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Court ruling provides clarity on whether superannuation is an estate asset

By Keeli Cambourne, Deputy Editor SMSF Adviser and Matthew Burgess, Director, View Legal

A recent Victorian court decision has provided a stark reminder of the interplay of superannuation entitlements and deceased estates, says a specialist legal practitioner.

Matthew Burgess, director of View Legal, said the case of Ghosh v Ghosh & Ors [2024] VSC 259 (Ghosh) is complicated but highlights the importance of thorough documentation when disputing assets in deceased estates, especially regarding superannuation.

“In all Australian jurisdictions other than NSW, superannuation is only an asset regulated by a will if the death benefit is paid to the deceased member's legal personal representative,” Burgess said.

“In the high-profile decision of Benz v Armstrong; Benz v Armstrong; Benz v Armstrong [2022] NSWSC 534 (Benz), the ‘notional estate’ rules that apply in NSW, provide that in certain circumstances assets or estates that have a connection to NSW, that are not owned personally by a deceased such as those held via an SMSF, can still be subject to attack when the estate itself is challenged.”

He noted that in the Benz case the personal assets of the deceased that would have passed to children from a first marriage under the will were negligible, however the application of the notional estate provisions instead created a pool of available assets in the region of $18 million sourced from a self managed superannuation fund.

“In all other Australian jurisdictions, the decision in Stock (as Executor of the Will of Mandie, Deceased) v N.M. Superannuation Proprietary Limited [2015] FCA 612 (Stock)is often cited as the starting point demonstrating the fact that superannuation death benefits are not an estate asset,” Burgess said.

“The decision in Stock was claimed as determinative in this most recent case of Ghosh as the basis for any superannuation entitlements to be ignored in proceedings challenging the estate.”

The facts in Ghosh were made extremely complicated as the parties involved were self-advised, with the court noting that a key party to the proceedings had shared many “untruths” that often “presented as bizarre and lacking in much in the way of proportion or reality”.

Burgess said the court accepted that Stock is authority for the proposition that superannuation is not an asset of an estate, and a trustee is not bound to follow the directions of a will.

“Even if superannuation is specifically mentioned in a will, it does not make it an asset subject to the terms of the will,” he said.

“This fact needed to be understood, however, it also depends on the facts of the case where a death benefit could be paid to the estate if there was a valid binding death benefit nomination (BDBN) in favour of the legal personal representative of a member.”

He continued that in Stock all relevant evidence was before the tribunal, which confirmed there was no such nomination and it was held that 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.

"Rather, the trustee of a superannuation fund must independently determine the distribution of a death benefit," Burgess said.

"In Ghosh, however, there was no evidence before the court in relation to the structuring of the superannuation arrangements and therefore the court refused to accept Stock as authority for a blanket rule that superannuation death benefits are never an asset of an estate."

Furthermore, in Ghosh whether superannuation may be an asset of the estate was held to be dependent on the relevant documents; particularly the trust deed and/or any BDBN, neither of which was before the court.

Burgess said the risks of relying on the rule in Stock were heightened in the circumstances given the lessons from cases such as McIntosh v McIntosh [2014] QSC 99, where it was held that without a valid BDBN an administrator of an estate has a duty to apply for payment of superannuation funds to the estate.

"While an administrator has no proprietary right to a superannuation death benefit, they do have standing to seek to compel the trustees of the fund to exercise their discretion to pay out the funds to the legal personal representative of the estate," he said.

"In many situations, therefore, a person otherwise entitled to administer a deceased estate may choose not to act, thereby relieving them from any duty to act in the best interests of the estate. This in turn allows the person to make an application for superannuation benefits to be paid to them personally, without their actions being challenged as a conflict of interest."

He concluded that ultimately in Ghosh the court ordered that all superannuation documentation needed to be produced to be considered and then determine whether the material gave rise to there being an asset for the benefit of the estate of the deceased member.

The material the court required to be produced included any trust deed, any BDBN and any document that might identify the trustee of the fund.