and making binding beneficiary nominations in respect of superannuation benefits."

4 The exercise of the discretion

4.1 *Re Marsella (No 2)*[29]

This case concerned a trustee distributing the death benefits of a SMSF to herself.

Helen Marsella died on 27 April 2016 and was survived by her husband and two children from her previous marriage, Caroline and Charles.

The husband was the executor of her estate and was the plaintiff in the matter.

In 2003, the deceased founded the Swanston Superannuation Fund ("the fund") and used this to manage her retirement funds. The deceased and her daughter, Caroline, were appointed trustees of the fund and the deceased was its sole member.

Pursuant to clause 8.1 of the trust deed, the office of trustee was to be held by two or more individual trustees or a corporate trustee. After the death of the deceased, Caroline appointed her husband, Martin, as a trustee of the fund, in order to satisfy clause 8.1.

Caroline and Martin were the first and second defendants in the matter.

The death benefit payable was $450,416.

The deceased had previously executed a binding nomination in favour of her grandchildren, but it had expired, nor was it valid. No other written nomination was executed by the deceased.

Clause 51.4(b) of the trust deed provided that, in circumstances where there was no binding nomination in effect, the death benefit was to be paid to one or more dependants of, or the LPR of the deceased member. The payment was to be in such proportions as the trustee shall determine in its discretion.

A 'dependent' was defined to include the widower of a member and any child of the member.

On 17 April 2017, Caroline and Martin, as trustees of the fund, exercised their discretion to resolve to pay the entire benefit of the fund to Caroline.

This decision was made after the accountant who prepared the fund deed impressed upon Caroline that the death benefit had to be paid as soon as practicable and that she should get specialist advice before doing so.

The minutes of the resolution stated that the trustees had made the decision "[a]fter due consideration having been made by the surviving Trustee of the possible interests of all

[29] [2019] VSC 65

Dependants of the deceased member, the potential eligible Beneficiaries of the Member, and the Member's Estate…". The minutes were prepared with the assistance of solicitors.

On 26 April, the plaintiff's solicitors wrote to the trustees' solicitors seeking explanations in relation to the sale of assets of the fund. The trustee's solicitor responded to that correspondence, asserting that the plaintiff 'is neither a Member, Trustee or Beneficiary of the Fund' and as such, the trustee was 'not required to consult with him on any matter relating to the administration of the Fund, nor provide any undertakings or accounting'. It was further asserted that the trustees had an 'absolute and unfettered discretion' in relation to the resolution to distribute the proceeds of the fund.

The plaintiff husband sought:

- the removal of Caroline and Martin as trustees of the fund;
- the appointment of a new trustee; and
- an order that Caroline and Martin repay to sum paid, plus interest.

The issues in the dispute were:

- whether the trustees properly exercised their discretion, as trustees, in resolving to distribute the proceeds of the fund on 17 April 2017, including whether they acted in good faith and upon real and genuine considerations and in accordance with the purpose for which the power was conferred; and
- whether Caroline and Martin should be removed as trustees.

The estate was also subject to an application for further provision by the deceased's husband. In the judgment for those proceedings, the Court found that upon the death of the deceased, Caroline exhibited a marked negative attitude towards the deceased's husband and found that their relationship had broken down irretrievably.

Applicable principles

McMillan J stated the applicable principles as follows:

- in accepting office, a trustee becomes bound by certain duties, including becoming familiar with the terms of the trust instrument, and exercising her or his powers in the best interests of the beneficiaries;
- while a trust instrument may afford the trustee absolute and unfettered discretion, such discretion must be exercised in '*good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred'*. In considering this question, a court may look at the inquiries the trustee made, the information they had, and their reasons for, and manner of, exercising their discretion. This includes consideration of any gaps or errors in the information;

- however, it is not the Court's role to determine the weight the trustee should have attributed to relevant matters in exercising its discretion, or to decide how the power should have been exercised, or the wisdom of its exercise';
- a lack of good faith, or mala fides, encompasses more than fraud. It may include the taking account of irrelevant considerations and a refusal to take into account relevant considerations. While unreasonableness of itself is not a ground for interference by the Court, it may form evidence that a discretion was never really exercised at all, or evidence of mala fides;
- a 'grotesquely unreasonable result may be evidence of a miscarriage of duty';
- However, 'mere carelessness or honest blundering' will not amount to mala fides;
- The trustee must inform her or himself of the matters relevant to the decision. If consideration is not properly informed, it is not genuine'. There must be the exercise of an 'active' discretion;
- The purpose for which the power is conferred on the trustee must be inferred from the trust deed. Whether a trustee exercised a power for a proper purpose is a question of fact to be decided on the evidence;
- A trustee is not bound to disclose her or his reasons in reaching a particular decision, and a negative inference cannot be drawn from the non-disclosure by a trustee of the reasons for his or her decision.

Her Honour found that:

- although Caroline fell within the class of objects identified in the power of distribution within clause 51.4(b) of the trust deed, this did not negate her duty to exercise the power in good faith, upon real and genuine consideration, and for the purposes for which the power was conferred;
- a donee of a fiduciary power ought to be more vigilant when discharging that power in their own favour. Here, Caroline was not and exercised her discretion under misapprehensions as to the terms of the trust deed, the duties she owed to the plaintiff and the relevance of the plaintiff's role as executor of the deceased's estate;
- Caroline's assertion that the plaintiff was not a beneficiary was inconsistent with the definition of beneficiary in the trust deed, which included widower of the deceased member, and also in his capacity as executor of her estate. This was despite it being Caroline's duty to familiarise herself with the terms of the fund deed;

Here, in order for there to have been a real and genuine consideration in exercising the discretion, McMillan J held that Caroline ought to have considered the intention of the deceased, the relationship between the deceased and her dependants and the financial circumstances and needs of the dependants.

However, even assuming that the deceased did not intend the plaintiff to benefit from the fund, ignoring the plaintiff's relationship with the deceased as husband and wife and neglecting the plaintiff's limited financial circumstances, demonstrate a failure by Caroline to take into account relevant considerations in exercising the discretion.

Additionally, Caroline failed to make a distribution to her brother, which was inconsistent with her own submissions that the deceased intended to benefit her children and grandchildren with the fund.

There was also an uncertainty in relation to the required numbers of trustees of the fund. Although the accountant for the fund advised Caroline that she should seek specialist advice in relation to this, Caroline did not and failed to resolve this uncertainty, despite being required to make a significant financial decision in distributing the benefits of the fund.

McMillan J considered that, on balance, Caroline acted arbitrarily in distributing the fund, with ignorance of, or insolence toward, her duties as trustee. She acted in the context of uncertainty and had misapprehensions as to the identity of a beneficiary, her duties as trustee, and her position of conflict. Therefore, she was not in a position to give a real and genuine consideration to the interests of the dependants.

Her Honour described the decision by Caroline as involving "ill-informed arbitrariness" and stated that his amounted to bad faith, as her conduct was beyond 'mere carelessness' or 'honest blundering'.

McMillan J held that Caroline's husband, Martin, acted carelessly but not in bad faith. However, he did act in breach of his duty to avoid conflict.

Although the exercise of Caroline's discretion was in bad faith and without real and genuine consideration, her Honour held that it was not made for an improper purpose as it was unclear whether Caroline's arbitrariness and lack of consideration were on account of her personal animosity toward the plaintiff or the need to distribute the fund as soon as possible.

In relation to the appointment of Martin as the trustee, McMillan J found that the appointment of Martin as trustee did little to alleviate the conflict between Caroline and the deceased's husband. In fact, this appointment served to compound the personal acrimony between the parties.

McMillan J held that in the circumstances, particularly in light of the size of the fund and the complexities surrounding the fund deed and compliance with the *SIS Act*, specialist advice appeared to be justified (as had been recommended).

McMillan J made an order that Caroline and Martin be removed as trustees of the fund as they failed to exercise the discretion afforded to them in clause 51.4(b) of the fund deed by not giving real and genuine consideration to the interests of dependents, acted arbitrarily in distributing the proceeds of the fund, and did so in the context of substantial personal conflict.

Further, the exercise of discretion to pay the proceeds of the fund to Caroline was set aside.

4.2 *Wareham v Marsella*[30]

The trustee appealed McMillan J's decision.

The Victorian Court of Appeal upheld McMillan J's decision. The court confirmed that the standard to be applied in review an exercise of discretion by the trustee of a super fund was that set out in Karger v Paul[31].

The appellants disputed the trial judge's finding that the trustees had failed to give real and genuine consideration to the personal claims of the respondent.

They argued that the solicitor's letter, written after they had already exercised their discretion and in the context of litigation, could not be evidence that they acted on incorrect advice (being that the spouse was not a potential beneficiary) and that was inconsistent with the terms of the minutes themselves, which specifically referred to the trust deed and the definition of "Dependant" and acknowledged that the estate was a potential beneficiary.

The respondent submitted that the recitations in the minutes were "formulaic" and there was no evidence that the minutes reflected meetings that were actually held.

The court thought it was "noteworthy that the letter employs the capitalised terms used as definitions in the trust deed" and said "it is scarcely likely that responsible lawyers would write such a letter if they had previously advised their client that Mr Marsella was both a Dependant and a Beneficiary under the terms of the trust deed". The more likely inference was they had given advice in accordance with the letter.

The inference the trial judge had drawn, that the trustee had misunderstood her duties on the basis of incorrect advice, was not falsified by the minutes. The fact that the minutes referred to the trust deed and the definition of "Dependant" did not reveal that the trustees had any understanding that the spouse was a Dependant and therefore potential beneficiary. If the appellant had been advised that the respondent had no interest in the matter, reference in the minutes to the defined term "Dependants" would not have altered that position. On the contrary, it would naturally be inferred that, consistent with the advice, she understood that term not to include him. There was no suggestion in the minutes or other evidence that the trustees had looked at the trust deed.

The appellants further argued that the objective evidence showed that the deceased did not wish any part of the death benefit to be paid to the respondent (because of the binding nomination in favour of the grandchildren), and that she envisaged her daughter receiving the entire benefit (because she would be the sole remaining trustee after she died).

The court found these matters could not influence the construction of the trust deed. The binding nomination was signed the dame day as the trust deed, and was inconsistent with it. The

[30] (2020) 61 VR 262
[31] [1984] VR 161

submission was more along the lines that the trustees acted in accordance with the deceased's wishes. The court said that even accepting that to be the case for the sake of the argument, the fact that there may have been good grounds for the discretion not to be exercised in favour of Mr Marsella is irrelevant at this point. If the trustees did not exercise the discretion upon real and genuine consideration, there had not been a proper exercise of the discretion. "The fact that the discretion could have been properly exercised in the same way cannot alter that position".

The court rejected an argument that bad faith needed to be shown in order for a trustee's discretion to be overturned. It held that was completely contrary to Karger v Paul, and that the three obligations on a trustee in exercising a discretion were separate obligations – to act in good faith, to act upon real and genuine considerations and to act in accordance with the purpose for which the discretion was conferred.

On the question of whether the trial judge was wrong to remove the appellants as trustees, the Court held the test was not whether they were unfit to act, but rather, the welfare of the beneficiaries as a whole. The Court thought there was a real risk, that even with correct legal advice the interests of all potential beneficiaries may not be given real and genuine consideration by the present trustees, but that they may instead simply act to reinstate the decision, made in their own favour, which they had fought to uphold. In the circumstances, it had not been shown that the judge's discretion miscarried and the removal stood.

Finally, the Court held the fact that a resolution had been made to wind the trust up was no impediment to the making of remedial orders by the Court. No irrevocable step had been taken pursuant to that resolutions that it could not be undone. As such, the trial judge was correct to reject the submission that the Court lacked jurisdiction.

4.3 *Tito (Administrator of the Estate of Atkins) v Atkins*[32]

This was a decision of the Federal Court, appealing a decision of the Superannuation Complaints Tribunal (**SCT**) (AFCA's predecessor).

The deceased died on 8 October 2017. The trustee of the deceased's super fund determined to pay the death benefit 100% to his legal wife, rather than to his estate, or his brother and sister.

The Tribunal affirmed this decision. The estate and the brother and sister appealed. Perry J dismissed the appeal.

The Applicants said the Trustee's decision was not fair and reasonable because the benefit should have been paid to the estate, where it would be shared equally between the wife and the brother and sister.

At his death, the deceased and his wife had been married for less than six months and were married in circumstances where he knew he was dying. There was no dispute that the deceased and his brother and sister shared an extremely close relationship, and they all lived together.

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[32] [2022] FCA 183

Under the trust deed, if the trustee held a “Preferred Nomination” then the trustee had a discretion to pay to one or more of the Member’s Dependants or the LPR. If there was no “Preferred Nomination” then the trust deed provided it must be paid to the estate.

A non-binding ‘Preferred Nomination’ had been made by the deceased in favour of the brother and sister. This pre-dated the deceased’s marriage. There was subsequent evidence (both in a will and expressed orally) that the deceased wished for his super to be divided equally between the three of them (the wife and two siblings). The applicants submitted that in light of this evidence, it was not fair and reasonable to pay 100% of the death benefit to the wife.

Her Honour held that, even though the deceased had expressed an intention for his superannuation to be distributed in ‘equal thirds’ between the Applicants and the first respondent, those intentions fell to be considered in the context of the trust deed, which gave the trustee the discretion to pay the death benefit directly to the Member’s dependants or an LPR.

Perry J agreed with the Tribunal that it was fair and reasonable for the Trustee to pay the benefit to the wife. In doing so, the Trustee was giving effect to the terms of the trust deed and the core purposes of superannuation.

The brother and sister also submitted they were dependants as they were in an ‘interdependency relationship’ with the deceased at the time of his death. The Tribunal had found they were not, as there was no independent supporting evidence of actual financial dependency. This was upheld on appeal.

While the Applicants submitted that the first respondent married the deceased in circumstances where there was no prospect of a shared life together, this did not impact the first respondent meeting the definition of ‘dependant’ under the *SIS Act*. She was his legal wife.

5 De facto cases

5.1 *Wan v BT Funds Management Limited*[33]

This was a decision of the Federal Court, on appeal from a decision of the Australian Financial Complaints Authority ('AFCA').

The super in question was a retail fund. There was no binding nomination, but there was a non-binding nomination in favour of his estate.

The trustee of the deceased's superannuation fund had resolved to distribute a death benefit to the deceased's estate rather than to the applicant. AFCA affirmed that decision.

The applicant asserted that she was the deceased's dependant and the death benefit should have been paid to her. She asserted she was a dependant because she was either: his de facto spouse, or alternatively, she was in an inter-dependency relationship with him, or alternatively, she was financially dependant on him.

Under the Trust Deed the trustee had an absolute discretion to pay the death benefit to a dependant and/or his LPR. That trust deed also permitted the trustee to take into account any non-binding nomination the deceased had made, even though the trustee was not bound by such nomination.

The trustee initially resolved to pay to the applicant on the basis that she was his de-facto spouse at the date of his death. However, after objection by the executor, the trustee instead resolved to pay to the estate. After further objection by the applicant, the trustee affirmed that decision, finding it did not consider she was a dependant.

The practical effect of the first decision was that the applicant would receive 100% of the death benefit. The practical effect of the subsequent decisions was that the applicant would receive 1/3 of the death benefit under the deceased's will.

The applicant made a complaint to AFCA, which affirmed the trustee's decision, concluding that it was fair and reasonable because the applicant was not a dependant of the deceased at the time of his death.

The Applicant appealed to the Federal Court, arguing that she was a dependant of the deceased.

It is important to note that on a complaint to AFCA, the question for determination is whether the decision of the trustee was fair and reasonable.

An appeal to the Federal Court from AFCA is only on a question of law.

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[33] [2022] FCA 302

The applicant argued that AFCA misconstrued the definition of 'dependant' in the Trust Deed, in that it should have been considered more broadly than simply the definition in s10 of the *SIS Act*, in accordance with its ordinary meaning, including the concept of "emotional dependence". This was rejected, because there was nothing in the Trust Deed to support a construction of 'dependant' as including emotional dependence, the concept of emotional dependence is too vague, and it would be too difficult to prove whether someone was emotionally dependent on another.

The applicant further argued that AFCA erred by failing to give proper, genuine and realistic consideration to the Applicant's claims that she was a de-facto spouse of the deceased or in an interdependency relationship with the deceased. The Judge disagreed.

The definition of 'spouse' under s10 of the *SIS Act* includes someone who, although not legally married to a person, lives with that person on a genuine domestic basis in a relationship as a couple. Eight factors are indicative of when two people are living together on a genuine domestic basis in a relationship as a couple: the duration of the relationship, the nature and extent of a common residence, whether or not a sexual relationship exists, degree of financial dependence or interdependence, ownership, use and acquisition of property, the degree of mutual commitment to a shared life, the care and support of children, and the reputation and public aspects of the relationship.

His Honour considered that AFCA had carefully considered each of the factors, weighed up the relevant evidence, and concluded at the date of the deceased's passing, the Applicant and deceased were not living together in a genuine domestic relationship as a couple.

His Honour also considered that AFCA did not misconstrue the phrase 'lives with' in s10 definition of 'spouse'. This ties in to the factor of the nature and extent of common residence. Whether a common residence exists is a matter of degree and matter of fact in each case. The judge considered that AFCA were entitled to regard that the Applicant maintained her own residence and, in the context of other relevant evidence, that this was an indicator that the Applicant was not living with the deceased and therefore was not in a spousal relationship with him. Even if the words 'lives with' were considered in isolation, His Honour considered that there was evidence against the Applicant living with the deceased, being that the deceased had said to a long-time friend that 'sometimes [she] stays [at his place], sometimes she stays at her place'.

His Honour therefore considered it was not unreasonable for AFCA to draw an inference from the evidence that the Applicant did not 'live with' the deceased and was therefore not a spouse of the deceased.

His Honour also found that AFCA was not in error on the question of whether the Applicant and deceased were in an interdependency relationship. The definition of 'interdependency relationship' requires that the two persons live together. They considered it, and found that they were not.

Finally the applicant argued AFCA had erred by concluding there was no evidence of (a) financial (inter)dependence between the Applicant and the deceased, and (b) the deceased's residence being a common residence shared by the Applicant and the deceased.

In coming to their decision, AFCA had acknowledged that the deceased paid for all household groceries and utilities, the expenses on a car which he allowed the Applicant to use, and that he also paid for the Applicant's one-off dental expenses. However, the fact that the Applicant had an income from Centrelink and maintained her own residence were factors AFCA considered outweighed other evidence that the Applicant financially relied on the deceased and that they lived in a common residence.

Ultimately, his Honour was satisfied that AFCA made no legal error in upholding the Trustee's decision as being fair and reasonable. Accordingly, the decision to pay the death benefit to the estate rather than the Applicant was upheld.

5.2 *Reeves v Nulis Nominees (Australia) Limited (Trustee)*[34]

This was a decision of Nicholas J in the Federal Court, on another appeal from a decision of AFCA.

The issue was whether AFCA erred in affirming a decision that the trustee of the deceased's superannuation fund had acted fairly and reasonably by distributing a death benefit to the deceased's parents rather than his girlfriend (the Applicant).

The deceased died on 25 December 2017. The applicant claimed to be his de facto spouse.

The deceased had not nominated a beneficiary and therefore the trustee had to determine whether to pay the death benefit to one or more of the Dependants of the Member.

The Trustee paid the death benefit to the deceased's parents and the applicant complained to AFCA.

AFCA upheld the Trustee's decision, finding that:

1. the Applicant was not a dependant or financial dependant of the deceased,
2. the Applicant was not in an interdependency relationship with the deceased, and
3. the Trustee's decision was fair and reasonable.

The Applicant appealed to the Federal Court, who found no error of law in AFCA's decision, so the appeal was dismissed.

His Honour considered the question of whether the Applicant was financially dependent on the deceased.

[34] [2022] FCA 627

In its decision, AFCA had stated,

> *' … the concept of financial dependence generally requires the provision of regular financial contributions of specified amounts for everday living expenses, even if the amounts are small'.*

The Applicant stated that she was made redundant on 21 December 2017 and that the deceased had promised to look after her financially, the only evidence of this being a text message saying, 'we will get through this'. It was not clear whether the text referred to financial support and the deceased died four days later. As there was no other evidence of financial dependence, his Honour upheld AFCA's finding that the Applicant was not financially dependent on the deceased.

5.3 *Re HRA*[35]

Whilst this is not a superannuation case, it is a disputed de facto case under Queensland intestacy laws and the facts are very relevant in the context of disputed superannuation cases.

It is a 2021 decision of Lyons SJA in the Supreme Court of Queensland, where I appeared for the Applicants.

The deceased died without leaving a valid will. The Applicants were the niece and nephew of the deceased. They applied for Letters of Administration on intestacy of the estate of the deceased.

The respondent sought a declaration that she was the de facto spouse of the deceased. If successful, she would be entitled to 100% of his residuary estate and would have first priority to administer the estate, to the exclusion of the niece and nephew.

The deceased died without having married and had no children. His closest relatives at the time of his death were the niece and nephew. He left an estate of approximately $1.6 million.

The deceased and the respondent had been in a long-term de facto relationship and lived together at the deceased's farming property for about 17 years (between 1995 to 2012). They ceased living together in 2012 when the respondent moved into a Retirement Village in Bundaberg.

In 2011, the deceased began to experience dementia, which became more pronounced over the next year. However, he refused to enter into a nursing home.

In March 2013, the niece applied to QCAT for orders appointing the Public Trustee as Administrator and the Adult Guardian as Guardian. The Adult Guardian subsequently moved the deceased into a retirement village in Gympie.

The respondent assisted the deceased's niece with moving the deceased and attended at his property for that purpose.

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[35] [2021] QSC 29

Under section 5AA(1)(b) of the *Succession Act* (Qld), a person is a deceased person's 'spouse' if they are a de facto partner, as defined in section 32DA of the *Acts Interpretation Act* (Qld) (***AIA***) and had been living together as a couple on a genuine domestic basis within the meaning of the section for a continuous period of at least two years ending on the deceased's death.

This can be distinguished from the superannuation context, where the two year requirement does not exist.

Under the Queensland *AIA*, the indicia of persons living together on a 'genuine domestic basis' under s 32DA(2) include:

a) The nature and extent of their common residence
b) The length of their relationship
c) Whether or not a sexual relationship exists or existed
d) The degree of financial dependence or interdependence, and any arrangements for financial support
e) Their ownership, use and acquisition of property
f) The degree of mutual commitment to a shared life, including the care and support of each other,
g) The care and support of children
h) The performance of household tasks, and
i) The reputation and public aspects of their relationships.

While there was no doubt that the deceased and respondent were living together on a genuine domestic basis until 2012, the respondent could only succeed if she was living with the deceased for a continuous period of at least two years prior to his death.

Lyons SJA found:

- there was no dispute that the deceased and the respondent shared a common residence until the respondent moved to a Retirement Village in 2012. However, they did not share a common residence in the last two years of the deceased's death, being at separate aged care facilities.
- whilst the relationship was a particularly long one, probably at least 30 years, the respondent had moved out of the shared residence in 2012 for health reasons. She had in fact made a decision to leave and move into a Retirement Village in circumstances where it was clear the deceased did not want to.
- in the seven-year period from 2012 to the deceased's death, the respondent had only attempted to contact the deceased three times at his nursing home, called him once in 2013 and visited him twice. There was no evidence of the respondent attempting to contact the deceased in the last two years of his life, which was the relevant period.

- after the deceased's dementia became severe in around mid-2013, there was no real ability for him to maintain a continuing relationship with the respondent, even though there was no intention to bring the relationship to an end.
- her Honour maintained that, even if one party has lost capacity and ability to communicate meaningfully, the other party can still show evidence of committing to the relationship by expressing interest and a continuing effort to engage with their partner – for example, by providing care, by visiting the person in their facility, sending gifts, and continued involvement in decision-making about their care.
- the respondent did have capacity and ability to make an objective commitment to the deceased, but the deceased did not have the same capacity to contribute to an ongoing relationship after 2013.
- the respondent chose not to make an objective commitment to her relationship with the deceased, and while she may not have made a deliberate choice to end the relationship, she did not nurture or maintain it in any way.

It was held that no de facto relationship existed in the last two years of the deceased's life.

5.4 *Nguyen v AFCA*[36]

This was an appeal to the Full Federal Court. The issue was whether a de facto relationship had terminated *prior to* the deceased's death.

There was a BDBN leaving the deceased's $1.122m death benefit to his de facto spouse.

The deceased's mother claimed the super, alleging the de facto relationship had terminated prior to death. If that were the case, then the fund rules provided that the BDBN ceased to be valid and effective.

The deceased had died by suicide. On the day of his death, the deceased sent a text message to his sister stating that he wanted to give everything to his family members and the appellant *"receives nothing of my assets…for he has put in the position or stage of my life where I had enough"*.

The question on appeal was whether the text message, in and of itself, was sufficient to terminate the de facto relationship. The deceased had not taken any other steps to end the relationship, and the spouse's evidence was that they had not separated and the deceased had made "a foolish and rash decision to end his life following a night of heavy drinking."

The Full Court held that the relationship very plainly terminated from the point of death. Under the fund rules however, the question for consideration was whether the relationship terminated prior to (rather than because of) the deceased's death. "Were it otherwise, the death of a member

[36] [2024] FCAFC 77

would always invalidate what would otherwise stand as a valid binding death benefit nomination."[37]

The Full Court placed reliance on the decision of Dutney J in *S v B (No 2)* [2005] 1 Qd R 537, where the Court of Appeal held that a *de facto* relationship ends when:

> *"one party decides they no longer want to live in the required degree of mutuality with the other but to live apart. It [is not] necessary to communicate this intention to the other party* ***providing the party that is desirous of ending the relationship acts on his or her decision.***"[38]

It was held that for the purposes of the fund rules, where one party to a de facto relationship forms an intention to end the relationship, "he or she must act upon that intention in order to effect its termination. That might, in some cases, involve the communication of the intention to the other party. Alternatively, it might involve some other conduct consistent with termination."

It was held:[39]

- it is not necessary for a party to a de facto relationship to communicate their intention to the other party in order to 'terminate' it";
- where there is no such communication, there must be some other conduct that is apt to stand as a practical manifestation of the intention so formed;
- a person who tells a third party of his or her intention to end a de facto relationship should not be understood, merely by that communication, to have done so;
- termination requires some other conduct inconsistent with the continuation of the relationship — for example, desertion, unilateral relocation, refusal to cohabitate, or refusal to communicate otherwise than in writing.

In the present case, the only conduct which unambiguously effected the end of the relationship was the deceased's death. That conduct could not stand as having ended the relationship prior to death, nor could the deceased's communicating to his sister his intention to end his life.[40]

The BDBN was upheld.

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[37] at 293
[38] at [48]
[39] At 294
[40] *Nguyen v AFCA* (2024) 304 FCR 286, 294 (Snaden J)

6 Managers, Attorneys and Administrators

There has been considerable divergence between the different States as to whether attorneys and administrators have the power to make a valid and binding BDBN in that capacity (subject to the terms of the trust deed authorising that to occur). This is where the overlay of the general law in each jurisdiction becomes relevant and has resulted in inconsistent approaches throughout Australia.

6.1 *Re Narumon Pty Ltd*[41]

In this case the applicant, Narumon Pty Ltd, as trustee of an SMSF, being the John Giles Superannuation Fund, sought a number of declarations from the court to resolve "uncertainties" in the context of ongoing litigation in relation to Mr Giles' estate. The relevant question for this paper, was whether an attorney had power to make a BDBN on behalf of a member who had lost capacity.

Mrs Giles, the wife of the deceased, together with Mrs Keenan, the deceased's sister, were both appointed as attorneys for financial matters for Mr Giles by EPA.

On 16 March 2016, Mrs Giles and Mrs Keenan signed an "extension of binding death benefit nomination" by which the last BDBN made by the deceased on 5 June 2013 was confirmed and extended for a further three-year period. At the same time, Mrs Giles and Mrs Keenan also signed a new BDBN, which nominated Mrs Giles and her son, Mr Nicholas Giles to each receive 50% of the benefit payable on Mr Giles' death (this was done to correct a potential defect in the 2013 extension nomination).

The trust deed expressly contemplated that any power or right given to a member may, if the person is under a legal disability, be exercised by an attorney.

Bowskill J (as she then was) noted that there was no restriction in the *SIS Act* or *SIS Regs* preventing an attorney from executing a BDBN.

Her Honour went on to consider whether the actions of the attorneys were consistent with the *Powers of Attorney Act 1998* (Qld) (the **POA**). In doing so, her Honour held:

- that making a BDBN was not a testamentary act and as such, was not captured by the restriction that exists in the POA in terms of an attorney making a will;[42]
- the execution of a BDBN was a "financial matter" as defined in section 1 of schedule 2 to the POA, stating:

> *The effect of a binding death benefit nomination, if valid, is to bind the trustee of the superannuation fund to pay benefits, following the member's death, to the*

[41] [2018] QSC 185

[42] Ibid, [71]

> *nominated persons (and, if relevant, to do so in the nominated way). That does not seem to fall within any of the examples in the definition of a financial matter, including as a legal matter relating to the principal's financial matters. But the examples given are not exhaustive and do not limit the meaning of the provision. It is difficult to see why the exercise of a member's right under a self-managed superannuation fund deed, to require the trustee of the fund to pay benefits, after their death, in a particular way would not be "a matter relating to the [member's] financial … matters". Given the breadth of meaning of the word "financial" (of, pertaining, or relating to finance or money matters) such an act does fall within the meaning of this term.*[43]

Relevantly, the Court also considered the protective features of the POA and whether the making of the BDBN in 2016 was a conflict transaction pursuant to s 73 of the POA. Ultimately, it was concluded that as the effect of the 2016 extension was to do no more than confirm the nomination the deceased had made when he had capacity, it was not a conflict transaction. Her Honour expressly stated that different considerations may apply where an attorney is making a new nomination, that was different to the existing estate planning objectives of the principal.

6.2 *G v G (No 2)*[44]

This case dealt with the application of the *NSW Trustee and Guardian Act 2009* (NSW) (the **TAG Act**) and private managers of the estates of protected persons. In this case, the First Defendant was a "protected person" within the meaning of section 38 of the TAG Act.

The First Plaintiff was the father of the First Defendant, and the Second Plaintiff was the sister of the First Defendant (collectively, the **Plaintiffs**). The Plaintiffs were the private managers of the First Defendant's protected estate. The Office of the NSW Trustee was joined as the Second Defendant as the relevant body that has the power to authorise the investments made by a private manager.

The case considered the power of the NSW Trustee under the TAG Act to authorise the investment of a substantial part of the First Defendant's estate in a regulated superannuation fund and whether a BDBN can be made by a manager of a protected fund.

The Court found that NSW Trustee:

(a) has the power under ss 64 – 66 of the TAG Act to authorise a private manager to invest into a superannuation fund; but

(b) the powers conferred on the NSW Trustee by the TAG Act did not extend to authorising the making of a BDBN.

In making that determination, the Court:

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43 Ibid, [69].

44 [2020] NSWSC 818

- noted the prevailing view in Australia was that a BDBN was not a testamentary act;
- held that a decision to invest money into a superannuation fund requires compliance with section 39 of the TAG Act, which is a statutory reformulation of the fiduciary duty to act in the best interests of the principal; and
- whilst a decision to invest in a superannuation fund might meet this test, a BDBN that directs the trustee to pay a benefit otherwise than to the estate of the protected person will, ordinarily, not meet the statutory test.[45]

Interestingly, Lindsay J went on to say:[46]

> *Although the trustee of a superannuation fund may ostensibly have a discretion to pay a death benefit otherwise than to the estate of a deceased member who was, in life, a protected person, it can not do so without exposing itself to a liability to the estate for breach of a fiduciary obligation (or participation in a breach by the manager) where the deceased's membership of the fund is a consequence of an investment by a protected estate manager on behalf of the protected person.*

6.3 *SM*[47]

This is a decision of the Western Australian State Administrative Tribunal (**WASAT**) which expressly rejected the approach of Bowskill J in *Re Narumon* on the question of whether the making of a BDBN is a testamentary act.

The Tribunal did not agree with the position that had been adopted by her Honour Bowskill J and held that a BDBN was a testamentary disposition, stating:

> *"The 'friendly society cases' and the 'nominee insurance policy cases' support the proposition that a BDBN is a testamentary disposition. In these cases, where a BDBN is made in respect of funds in which the superannuation member has a beneficial interest up to the time of death, and is not made further to a contractual right, the nomination of a beneficiary to receive the funds on the member's death is considered to be a testamentary disposition".*[48]

Interestingly, the Tribunal referred to Bowskill J (as her Honour then was) as "his Honour".

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45 Ibid, [56]
46 Ibid, [68]
47 [2019] WASAT 22
48 Ibid, [98], (Sharpe DCJ, Members Le Miere and Barton)

6.4 *Re SB; Ex parte AC* [49]

SB was seriously injured in a motor vehicle accident, leaving her almost totally paralysed. On an application for a statutory will for SB,[50] the applicant also sought a declaration that, upon the proper construction of the *Guardianship and Administration Act 2000* (the **GAA**), SB's administrator can execute a death benefit nomination on her behalf.

The Court found that a non-lapsing nomination is not a revocable disposition of property intended to take effect at death, relying on the reasoning in *Re Narumon Pty Ltd,* the decision of the Supreme Court of Victoria in *McFadden v Public Trustee for Victoria* wherein Holland J found that the right to nominate a beneficiary was in the nature of a power of appointment inter vivos reserved or given by a trust instrument to the settlor or some other donee, and the decision of *Re Application by Police Association of South Australia* (which was to a similar effect of *McFadden*).[51] *SM* was not referred to.

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49 [2020] QSC 139

50 Pursuant to s 21 of the *Succession Act 1981*, the Court has the power to make a statutory will. At the time of this decision, the Applicant was also required to seek leave pursuant to s 22 of the *Succession Act 1981* (Qld) prior to its repeal by s 23 of the *Justice and Other Legislation Amendment Act 2020* (Qld)

51 Ibid, [44(b)] (Martin J)

7 Watch this space?

The lack of clarity and understanding of a party's role in the administration of superannuation death benefits has been one of the main causative factors driving the litigation the subject of these cases.

Some of these cases have provided much needed clarity, albeit they have led to inconsistent outcomes between jurisdictions across Australia.

One thing is certain: there is an increasing reliance placed on specialist estate planning professionals to ensure their knowledge is kept up-to-date in a rapidly developing area of the law.