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CASELAW GUIDES PRACTITIONERS IN ADVISING THEIR CLIENTS ON NON-BINDING NOMINATIONS, COLLECTION OF DEATH BENEFITS AND POSSIBLE CONFLICTS OF INTEREST FOR PERSONAL REPRESENTATIVES. BY CHRISTINE SMYTH AND KATERINA PEIROS

Australians currently have more than $2.3 trillion[1] invested in superannuation products and so it is no surprise, that upon death, an interest in the proceeds of these products results in contested applications to the entitlements. While it is commonly understood that certain people have a right to raise a claim for superannuation death benefits,[2] what is not commonly appreciated is that a conflict of interest will often arise where a personal representative of an estate seeks to raise a claim for themselves, at odds with the estate's right to raise a claim on whose behalf the personal representative must act.

With so much at stake, it was only a matter of time before the issue was litigated. The first decision was the Queensland one of *McIntosh v McIntosh (McIntosh)* where Atkinson J opened her judgment with:

"This decision deals with an area of the law which has growing practical importance in view of the growth of personal superannuation: how should the legal personal representative of a deceased person deal with the entitlement to payment of the deceased person's superannuation upon death".[3]

Atkinson J's judgment sets out the principles which apply in very common circumstances.

Non-binding nominations and administrators

In *McIntosh,* James McIntosh died at the age of 40. He had various health issues and resided with his mother. His mother (Mrs McIntosh) described their relationship as inter-dependent. James assisted with household expenses in various ways, they worked together and she supported him throughout his illnesses and with the limitations he suffered as a result of his illnesses, including personal care. James was not particularly close with his father (Mr McIntosh). His parents had separated when he was young and the relationship between his parents was acrimonious.

As James died intestate, Mrs McIntosh applied and was appointed administrator of his estate with her and Mr McIntosh being entitled to it equally. Mr McIntosh did not apply, nor did he oppose her appointment as administrator as she had undertaken to "faithfully . . . comply with [her] duties as personal representative in administering the estate . . . in accordance with the rules of intestacy".[4]

The estate was valued at approximately $80,000. However, James had three superannuation accounts with large industry funds valued at more than $450,000. James had left non-binding nominations in favour of Mrs McIntosh on all the accounts.

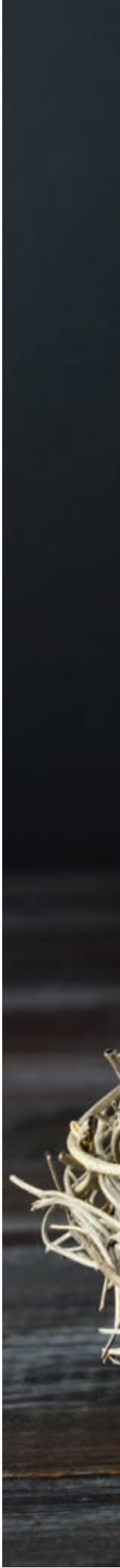
Mrs McIntosh applied to all three super funds, seeking to have the death benefits paid to her directly on the basis of an inter-dependency relationship. Mrs McIntosh did not inform Mr McIntosh that she was taking this step though each super fund was provided with information about James' relationship with his father, an avenue to contact him and the nature of the grant.

The super fund trustees did not contact Mr McIntosh, even though Mrs McIntosh was notified by at least one of them that "every dependent of the deceased and potential claimant must be contacted, and their intentions recorded".[5] Mr McIntosh did not contact the super funds either.

All three super funds determined that there had been an inter-dependency relationship, and paid the death benefits to Mrs McIntosh personally which she received tax-free.

On becoming aware of this, Mr McIntosh demanded that James' death benefits be paid into the estate on the basis that Mrs McIntosh, as administrator, breached her fiduciary duty to the estate by actively seeking payment to herself personally rather than maximising the estate, thereby allowing a conflict of personal interest and duty to the estate to occur.[6]

In addition to equitable principles, Mr McIntosh relied on s52(1)(a) of the *Succession Act 1981* (Qld), submitting that under that section Mrs McIntosh, as the court appointed personal representative of the estate, had a "positive duty to get in the assets of the estate"[7] and "seeking the payment of the . . . death benefit to herself personally, without also doing so on behalf of the estate or, otherwise informing [him] that he could do so, breached both these duties".[8]



Mr McIntosh claimed that the appropriate remedy for this breach was an account for the profits and the court should order Mrs McIntosh to transfer the funds to the estate.
Mrs McIntosh submitted that she was entitled to apply for the release of the funds to her, as superannuation is not an estate asset and the payment to her resulted from the super fund trustee, after making its own inquiries, exercising its discretion to pay her. She conceded that as administrator of the estate she was in a fiduciary relationship with the beneficiaries of the estate, however, "given the content of the fiduciary duty in the circumstances of this case she did not breach any such duty".[9]

The content of the duty derives from both equitable principles and s52(1)(a) of the *Succession Act 1981* (Qld) which provided that the duty of a personal representative is to "collect and get in the real and personal estate of the deceased [and] did not include the inchoate right to compel the superannuation fund to exercise its discretion according to the superannuation deed".[10] Mrs McIntosh submitted that neither the superannuation benefits nor the inchoate right was an asset of the estate to which the Act applied.

Mrs McIntosh also submitted that any potential conflict between her being a potential recipient of the proceeds and her duty as an administrator was known at the time Mr McIntosh consented to her appointment and was, therefore, not part of her duty as administrator.

Atkinson J focused her decision on the distinction between "administrator" appointed by the court and "executor"' chosen and appointed by the willmaker. She concluded that, the willmaker being capable of and should be taken as consenting to any potential or existing known or predictable conflict of personal interest to duty of the executor. She drew on the judgment in *Mordecai v Mordecai*[11] – that the conflict cannot be created by the executor, but can only be pre-existing to enable the implied endorsement of the conflict by the willmaker. In the case of intestate estates, the court prefers to pass over an administrator who may have a conflict.

Atkinson J found that as Mrs McIntosh applied for the release of the death benefits to herself after her appointment as administrator, as at the date of her claim for the death benefits she was already subject to the "fiduciary duties reposed in the office of administrator".[12]

Her Honour said: ". . . it is essential to fiduciary duties that they include the core or irreducible minimum duties necessary for the legal personal representative to perform

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- A person holding a grant of representation is subject to a duty of loyalty and fidelity and has a duty to maximise the estate for the benefit of beneficiaries.
- Such person may breach their duty to the estate by seeking payment of death benefits to themselves personally rather than on behalf of the estate.
- If this occurs, the person may be ordered to account for the profits and repay the funds into the estate.

their obligations 'honestly and in good faith for the benefit of the beneficiaries'. This is the encapsulation of the fiduciary's duty of loyalty and fidelity".[13] She also referred to the fiduciary's duty of trust and confidence, duty not to profit from this trust and a duty not to place themselves in a position where their duty and their interest may conflict or act for their own benefit or the benefit of another person without the informed consent of the willmaker or beneficiaries.

Atkinson J found that Mrs McIntosh had a clear conflict of duty and had preferred her own interests to the interests of the estate, and as such had breached both the statutory duty and the common law duty.

Importantly for practitioners, she also said that in the Queensland statutory framework and at common law, where there are non-binding, lapsed or no nominations, an administrator has a duty to seek payment of the death benefits to the estate, by compelling submissions to the trustee calling on the trustee to exercise their discretion in this way but within the realms of the superannuation legislation.[14] It was her Honour's view that it is self-evident that in the absence of a conflict of interest, the administrator would apply to have the death benefits paid to the estate. She distinguished this from situations where a binding nomination is in place. This reasoning would also apply in Victoria.

Accordingly, Mrs McIntosh was ordered to account to the estate for all of the death benefits received by her.

This case turned on the axis firstly of her being a court appointed administrator, such appointment giving rise to both statutory and equitable duties to the estate and the nomination being non-binding.

Non-binding nominations & executors

McIntosh created debate in the legal community as to the extent and scope of the duty, in particular, the distinction it made between an administrator and an executor. Specifically, an administrator can only be appointed by the court, whereas an executor can only be appointed by the willmaker in their will, and to that end the willmaker can be taken to waive a potential conflict having regard to its knowledge of the executor it appoints.

This distinction between an administrator and an executor, for the purposes of the fiduciary duties owed, may now be largely non-existent as a result of the decision issuing out of the Supreme Court of South Australia. In December 2015, the South Australian Supreme Court handed down the decision of *Brine v Carter (Brine)*,[15] which turned on the axis of non-binding nomination and executor common law fiduciary duties.

In *Brine*, Professor Brine's long term de facto spouse (Ms Carter) and his three sons from a prior relationship were the executors of his will. His assets were extensive across multiple jurisdictions, including France, the UK and Australia. His will gave Ms Carter a life interest in his residences and some minor gifts, whereas the balance went to his sons and grandchildren.

Professor Brine also had two superannuation accounts with UniSuper, one which was a defined benefit with a reversionary pension to Ms Carter (without a final death benefit), and another account with a non-binding nomination in favour of the estate.

Ms Carter was aware of the two accounts and urgently sought to have them both paid to herself. The Court found that from Professor Brine's death in December 2012, she had deliberately failed to disclose information and misled her co-executors about the number and value of the accounts and that the estate or the sons were eligible beneficiaries for one of the accounts.

The sons made their own inquiries and ascertained the true position on 4 March 2013. From that point on, Ms Carter continued with her claim for the death benefits and the sons, as executors, jointly opposed it and sought to have the death benefits paid to the estate as per their father's non-binding nomination. Ms Carter did not participate in this objection.

UniSuper reviewed the submissions of the parties and determined to pay the death benefit to Ms Carter as the dependent. The claim went through two rounds of appeals, including at the Superannuation Complaints Tribunal.

Eventually, the death benefit was paid to Ms Carter and the sons sought a declaration that Ms Carter had breached her fiduciary duty as executor and should account to the estate for the benefit she received, similarly to *McIntosh*.

Blue J was not bound by the same statutory framework as Atkinson J. Blue J considered the matter on the basis of common law and equity. He found that although Ms Carter was an unreliable witness, had deliberately deceived her co-executors and had breached her fiduciary duties as executor until 4 March 2013, because she did not participate in the objection to the determination of the trustee and because the trustee had heard the competing evidence of the sons and made its own decision, there was no breach by Ms Carter after 4 March and, therefore, no remedy was required. There was no causal connection between the breaches before 4 March and the benefit ultimately received by Ms Carter.

Blue J summarised the law as:

"An executor owes a duty to identify, secure and collect assets of the estate.

"An executor is a fiduciary who owes fiduciary duties. A fiduciary generally owes a fiduciary duty not without prior authorisation:

1. to use knowledge or an opportunity arising out of his or her fiduciary position for his or her personal interest; and
2. to pursue a personal benefit in circumstances in which there is a real or significant possibility of conflict between his or her fiduciary duty and personal interest".[16]

Blue J agreed with Deane J's judgment in *Chan v Zacharia*[17] that a fiduciary should have no opportunity to be swayed by considerations of personal interest, and if any benefit is derived from their position, the fiduciary should account for it to ensure no actual personal advantage is derived by the fiduciary.[18] The remedy is that the fiduciary holds the benefit on a constructive trust for the principal (in this case it would be the estate).[19]

Having found that a fiduciary is not entitled to promote their personal interest[20] or make a profit as a result of knowledge or information gained as a fiduciary without the informed consent of the person to whom the duty is owed,[21] Blue J said that these principles are to be applied flexibly and subjectively on the facts.

On the facts, Blue J found that Professor Brine did not authorise the conflict[22] as he could not have envisaged these specific subjective complex circumstances at any time.[23] He also found that the sons did not consent to the conflict for the period from date of death to 4 March, but the sons had consented to the conflict after 4 March by allowing Ms Carter to remain as their co-executor.

Ultimately, Ms Carter did not have to account for the profits.

Blue J discussed *McIntosh*[24] and concluded that at common law, administrators and executors owe the same fiduciary duties. The distinction between Mrs McIntosh's conduct and Ms Carter's was not that Mrs McIntosh was an administrator and Ms Carter an executor, but that Ms Carter recused herself after 4 March from acting as executor with respect to the UniSuper claim whereas Mrs McIntosh did not act in that way at any time.

Conclusion

Practitioners advising willmakers might consider having their clients turn their mind to the choice of executors and inclusion of clauses to authorise or prohibit conflict, if conflict is foreseeable, or generally. The consequences of reversionary pensions, binding and non-binding nominations and choice of beneficiary for superannuation (whether in SMSFs or large funds) should also be considered.

Practitioners advising personal representatives may now need to consider advising their clients about consequences of seeking the payment of death benefits personally to the adverse interest of the estate. Potential administrators of estates may need to be advised to consider making a joint application with another person, not becoming a personal representative of the estate at all or considering the manner, timing and sequence of their application for letters of administration and their personal application for superannuation.

Practitioners advising beneficiaries or co-personal representatives may need to advise their clients on the duties owed to them by personal representatives and on holding the representatives to such high standards. Given that a substantial amount of wealth is now held through superannuation and there are very few Australians of working age without superannuation,[25] these cases are instructive to practitioners advising their clients as to where the law is headed.

Practitioners may now find clients, both at the estate planning stage and at the administration stage of an estate, pay a great deal more attention to considering these issues. ■

Christine Smyth is president of the Queensland Law Society, a partner at Robbins Watson Solicitors and an accredited specialist in succession law (Qld).

Katerina Peiros is an LIV accredited specialist in wills & estates and the principal of Hartwell Legal.

1. www.apra.gov.au/Super/Publications/Documents/2017QSP201703.pdf.
2. The eligible recipients of superannuation death benefits are listed in the *Superannuation Industry (Supervision) Act 1993*.
3. *McIntosh v McIntosh* [2014] QSC 99 at [1].
4. Note 3 above, at [3] and [9].
5. Note 3 above, at [39].
6. Note 3 above, at [60].
7. Note 3 above, at [60].
8. Note 3 above, at [60].
9. Note 3 above, at [57].
10. Note 3 above, at [58].
11. (1988) 12 NSWLR 58.
12. Note 3 above, at [68].
13. Note 3 above, at [69].
14. Note 3 above, at [71] and [74].
15. [2015] SASC 205.
16. Note 15 above, at [123]-[124].
17. (1984) 154 CLR 178.
18. Note 15 above, at [126].
19. This argument succeeded in the recent high profile case of *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 where an agent was required to account to the principal for a bribe or secret commission by holding it on a constructive trust.
20. Note 15 above, at [128].
21. Note 15 above, at [127].
22. Ms Carter argued that Professor Brine appointed her as executor with full knowledge of the potential conflict, Note 15 above, at [141].
23. Note 15 above, at [145].
24. Note 15 above, at [138]-[39].
25. The ABS reports that as at 30 September 2016, the population of Australia is 24,229,000 (www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0). The ATO at www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/Super-accounts-data/Super-accounts-data-overview/ reports that as at 30 June 2016, more than 14.8 million Australians held at least one superannuation account. As at June 2016 superannuation statistics say there are more than 28 million superannuation accounts in Australia - www.superannuation.asn.au/resources/superannuation-statistics/. Although the ASFA (www.superannuation.asn.au) reports that for the 2013/2014 financial year, 60.8 per cent of Australians did not have superannuation, these statistics include Australians aged 15-19, self employed individuals who do not have to contribute to superannuation, the elderly who retired before superannuation became compulsory and a high proportion of older females who stayed home to look after the family.