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Can super death benefits be regulated by way of a will?

by Matthew Burgess, Director, View Legal, 2 June 2022

It is generally accepted by specialist advisers that superannuation death benefits are not an estate asset; despite the fact that such benefits may be paid to a legal personal representative (LPR) for distribution under a will.

The decision in *Stock (as Executor of the Will of Mandie, Deceased) v N.M. Superannuation Proprietary Limited* [2015] FCA 612 perhaps most starkly highlights the long understanding position in this regard.

Broadly the background was as follows:

• The member died without making any binding nomination for his superannuation benefits, although binding nominations were permissible.
• The member had made a non-binding nomination to his wife, however she predeceased him.
• The trustee of the super fund resolved to pay the death benefit to the member's dependants, namely 3 adult children, in equal shares.
• The LPR challenged the distribution on the basis of comments in the member's will, including the fact that two of the adult children had entered into a settlement agreement with their father 20 years earlier confirming they would have no entitlement under his estate.
• Under the member's will, his estate made provision for grandchildren and the child who was not a party to the settlement the other two children had entered into.

In rejecting the LPR's challenge it was confirmed that superannuation is not an asset of an estate and a trustee is not bound to follow the directions of a will.

In particular, even if superannuation is specifically mentioned in a will, this does not make it an asset subject to the terms of the will.

While a trustee may review a deceased member's will, it is not the role of a super fund trustee to attempt to resolve issues relating to their estate.

An alternative view

Despite the widely accepted position in relation to superannuation entitlements and wills, there are unusual exceptions to the rule that a willmaker can only regulate the transfer of assets they personally own under a will in adjacent areas.

Superannuation advisers should be mindful of the rules in these areas in relation to their potential future application to superannuation funds; particularly sole member SMSFs.

In particular, in certain situations the standard position that assets of a company are not something individual shareholders have the authority to regulate under their will has been overruled.

Recent decision

The decision in *Wheatley v Lakshmanan* [2022] NSWSC 583 (Wheatley) provides a detailed analysis of the key rules in this area.

At the heart of the factual matrix in this case was a clause in a will that purported to gift to a child of the willmaker, unencumbered, a commercial property - with a further direction that the property 'be placed into a trust or superannuation fund of (the child's) choice'.

The relevant property however was owned by a company that the willmaker was at all material times (i.e. both at the date of the making the will and at the date of death) the sole shareholder.

In confirming that the purported gift of the property was ineffective the court stated:

- the general position is that a willmaker cannot bequeath something that they do not own;
- it may be that where a willmaker conveys to the executor a direction to reduce into possession an asset not owned by the willmaker, and the executor is armed by the willmaker with the power to get the asset (eg by directing that all relevant assets are to be held on trust under the estate) they will be bound to do so - and then deal with the asset as directed by the will (see *Re O'Callaghan* [1972] VR 248 (O'Callaghan));
- that is, if there is the conferral of power upon executors to deal with shares in a company that owns the assets in question as if they were beneficial owners, coupled with express gifts under the will, this can give rise to an implication that the trustee was required to use the shares of the company to ensure the assets of the company are transferred as set out in the will;
- this said, the court commented that it may also be that the earlier cases such as O'Callaghan were in fact decided incorrectly - a point the court did not need to resolve on the basis that in the will in Wheatley, the requisite power was not granted to the executor of the will in any event;
- the key reason for suggesting that the previous cases may be wrong at law is that they are vague in clarifying how exactly an executor exercising rights as a shareholder can cause the relevant company to divest itself of the assets purportedly bequeathed. That is, the shareholders do not manage the company's affairs; rather the directors do and a court should not construe a will in a manner that would or might place the directors in a position where their statutory duties as directors are in conflict with the willmaker's intentions, based on a conflation of ownership with management (or day-to-day conduct) of a company.

Conclusion

Despite the outcome in Wheatley, the principles from decisions such as O'Callaghan arguably could be extended to SMSFs, at least those which are sole member funds.

Ultimately both cases highlight the interplay of entity structuring and estate planning should never be underestimated - and highlight that holistic estate planning is always much more than simply a will.

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