

## Advisers on notice over super and holistic estate planning

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

Two recent court cases highlight the need to adopt a holistic approach in relation tax and estate planning, particularly where superannuation benefits might form part of the estate, says a legal specialist.

Matthew Burgess, director of View Legal said the decision in *Stock (as Executor of the Will of Mandie, Deceased) v N.M. Superannuation Proprietary Limited* [2015] FCA 612 is a reminder of the fact that superannuation death benefits are not an estate asset.

In this particular case, the member died without making any binding nomination for his superannuation benefits, although binding nominations were permissible. He had made a non-binding nomination to his wife, however, she predeceased him.

The court heard the trust deed for the fund provided that if there was no binding nomination, the trustee retained the discretion to pay a death benefit to the member's dependants or legal personal representative (LPR). In this instance, the trustee of the super fund resolved to pay the death benefit to the member's dependants, namely three adult children, in equal shares.

The LPR challenged the distribution based on 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," Burgess said.

"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."

He added that instead a trustee must independently determine the distribution of a death benefit, unless there is a valid binding death benefit nomination.

"The court also confirmed that in making a determination, a super fund trustee need only show that their decision is fair and reasonable. Any court review of a trustee decision therefore did not need to analyse the trustee's processes or reasoning," he said.

Burgess said the more recent decision in *Neal v Brown* [2024] NSWSC 841 provides further clarity in relation to the above issues including in the context of so-called "fast death tax" – a tax that is imposed on superannuation members who die with a balance in superannuation, however have no tax dependants.

"Relevantly there were entitlements under two separate superannuation funds, with the willmaker stating as follows under their will:

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'I CONFIRM all net monies from my superannuation and pension entitlements in PortfolioOne Pension Service (PIN XXXXX XXXX) and OnePath OneAnswer Frontier Pension (PIN XXXXX XX) and all other pension, retirement or superannuation funds (if any) in my name or held in my favour at the time of my death be received by my Trustee into my Estate and then to be left and distributed in equal shares to those surviving me being [the Children] and for [Sebastien] (to be held in trust until he attains twenty five (25) years of age) for their respective benefit absolutely.'

"The relevance of the above clause was predicated on whether any superannuation entitlements passed to the willmaker's LPR for administration pursuant to the will."

In this case the court confirmed that in relation to the PortfolioOne balance, prior to death the willmaker had taken all steps necessary to convert that superannuation entitlement into cash, however the redemption and payment into the willmaker's bank account did not occur until after the member's death.

It stated that it was unnecessary to decide whether the redemption request could have been cancelled before it was processed although noted it likely could have been.

"The court said the important point was held to be that, as at the date of the willmaker's death, there was a functioning superannuation account which had not been converted into cash and the superannuation fund trustee's obligations with respect to that account were continuing," Burgess said.

"Therefore, the entitlement was not deemed and the separate gift of the proceeds of that entitlement under the will did not fail - that is the gift under the will took effect."

Further, the court continued, in contrast, the OnePath entitlement was different as the relevant equitable and statutory obligations of the superannuation fund trustee ceased when the monies were paid into the willmaker's bank account before death.

"It stated that the mixing of those monies with other funds prevented any tracing of funds that might have otherwise seen the specific gift not fail," Burgess said.

"Therefore the court held that there were no relevant superannuation or pension entitlements in relation to the OnePath account 'at the time of [the Deceased's] death' and thus those funds simply formed part of the residuary estate and were not part of the specific gift, as set out above."

Burgess added that in this case, as a minimum, the second order consequences of withdrawing superannuation benefits should have been considered and the will amended in lock step before proceeding with the withdrawals. "Indeed, ideally, the desired outcome in relation to superannuation entitlements should have been anticipated by what specialist holistic estate planning advisers often refer to as 'if, then' drafting under the will documentation, well before any withdrawal," he said.

"For example here, a provision that provided that if the superannuation benefits had been withdrawn prior to death, then a specific cash gift under the will to the intended beneficiary would be activated, rather than those entitled to the residuary estate becoming the recipients unintentionally."