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Death benefit dilemmas: trustee discretion and AFCA's approach to law and fact

BY DARRYL BROWNE - APR 10, 2026 9:00 AM AEST

SNAPSHOT

- In recent months, a host of decisions by the Australian Financial Complaints Authority regarding payment of a deceased member's death benefit offer insight into the different methods by which payment of the death benefit can be decided, and AFCA's role in that process.
- This article, the second in a two-part series, examines AFCA's review of trustees' discretionary decisions, including how dependency, member wishes and competing claims are weighed in practice.
- It also explores AFCA's dual role in making findings of fact and determining questions of law, and highlights the practical implications of its less formal fact-finding processes for practitioners.

Examples of a trustee's discretionary decisions

Many of the decisions before the Australian Financial Complaints Authority ('**AFCA**') involve a review of the trustee's discretionary decisions.

In *Case 12-00-1057902 (concerning AustralianSuper Pty Ltd)*, the trustee decided there were two eligible beneficiaries: the member's son and the member's brother (by reason of satisfying the requirements for an interdependency relationship). The member died in September 2022. He had made a non-binding (and therefore not effective) nomination in 2009 in favour of his son (as to 80 per cent) and sister (20 per cent). The trustee, mainly having regard to the brother's financial dependency on the member, initially decided to pay 90 per cent of the member's death benefit to the brother and the remaining 10 per cent to the son.

After considering the son's further submissions, the trustee decided to pay 80 per cent to the brother and 20 per cent to the son. AFCA considered the trustee's exercise of discretion had not produced an outcome which was fair and reasonable in its operation. It substituted its own decision of 50 per cent to each of the eligible beneficiaries. Chief among AFCA's considerations were the age of the son (26 years), the effect of the son's severe epilepsy (which could not be controlled by drugs and had required hospitalisation) on his ability to maintain permanent employment, the member's bank statements showing regular payments to the son, and the member's wishes (which included the member's will leaving his estate to the son).

When the member whose circumstances were considered in *Case 12-00-1028245 (concerning Caresuper Pty Ltd)* died in August 2021, he had not made an effective nomination. The trustee of his superannuation fund therefore needed to decide who were the member's eligible beneficiaries. At the time of his death, the member was estranged from his wife, had two children and had returned to live with his mother. His will benefitted his nephew. Claims for the death benefit were made by all these persons.

The trustee made a series of decisions to pay the whole death benefit to the member's estranged wife. The executor of the member's will applied to AFCA to set aside the trustee's decision. AFCA decided to do so. It determined to pay the death benefit equally to three eligible beneficiaries: the member's wife, daughter and the estate of his mother (as the mother had since died). In making that determination, AFCA concluded all the claimants were eligible beneficiaries, none was financially dependent on the member at his death and no person was particularly deserving or more deserving than the other eligible beneficiaries.

AFCA considered the wife deserving as she had lived with the member from 2003 until late 2020 and she remained his spouse at his death. The daughter gave evidence of ongoing trauma from events when living with the member. AFCA stated the purpose of superannuation was not to right past wrongs or compensate for the member's behaviour. Nevertheless, it was relevant that the member promised to provide for the daughter and sometimes gave her money.

The mother had died whilst the application was before AFCA. The member had lived with the mother for nine months before his death and he was found to be in an interdependency relationship with her at his death. There was no evidence the member contributed to her household expenses during that time and the mother had no reasonable expectation of support from him in the future.

AFCA excluded the claims of the executor as the member's estate was left to his nephew but there was no evidence the nephew expected to receive financial support from the member.

In *Case 12-00-1089124 (concerning Mercer Superannuation (Australia) Ltd)*, the trustee made an initial decision in favour of the younger daughter over the older son as to 80:20 per cent. The legal personal representative ('**LPR**') said it should be paid to it (as it would then be divided equally between the children). The trustee made a second decision to pay the whole death benefit to the younger daughter. AFCA decided the trustee's exercise of discretion as not fair and reasonable, and substituted its decision to pay 40 per cent to the older son and 60 per cent to the younger daughter.

What if there is no valid and effective nomination, and no dependant or LPR?

Usually, if there is no valid and effective nomination, the death benefit is paid to the member's LPR or a dependant (or a combination of them). Occasionally, there is no one who fits either description. In that circumstance, the range of eligible beneficiaries is much broader. In *Case 12-24-123833 (concerning Mercer Superannuation (Australia) Ltd)*, it was the member's friend. In *Case 12-24-148571 (concerning HEST Australia Ltd)*, it was several former stepnieces.

Case 12-24-148571 (concerning HEST Australia Ltd) is an example of the relevance of the member's wishes in this context, too. The member died without having any dependants. No one was appointed his LPR. The trustee decided to pay the member's death benefit of $172,736 to the member's mother. That decision was challenged by the member's two former stepnieces who had remained close to the member and been nominated as his equal beneficiaries in a non-binding nomination made 15 years before his death. AFCA set aside the trustee's decision and determined to pay the death benefit to the applicants as this accorded with the nomination.

AFCA accepted the passage of time can render wishes, such as those contained in the non-binding nomination, less reliable. However, the trustee did not identify circumstances in the member's life that had changed to justify not placing any reliance on those wishes. On the other hand, the stepnieces provided evidence they were still in the member's life, even after the step relationship was formally severed, and that the member attended family events, including an overseas trip with them.

A common approach where there are no dependants or an LPR is to pay the death benefit in a manner consistent with the laws of intestacy. But, AFCA stated:

> 'It can be fair and reasonable to have regard to the laws of intestacy where there is no dependant or LPR. However, this should not be done in isolation or take primacy over other relevant factors, such as the wishes of the deceased' (at [2.3]).

AFCA's role includes making decisions of law

As was apparent in *Case 12-24-113046 (concerning HFTS Nominees Pty Ltd)*, when called upon to make decisions of law, AFCA wrestles with that responsibility. In that case, the issues of law related to essential validity of a nomination. Another example is *Case 12-24-123833 (concerning Mercer Superannuation (Australia) Ltd)*, where a non-binding nomination named a person as the member's LPR. The person wasn't the LPR. The issue of law was the construction of the nomination. AFCA construed the nomination as naming the person as a dependant, not an LPR.

A further example is *Case 12-00-1039664 (concerning NM Superannuation Pty Ltd)*. The trustee needed to decide whether children of a member's deceased spouse (the biological parent) met the description of the member's child and were therefore dependants and eligible beneficiaries of the member's death benefit. AFCA decided that, as a matter of law, a person (described by AFCA as a 'former stepchild') could be the member's child if two facts were satisfied. First, a spousal relationship between the member and the biological parent must be intact at the date of the biological parent's death. Secondly, the member and the former stepchild must maintain a relationship of affinity after the death of the biological parent.

However, AFCA agreed with the trustee's decision that, as a matter of fact, the two requirements were not established. The former stepchildren had little contact with the member both before and after their biological parent's death. By way of contrast, the requirements for a 'former stepchild' to be a member's dependant were satisfied in *Case 12-00-1024001 (concerning Caresuper Pty Ltd)*.

Take home message 4: If a practitioner is involved in a case where AFCA will need to decide an important legal issue, it would be unwise for the practitioner to assume AFCA will know legal principles that are not commonly involved in disputes concerning death benefits, or the manner in which legal principles are applied to facts when found. It would be prudent for the practitioner to provide detailed submissions outlining the relevant legal principles and their application to the case at hand.

Example of these principles

In *Case 12-00-1024001 (concerning Caresuper Pty Ltd)*, AFCA assumed the trustee's decision that there was no valid or effective nomination was correct. Just as the trustee did, it then needed to ascertain the eligible beneficiaries. AFCA considered there was a close and meaningful relationship with the member following the death of the biological parent. AFCA noted the former stepchild considered he was the member's child for superannuation law purposes. His solicitor asserted that, in the years preceding the death of his biological parent, he visited the member at her home weekly, often assisting her with various tasks, including those essential to her welfare, as well as assisting with any required manual and maintenance work. It was asserted the member regarded him as her son, and he was someone who the member could rely on for assistance and guidance.

AFCA noted the member appointed the former stepchild as the executor of her estate, and gave her estate to her daughter and the former stepchild in equal shares. AFCA was therefore satisfied that, for the purposes of superannuation law and the trust deed, the former stepchild was the member's stepchild and therefore a child of the member, notwithstanding that the biological parent had died many years before the member. The member's daughter was the only other eligible beneficiary.

As there was more than one eligible beneficiary, the trustee needed to make a discretionary decision, as did AFCA on review. The main factor which drove AFCA's decision was the member's wishes. AFCA noted the member was in the process of preparing a new will at the time of her death. A draft of the new will had been sent to the member at the time of her death but not executed before her death. The draft will divided her estate three ways: 40 per cent to her daughter, 30 per cent to her granddaughter and 30 per cent to the former stepchild. AFCA observed there was no evidence to suggest the member's ineffective nomination as to 50 per cent to the daughter and 50 per cent to the former stepchild no longer reflected her wishes with respect to her superannuation.

AFCA decided the trustee's discretionary decision to pay the death benefit in the same percentages as expressed in the ineffective nomination was within the range of fair and reasonable decisions open to it. Given this, the trustee's decision was affirmed.

AFCA's approach to fact finding

AFCA does not receive oral evidence or allow questioning of witnesses. Often the 'evidence' is not made under oath but consists merely of written statements or correspondence (including emails), as occurred in *Case 12-00-1024001 (concerning Caresuper Pty Ltd)*. It readily recognises these deficiencies and includes a statement to this effect in its reasons:

> 'AFCA is not a court of law. We do not have the power to take or test evidence on oath.
>
> When we assess complaints, we consider:
>
> > – available documents
> >
> > – the recollections of the parties
> >
> > – all relevant circumstances.
>
> We give more weight to documents created at the time the events occurred. If there are no relevant documents, we will decide what most likely occurred based on the available information. If there are conflicting recollections and these are evenly weighted, we may find that there are no grounds to set aside the trustee's decision' (at [3.1]).

This approach contrasts with the fact-finding process in courts. An extreme recent example of a court's approach is *Varelis v Rispoli [No 2]* [2025] WASC 554, where the main issue was whether the deceased had lived in a de facto relationship for at least two years before his death. The Court heard evidence from 33 witnesses over 11 days. In assessing the evidence, the Court had regard to

- contemporaneous documents;
- the objective facts;
- the witnesses' motivations;
- the overall probabilities;

- a party's failure to call further witnesses where, on the evidence of one or more witnesses, the Court would ordinarily expect that would be done; and
- the manner in which the witnesses gave evidence.

Take home message 5: It is important for the profession to be aware of the much less rigorous approach to fact-finding adopted by AFCA and prepare the client's case with an awareness of the differences.

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