

Establishing dependency – the parameters continue to expand

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The concept of dependency is fundamental in a range of estate planning situations.

Three high profile, and critical, examples are that dependency is a precondition before a potential beneficiary is entitled to be:

1. considered as a recipient of a superannuation death benefit;
2. treated as a tax dependant;
3. an eligible person in making a claim against a deceased estate (e.g. under the state-based family provision application or testator family maintenance provisions).

As is the case in many areas of estate planning, whether dependency is established in any particular situation will turn on the factual matrix.

For example, in relation to a superannuation death benefit, for tax purposes, the key tests set out under the legislation (being section 302-200 of the Tax Act) are that the member and (claimed dependant) must:

1. have a close personal relationship; and
2. live together; and:
 - (i) one or each of them provides the other with financial support; and
 - (ii) one or each of them provides the other with domestic support and personal care.

It is critical to note that all four of the above criteria must be met to satisfy the definition. One example of the rules in this area is the case of SCT D16-17/149.

In this case, the deceased member had nominated his sister under a non-lapsing binding death benefit nomination (BDBN).

The sister (who was claiming to be in a relationship of interdependency with the member and therefore permitted to be nominated under the BDBN) lived in a different country. In other words, the parties did not "live together".

As the definition of interdependency requires all elements to be established, an interdependency relationship, was automatically unable to be demonstrated, regardless of what other aspects of the criteria were satisfied.

In turn, this meant that what otherwise appeared to be a valid BDBN that the trustee would have been bound to follow was in fact void.

The decision noted that the sister may have been a dependant, by virtue of financial dependency on the deceased member; however no evidence was provided supporting this conclusion.

This meant the trustee was required to pay the death benefit to the members legal personal representative, on the basis that there were no dependants.

Recent development

While each area of the law concerning dependency has its own nuances, the principles developed in one discipline can provide a point of reference for other areas.

The recent decision in *Robinson v Glennon* [2025] NSWSC 770 provides another point of reference in the context of the (arguably ever evolving) definition of a spousal relationship of dependency.

The case related to a claim for further provision from a deceased estate.

The relevant legislative section in issue required the claimant be wholly or partly dependent on the deceased person and a member of the household of which the deceased person was a member; concepts the court reiterated were intentionally broad. Another section which may have provided grounds for a claim was predicated on cohabitation at the time of death, which was held to have not existed.

The deceased died without a valid will, and (but for the claim of the deceased's former life partner), under the intestacy regime the deceased's sister would have been entitled to the entire estate.

The factual matrix accepted by the court included the following indicia:

1. accommodation provided by the deceased for over a decade (see *Spata v Tumino* (2018) 95 NSWLR 706) - despite this being intermittent (punctured by a recurring pattern of alleged abuse and violence - often fuelled by alcohol and illicit substance abuse by the deceased - which ultimately resulted in apprehended domestic violence orders for both parties, which they apparently intermittently then agreed to ignore);
 2. domestic support provided by the deceased including household assistance and emotional support (again intermittently);
 3. lifestyle support, which included rent-free accommodation and contributions to wellbeing, despite a separate residence being maintained by the claimant (see *Vaughan v Hoskovich* [2010] NSWSC 706).
- Ultimately it was held that partial dependency was enough to satisfy the statutory requirements (see *McKenzie v Baddeley* [1991] NSWCA 197), particularly when factoring in the moral duties owed by the deceased. This was despite the fact that whatever relationship had existed likely permanently ceased some weeks before death (to the extent that the claimant was unaware of the death until reading about it on Facebook some six weeks later).

The extremely fluid nature of the relationship here that was sufficient to establish dependency arguably further supports the potential for a range of claimants not traditionally considered as enjoying substantive rights against a deceased estate, for example:

1. former partners;
2. informal carers;
3. friends and housemates; and
4. individuals involved in non-traditional relationships (including multiple spouses in non-exclusive or 'open' (search 'Mark Latham' for 2025 contemporary content) relationships).

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Ultimately, in an estate valued at circa \$300,000, the costs of the sister were at least \$155,000, which the barrister for the claimant (who acted on a pro bono basis) observed were 'absolutely extraordinary', the claimant was awarded the entirety of the estate. However, the sister was permitted to recover \$100,000 of her legal costs, together with a reimbursement of estate expenses she incurred (eg the funeral).

Arguably, in addition to the dependency principles, the case is also a reminder of the heuristic that it is possible to win every litigation, guaranteed: as long as you are the lawyer.

Or in proverb form: "in litigation, the lawyers are the only winner; and their victory is guaranteed by the system.