

Conflict of duty and death benefit payments

Shaun Backhaus

Lawyer, DBA Lawyers

P: 03 9092 9400 D: 03 9092 9403

E: sbackhaus@dbalawyers.com.au

W: dbalawyers.com.au T: @DBALawyers

Notes current as at 16 September 2019

DBA
Lawyers

1

Legal notice

These notes are a general guide only based on our view of the law as of 16 September 2019. They are no substitute for expert advice. Anyone seeking to rely on these notes should obtain expert advice to confirm particular issues especially as the law is subject to ongoing changes and substantial penalties can be imposed. We are not licensed to provide financial product advice under the *Corporations Act 2001* (Cth). Copyright resides in DBA unless another source is noted.

DBA
Lawyers

2

Overview

- What are we looking at?
 - Conflict that arises where an executor (or administrator) applies to a super fund trustee to receive death benefits in their personal capacity
- Why is this relevant for SMSFs?
- The case law
- How this might be managed

Succession Planning and Control

- Smooth transition upon key events
- Right person in control at the right time
- Clear who is the trustee at any time (or controlling the trustee)
- Ensuring death benefits go where intended
- Good planning can remove this conflict
 - A BDBN which may remove the conflict
 - Express conflict authorisation in documents eg, wills, EPoA

Why is this relevant?

- 600,000 SMSFs
- 70% are 2 member funds (bulk of that will be spouses)
- Spouses will often:
 - Appoint each other as executor under a will/or they become administrator
 - Be in control of the SMSF
 - Want each other to receive death benefits
 - Acting in an extra capacity = extra complicated

Executor/administrator

- Executors – appointed under a will, apply to court for probate
- Administrators – appointed by courts via applying for letters of administration
- An executor will also often be in control of the SMSF trustee (spouses often already in control)
- Section 17A(3)(a):
SMSF does not fail to satisfy trustee/member rules where:
 - (a) a member has died and their LPR is a trustee of the fund or a director of a corporate trustee, in place of the member ...

NOT AUTOMATIC (see *Ioppolo v Conti* [2015] WASCA 45; *Re Marsella; Marsella v Wareham* (No 2) [2019] VSC 65)

Dawson v Dawson

- [2019] NSWSC 826 [citations omitted]

[104] As to the defendants' submission that appointment of the second defendant as trustee was compliant with the SIS Act, I accept that s 17A(3)(a) of the SIS Act permits the second defendant, as the LPR of Peter Dawson's estate, to be appointed a trustee and the Fund would have been compliant (*sic*) as a SMSF if he had been. *But s 17A(3)(a) is permissive only, to provide for continued compliance after the death of a member. It does not mandate that a LPR (such as the second defendant) be appointed a trustee in place of a deceased member. Nor does it mean that the second defendant, as LPR, became a trustee of the Fund following Peter Dawson's death, irrespective of whether the Fund was a two or one-member fund...*

Conflict arising as an administrator/ executor

Obligations overview

- Conflict that arises where an executor (or administrator) applies to a super fund trustee to receive death benefits in their personal capacity (not as executor)
- What are the obligations on an executor/administrator? (common law and statute)
 - Read will/understand obligations
 - Funeral arrangements
 - Seeking authority to administer (probate)
 - Advertise for claims
 - Identify and call in all property/assets, maximise the estate
 - Identify and pay debts/liabilities (in priority)
 - Administer/distribute estate in accordance with the will (communicate with beneficiaries)
 - Establish trusts
 - Inventory of the estate if called upon
 - Also consider normal trustee obligations (proper exercise of power, act in good faith be properly informed)

Obligations overview

- What are the obligations on an SMSF trustee?
 - Pay/cash death benefits as soon as reasonably practicable (SISR reg 6.21(1)).
 - Duty of trustees properly to inform themselves is more intense in superannuation trusts' (*Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254)
 - Follow binding direction or exercise discretion
 - Normal trustee obligations – good faith, reasonable ('Flegeltaub unreasonableness'), proper purpose, genuine consideration
 - Does the trustee need to give reasons for an exercise of discretion?

The cases...

***McIntosh v McIntosh* [2014] QSC 99**

- Mother appointed administrator of son's estate
- Applied to 3 of son's industry/retail funds in personal capacity, which she received
- If paid to estate, would go equally to father (ex-spouses)
- Mother was a nominated beneficiary via non-binding nominations

***McIntosh v McIntosh* [2014] QSC 99**

- Inferred conflict authorisation?
- [62] **The testator may appoint someone ... whom the testator has designated as the sole named beneficiary under a non-binding nomination of the testator's superannuation fund. ... example of circumstances where the testator has nominated an LPR who has a known conflict and must be taken to have accepted that conflict. This is an exception to the general rule that no one who has fiduciary duties is allowed to enter into engagements in which the fiduciary has or may have ... [a conflict].**
- [64] The exception does not however extend to allowing a trustee, by the trustee's own act, voluntarily to put himself or herself into a new position of conflict
- Required to account to the estate for the benefits personally received

McIntosh v McIntosh [2014] QSC 99

At [69] ... As Millett LJ held in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18:

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. **A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.** This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

McIntosh v McIntosh [2014] QSC 99

[70] ... there was a clear conflict of duty ... contrary to her fiduciary duties as administrator. ... she was preferring her own interests to her duty as legal personal representative... . She was in a situation of conflict which she resolved in favour of her own interests. As such she acted ... in breach of her fiduciary duty as administrator of the estate ...

[71] **An administrator of an intestate estate has a duty to apply for payment of superannuation funds to the estate.** The administrator has no proprietary right to the funds * but has standing to compel the trustees of the fund to exercise their discretion to pay out the funds.

*In re Danish Bacon Co [1971] 1 WLR 248 at 256; Williams v Federal Commissioner of Taxation (1950) 81 CLR 359.

McIntosh v McIntosh [2014] QSC 99

[73] It is axiomatic that the legal personal representative would, if he or she did not have a conflict, make an application for the payment of the superannuation to the deceased member's legal personal representative. That application would be made as part of the administrator's duty to get in the estate. ***Unless the application is made and is successful the funds do not become part of the estate.***

[74] The trustee of the superannuation fund may make the payment to either or both of the legal personal representative or the member's dependants. This discretion resides in the trustee but is one which the deceased member's ***personal representative must be under a duty to call on the trustee to exercise.***

[75] The exercise of discretion is different to the duties falling upon a trustee of the superannuation fund when a binding nomination is made. ...

[78] The failure of the applicant to apply for payment to herself as legal personal representative ***was in breach of her fiduciary duty to act in the best interests of the estate***, for which she may be held liable by the court.*

Brine v Carter [2015] SASC 205

- Brine had appointed his three children and Ms Carter, his de facto spouse, as the executors of his estate
- 2 pensions – 1 could be paid to dependant or LPR
- Non-binding nomination in favour of LPR
- Ms Carter applied to trustee to receive benefits in personal capacity (note misrepresentation)
- Before trustee exercised discretion, children found out estate was a beneficiary, applied on behalf of the estate
- Trustee exercised in her favour, children disputed
- Ms Carter recused herself from any discussions/actions relating to dispute, remained executor, made further submissions in personal capacity

Brine v Carter [2015] SASC 205

[139] Mrs McIntosh was an **administrator** whereas Ms Carter was an **executor**. *This is not a relevant distinction because both owe the same fiduciary duties. 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 ...* she would not have acted in breach of her fiduciary duties ... However, she did not act in that way...

- Authorised conflict?

[143] ... authorisation to act notwithstanding a position of conflict may be conferred expressly or by necessary implication arising from the circumstances of the appointment.

[148] On no construction of the circumstances existing when Professor Brine made his will was Ms Carter authorised to act in the manner that she did in pursuing her personal interest when there was a conflict between her personal interest and her duty as an executor.

Brine v Carter [2015] SASC 205

- Children learnt true position, estate put in a competing claim
- Ms Carter acted in breach up until this point
- After this point, other executors agreed to her recusing herself, assumed conduct on behalf of the estate
- Aware of all circumstances, taken to have consented to Ms Carter pursuing own interests while still being an executor
- Not liable to account to estate –

“In these circumstances, there was no connection between Ms Carter’s breach of duty and the benefit she received” [165]

Burgess v Burgess [2018] **WASC 279**

- Mr Burgess died intestate, survived by wife and two children
- Benefits in 4 funds
- Mrs Burgess applied to be appointed as administrator
- She applied for and received benefits from 1 fund prior to appointment
- Another fund paid to her ~6 months after appointment
- Another paid to estate
- One yet to be paid
- No BDBNs
- Estate would be split among Mrs Burgess and 2 children
- Mrs Burgess herself applied to court (no misleading, deceit, family dispute. 'benign', note who the defendants are)

Burgess v Burgess [2018] **WASC 279**

[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.***

- Followed *McIntosh*. 'Cannot be faulted as a matter of law'

[85] ...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.

Gonciarz v Bienias [2019] **WASC 104**

- Ms Gonciarz was married to Mr Bienias at the time of his death, died intestate
- Defendants – mother and brother of deceased
- Interest in large fund. Non-binding nomination in respect of brother
- 26 Oct 2017 – first claim to trustee (personal), stated she had applied for letters of administration
- 18 Dec 2017 – grant of letters of administration
- Trustee indicated it would exercise discretion in favour of Ms Gonciarz
- Brother objected stating that he did not believe that Ms Gonciarz and the deceased were living together at the time of his death. Ms Gonciarz didn't know who objected or what the grounds of the objection were.

Gonciarz v Bienias [2019] **WASC 104**

- Defendants solicitors sent an email to the plaintiff providing a copy of *Burgess v Burgess* demanding she apply to receive the death benefits on behalf of estate. The defendant's solicitors said she was acting in conflict to her duties to the estate and demanded that she withdraw her personal application
- Sep 2018 – amended claim to be as administrator
- 2 Oct 2018 – withdrew the amendment, maintained claim in own name
- 25 Oct 2018 – further claim, both personal and as administrator
- 2 Feb 2019 – trustee decided to pay to estate
- Ms Gonciarz became aware that the defendant had informed the trustee that he believed Ms Gonciarz and the deceased were not living together at the time of death. Ms Gonciarz strongly refuted this allegation; was deeply hurt by it

Gonciarz v Bienias [2019]

WASC 104

- Sought a **revocation of the grant of letters of administration in order to be discharged from the conflict of interest** and be allowed to provide information to the trustee to challenge trustee's decision.
- [35] An incident of the fiduciary duty owed by an administrator of an intestate estate is that the administrator **must apply for payment of any superannuation funds that are not the subject of a binding nomination** to the intestate's estate: *McIntosh v McIntosh* and *Burgess v Burgess*.
- Acknowledged the plaintiff was in a position of conflict and was required to subordinate her claim to that of the estate. However, took into account that '[t]his difficult situation was not of the plaintiff's making.' [39]

Gonciarz v Bienias [2019]

WASC 104

- Found that the court should not compel the plaintiff to continue to act as administrator of the estate and that 'to do so would be inimical to the due and proper administration of the estate'. [40]
- Court exercised its discretion to revoke the grant of letters of administration and appoint a lawyer as administrator of the estate, allowing the plaintiff to make submissions to the trustee of the fund in her own name.
- Why was this different to *Burgess v Burgess*?
 - What were they asking?
 - What was the courts decision based on?

Key takeaways

- Consider express conflict authority in all documents – inferred authority may be possible but shouldn't be relied up
- Consider who should be administrator before applying
- Consider refusing to act as executor - but consider trustee/member rules
- If there is a valid and legally effective BDBN and subject to the document trail – this may overcome the issue
- Respect capacities in which you act

SMSFs

- Sara and Andrew, both members and directors of the trustee
- Andrew passes away
- Sara is made administrator and is remaining director
- What does Sara do?
 - As administrator– is *required* to apply to trustee of the SMSF
 - Cannot apply to receive personally
- Can the trustee of the SMSF pay to Sara personally?
- Court should respect the different capacities in which Sara acts
- *Moss Super Pty Ltd v Hayne* [2008] VSC 158 [30] (dispute over whether signed change of trustee in correct capacity):
 - If parties have, no doubt for good reason, established a complicated legal structure such as this, they must respect it. And where they have, as here, multiple roles to play they must respect the conflicts which may arise.

SMSFs

- (Assuming trustee discretion)
- Follow proper trustee procedures and become informed
- Exercise discretion in good faith, honestly, reasonably, for a proper purpose
- Write to beneficiaries, ask for information (Sara does not respond)
- NO NOT GIVE REASONS – this only opens up to challenge
- The trustee company could exercise its discretion to pay to Sara in her personal capacity
- HOWEVER, no case yet on this point — proceed with caution!
- Better yet, HAVE A BDBN (that stacks up)
- Does the estate still need to apply for death benefits if BDBN in place?
 - Apparently not, see judicial commentary in Gonciarz
 - BDBNs are often attacked
- Admit another director?

Executor/administrator

- conflict authorisation in will:
 - Authorised to enter into any 'conflict transaction' and can personally apply for and receive any benefits that I may have in any superannuation fund....
 - Is not required to make an application on behalf of my estate to the trustee of any superannuation fund that I have benefits in upon my death to receive such benefits on behalf of my estate

In *Burgess v Burgess* [2018] WASC 279 [15]:

...Preferably, his will would have said in explicit terms that there was no difficulty for his widow, if she was appointed as his executor, **in acting exclusively in her own interests by applying to receive personally and receiving the full entitlement to any superannuation fund proceeds to which he might be or become entitled in the event of his death**

- jurisdiction specific advice would be needed

Questions

CPD

- DBA Network provides a total SMSF CPD solution:
 - SMSF online update — 11 Oct, 7 Feb, 3 Apr
 - SMSF Core Course workshop 10 webinar series
 - SMSF Strategy Seminars — November, March
 - New DBA SMSF Podcast — dbanetwork.podbean.com/
 - More regular updates — dbanetwork.com.au
- DBA Lawyers provide a large range of SMSF and other documents eg, SMSF Auditors Kit — dbalawyers.com.au/auditors-kit/