Estate planning and superannuation death benefits

Darryl Browne is the principal at BROWNE. Linkenbagh Legal Services and Chair of the Law Society Elder Law, Capacity and Succession Committee.

BY DARRYL BROWNE

Snapshot

- A Legal Personal Representative ('**LPR**') has a fiduciary duty to collect the deceased's estate for beneficiaries.
- If the deceased was a member of a super fund, the duty will usually extend to collecting any death benefit for the estate.
- If the LPR is able to apply for the death benefit personally, a conflict of interest may arise, which will not be negated simply by reason of the person being named the executor.
- The conflict may be allowed by express permission in the will or it could be avoided by the person renouncing probate or not seeking a grant of representation.

A common scenario is a spouse applying for a member's superannuation death benefit after the member's death. Often, the spouse is also the member's executor.

The inherent difficulty with this common occurrence is that an executor has a fiduciary duty to collect the assets of the member's deceased estate for the member's beneficiaries. The rules for many superannuation funds allow the member's death benefit to be paid to the member's legal personal representative, which, if the member has left a will, is the member's executor. So, the spouse (or any other person able to apply for the death benefit and act as the deceased member's legal personal representative) may have a conflict between their personal interest in seeking the death benefit and fiduciary duty to seek the benefit for the estate as the member's legal personal representative ('**LPR**'). This much appears from *Brine v Carter* [2015] SASC 205 and a number of decisions involving estates where there is no will but the spouse is appointed the administrator. These cases are considered below but first of all, it is appropriate to reflect on the content of the conflict rule.

Conflict of interest

A legal personal representative, whether an executor or administrator, is a fiduciary. As such, the LPR 'is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is "a conflict or a real or substantial possibility of a conflict" between personal interests of the fiduciary and those to whom the duty is owed' (*Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557). An expectation or hope of future advantage may be sufficient to constitute an interest of the fiduciary for which his or her fiduciary duty could conflict (*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 103-4).

No conflict in two circumstances

There will not be a conflict or a real or substantial possibility of a conflict in at least two circumstances where an application is made for the member's death benefit: (i) where the spouse (or other claimant) is the sole beneficiary of the member's deceased estate; and (ii) where there is no decision for the superannuation fund to make concerning payment of the death benefit because payment of the benefit has been determined by the member (via a valid binding death benefit nomination) or is predetermined by the rules of the fund.

***Brine v Carter* [2015] SASC 205**: Professor Frank Brine appointed his de facto partner, Norma Carter, and his three sons from his former marriage as executors of his estate. Upon his death, a superannuation death benefit of $630,299 was payable by Brine's superannuation fund. Brine had signed a non-binding nomination in favour of his estate. The effect was that, if the trustee of the superannuation fund paid the benefit in the manner requested by Brine, the death benefit would be distributed to his sons through his will.

Carter successfully applied for payment of the death benefit to her. The sons sued Carter for disgorgement of those funds to the estate. They successfully contended that she breached her fiduciary duty by pursuing her personal interests in conflict with her duties as an executor. Ms Carter unsuccessfully denied any breach and unsuccessfully contended that, in any event, any conflict was impliedly authorised by Professor Brine. Nevertheless, the sons unsuccessfully contended that, as a result, she was obliged to account to the estate for the benefit received. Whilst the first two findings are unexceptional, I will briefly explain these last two findings.

No authorisation

A conflict of interest may be authorised before, during or after the event, and this may be expressed or implied. The judge recognised that a circumstance giving rise to the implication of pre-emptive authorisation is when a testator appoints as executor a person who is also made a beneficiary by the will. However, that rationale didn't apply to the testator's superannuation fund, in part because it was 'a sophisticated superannuation policy governed by a complex trust deed in which the trustee has discretionary functions' (at [145]). As a consequence, Carter's conflict wasn't authorised by her

appointment as executor. The position would have been the same if any of Brine's sons had applied for the death benefit for himself.

No obligation to account

Ultimately, the sons learned of the estate's ability to claim the death benefit. Thereafter they had the capacity and power to consent to conduct which was otherwise a breach of a fiduciary's duty. The judge noted that they exercised that power when they disputed the payment from the superannuation fund before the trustee of the fund made its final decision. Accordingly, Ms Carter was held not liable to account for her breach of fiduciary duty. The judge commented that '[t]he position would have been different if the other executors had not learnt the true position and [the superannuation fund] had decided to pay the superannuation to Ms Carter in the absence of any competing contention on behalf or in favour of the estate' (at [165]).

The intestacy cases

***McIntosh v McIntosh* [2014] QSC 99**: This was the first case to highlight the conflict facing an LPR who applies for the death benefit in a personal capacity. The case arose from the intestate estate of James McIntosh. His mother obtained Letters of Administration. The estate was worth about $80,000. This had to be divided with the mother's former husband. James had been a member of three superannuation funds. The combined death benefits from those funds were $453,748. The LPR applied to each of the funds to have the death benefit paid to her personally. The trustee of each fund determined to do so. Her former husband asserted the death benefits should have been paid to the estate. The LPR brought proceedings seeking judicial advice as to whether she was required to account to the estate for the death benefits.

The Court concluded that there was a clear conflict between the LPR's fiduciary duty to beneficiaries of the estate by reason of her position as administrator and her personal interest when she made application to each of the superannuation funds for the moneys to be paid to her personally rather than to the estate. The LPR was required to account to the estate for the benefit she gained for herself in breach of her fiduciary duty. This required her to transfer the death benefits she received from herself to the estate.

***Burgess v Burgess* [2018] WASC 279:** Brian Burgess left few assets but death benefits payable by four superannuation funds. He had a wife, two young sons, no will and no death benefit nomination. Because the estate was administered on intestacy, any payments made to the estate would be distributed in accordance with the statutory scheme in WA, meaning that the widow would receive the first $50,000 and one third of the residue. The sons would receive a third residue each. The wife, now widow, was appointed the administrator.

The widow applied to the superannuation funds to receive the death benefits. Thereafter she applied to the Court for orders concerning the administration of the estate. She had received the death benefit from one fund before she obtained the grant of representation. The Court saw no basis for finding any conflict in the widow receiving the death benefit before she applied for administration of the estate.

In relation to the other death benefits, the Court expressly applied the reasoning in *McIntosh*, referring to '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.'

The Court did not excuse the administrator from personal liability for acting in breach of trust. As she had paid herself a greater part of the death benefit than allowed on a distribution of the intestate estate, the widow was required to account for the surplus and a constructive trust was declared over her real estate.

***Gonciarz v Bienias* [2019] WASC 104**: Boguslaus Bienias also died intestate. The net value of his estate was $140,000. The death benefit payable was $541,412. His widow obtained letters of administration and sought payment of the death benefit. Potential beneficiaries alerted the widow to her breach of fiduciary duty in asserting her personal interests (by claiming the death benefit) in opposition to her duty as administrator to claim the death benefit for the estate. To remove the conflict, the widow successfully applied for revocation of the grant.

Solutions

Apart from the two situations referred to earlier where there is a lack of conflict – in the case of a sole beneficiary or a fund without a discretion about payment (such as where there is a valid binding nomination) - there are at least two other solutions to the conundrum of a LPR benefiting from the death benefit. The first can be taken in advance; the second can be adopted after the member's death.

Authorisation

In another judicial homily, the Court in *Burgess v Burgess* remarked that Burgess should have made a will which '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'. So, it may be sufficient for the testator to state in the will: '[Name of named executor] may, whether or not he/she is executor of my estate, apply for and receive in his/her own capacity any death benefit payable as a result of my death.'

Renunciation/Revocation/No grant

The judge in *Brine v Carter* remarked: 'If Ms Carter had disclosed what she knew about the superannuation benefits, recused herself from acting as executor in relation to them and left the other three executors to act alone on behalf of the estate in relation to them … she would not have acted in breach of her fiduciary duties' (at [139]). This was the route ultimately taken in *Gonciarz v Bienias*. This possibility is implicit in the reasoning in *Burgess* whereby the death benefit obtained before the grant was not disgorged. **LSJ**