THIRTEEN WENTWORTH SELBORNE

Control of Superannuation Upon the Death of a Member

A paper presented at the Third Annual Asset Protection Conference
Television Education Network

15 October 2015
Gold Coast, Queensland

Denis Barlin
Barrister
13 Wentworth Selborne Chambers
180 Phillip Street
Sydney in the State of New South Wales
dbarlin@wentworthchambers.com.au
(02) 9231 6646

Contents

1. Keeping Control of the Fund After Death

1.1 Essential in considering control of superannuation after death include (among other things):

1.1.1 the terms of any binding death benefit nomination; and

1.1.2 determining who the "legal personal representative" of the deceased (after death) of the incapacitated person (before death but after incapacity) is.

Ioppolo & Anor v Conti & Anor [2015] WASCA 45

1.2 In *Ioppolo & Anor v Conti & Anor* [2015] WASCA 45, the Western Australian Court of Appeal (Martin CJ, Buss JA and Beech J) confirmed that upon the death of a member of a self-managed superannuation fund, the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**) permitted, but did not require the executor of the deceased member's estate to be appointed as a trustee of the SMSF. Of concern was section 17A of the SIS Act, which provides that:

> *Subsection 17A(1) of the SIS Act contains the "basic conditions" that need to be satisfied for funds other than single member funds, in order to be a self-managed super fund. Subsection 17A(2) of the SIS Act contains for the "basic conditions" for single member funds so as to meet the definition of a "self-managed superannuation fund".*

1.3 Subsection 17A(1) of the SIS Act provides:

> *(1) Subject to this section, a superannuation fund, other than a fund with only one member, is a **self managed superannuation fund** if and only if it satisfies the following conditions:*
>
> *(a) it has fewer than 5 members;*
>
> *(b) if the trustees of the fund are individuals--each individual trustee of the fund is a member of the fund;*
>
> *(c) if the trustee of the fund is a body corporate--each director of the body corporate is a member of the fund;*
>
> *(d) each member of the fund:*
>
> *(i) is a trustee of the fund; or*
> *(ii) if the trustee of the fund is a body corporate--is a director of the body corporate;*
>
> *(e) no member of the fund is an employee of another member of the fund, unless the members concerned are relatives;*

(f) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund;

(g) if the trustee of the fund is a body corporate--no director of the body corporate receives any remuneration from the fund or from any person (including the body corporate) for any duties or services performed by the director in relation to the fund.

1.4 Subsection 17A(2) of the SIS Act provides:

*(2) Subject to this section, a superannuation fund with only one member is a **self managed superannuation fund** if and only if:*

(a) if the trustee of the fund is a body corporate:

(i) the member is the sole director of the body corporate; or
(ii) the member is one of only 2 directors of the body corporate, and the member and the other director are relatives; or
(iii) the member is one of only 2 directors of the body corporate, and the member is not an employee of the other director; and

(b) if the trustees of the fund are individuals:

(i) the member is one of only 2 trustees, of whom one is the member and the other is a relative of the member; or
(ii) the member is one of only 2 trustees, and the member is not an employee of the other trustee; and

(c) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund;

(d) if the trustee of the fund is a body corporate--no director of the body corporate receives any remuneration from the fund or from any person (including the body corporate) for any duties or services performed by the director in relation to the fund.

1.5 However, whilst subsections 17A(1) and (2) of the SIS provide that members of a self-managed super fund must also be trustees, or directors of corporate trustees, subsection 17A(3) provides that certain other persons may be trustees, by providing that:

(3) A superannuation fund does not fail to satisfy the conditions specified in subsection (1) or (2) by reason only that:

(a) a member of the fund has died and the legal personal representative of the member is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during the period:

(i) beginning when the member of the fund died; and
(ii) ending when death benefits commence to be payable in respect of the member of the fund; or

(b) the legal personal representative of a member of the fund is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during any period when:

(i) the member of the fund is under a legal disability; or
(ii) the legal personal representative has an enduring power of attorney in respect of the member of the fund; or

(c) if a member of the fund is under a legal disability because of age and does not have a legal personal representative:

(i) the parent or guardian of the member is a trustee of the fund in place of the member; or
(ii) if the trustee of the fund is a body corporate--the parent or guardian of the member is a director of the body corporate in place of the member; or

(d) an appointment under section 134 of an acting trustee of the fund is in force.

1.6 Circumstances in which entity that does not satisfy basic conditions remains a self managed superannuation fund.

1.7 The term "legal personal representative" for the purposes of subsection 17A(3) of the SIS Act is defined in section 10 of the SIS Act as:

> *... means the executor of the Will or administrator of the estate of a Deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person.*

1.8 *Ioppolo v Conti* is authority for the proposition that the SIS Act permits, but does not require, the executor of a deceased member's estate to be appointed as a trustee of a self-managed super fund.

1.9 The broad facts in *Ioppolo v Conti* were that:

- Mrs Francesca Conti and Mr Augusto Conti established the "Conti Superannuation Fund" in 1992.
- The Conti Superannuation Fund was established pursuant to the terms of a trust deed.
- Pursuant to the trust deed, Mr and Mrs Conti were the Fund's trustees and members.
- The trustee mandated that the Fund was to be conducted pursuant to the terms of the SIS Act, so as to obtain favourable tax treatment which was given to complying superannuation funds.

- Since the establishment of the Fund (in 2002), Mr and Mrs Conti made contributions to the Fund. Those contributions were recorded in the accounts of the Fund as standing to the benefit of their respective member accounts.
- Mrs Conti passed away on 5 August 2010.
- On 28 October 2010, probate of Mrs Conti's Will was granted to her son and daughter, them being the executors of the late Mrs Conti's estate.
- Mrs Conti's son and daughter (who are the executors) were issue from a previous marriage of Mrs Conti (that is, they were not Mr Conti's biological children).
- On 3 February 2011, Mr Conti (in his capacity as trustee of the Fund) determined that the benefit standing to the account of his wife were to be paid to him rather than to any of her children. Mr Conti did this after obtaining legal advice.
- After making the determination, Mr Conti elected to take the benefit in the form of a pension, with the pension being paid to him out of the assets of the Fund.
- On 4 February 2011, Mr Conti resigned as a trustee of the Fund and Augusto Investments Pty Ltd was appointed the trustee of the Fund.
- Agusto Investments Pty Ltd was a company which Mr Conti was a sole director.

1.10 The executors commenced proceedings claiming:

- As a trustee of the Fund, Mr Conti was required pursuant to section 17A of the SIS Act to appoint one of them to act as a trustee of the Fund in place of the late Mrs Conti.
- Until such an appointment was made, Mr Conti had no power to deal with the interest that the late Mrs Conti had in the Fund in his capacity as trustee of the Fund.
- The executives contended that Mr Conti's determination to confer the interest of the late Mrs Conti to himself was void, and that Mr Conti had acted in bad faith in making the determination by preferring his own interest to the interest of Mrs Conti's children.

1.11 The Western Australian Court of Appeal dismissed the executor's claims, and upheld the decision at first instance (see *Ioppolo & Hesford v Conti* [2013] WASC 389).

1.12 Martin CJ at [71] considered that there were no words in subsection 17A(3) of the SIS Act which mandated the appointment of a legal personal representative to be a trustee, or a director of a corporate trustee of a self-managed superannuation fund. It was observed at [71] that:

> *Significantly, however, there are no words in s17A(3), or any inference of legislative intension to be drawn from the operation or effect of the subsection viewed in the context of the section or in the context of the SIS Act as a whole, to suggest that a fund is obliged to utilise the opportunities for compliance provided by the subsection either within any particular time, or at all, if there are other means by which the*

> *fund can be brought into compliance. Nor is there anything in the language in of the subsection or any inference of legislative intent to be drawn from the effect of the subsection viewed in the context of the section or the SIS Act as a whole to suggest that any constraint is placed upon the powers of the trustee unless and until the opportunities for compliance provided by the subsection are utilised.*

1.13 The other provisions in s17A(3) are, as the executors rightly concede, permissive rather than mandatory. There is no sufficient basis to construe par(a) of s17A(3) differently. Rather, Martin CJ at [72] observed that:

> *To the contrary, a consideration of other provisions of the SIS Act compels the conclusion that s17A(3) should be construed in accordance with its natural and ordinary meaning – that is, as providing opportunities for compliance with the other requirements of the section which might, or might not, be taken up. As I have noted, pt 6 of the SIS Act contains a number of provisions with respect to the governing rules of superannuation entities and includes s52 which contains a number of specific convents to which trustees have regulated funds are subject. If it had been the intention of the legislature to impose obligations upon trustees for the protection of the interests which beneficiaries or dependents of deceased members may have in the benefit standing to the account of a deceased member, Part 6 of the Act would have been the obvious place in which to provide such obligations, rather than in s17A which stipulates the conditions which must be met in order for a regulated fund to achieve the tax concessions which attend satisfaction of those conditions.*

1.14 The Western Australian Court of Appeal also rejected the executor's claim that Mr Conti had acted in bad faith in making the determination that the late Mrs Conti's interest in the Fund should be conferred on him. In the context of the burden of proof, Martin CJ at [81] observed of the lack of discharge of the burden that:

> *As it is the executors who assert that Mr Conti did not exercise a discretion conferred upon him as trustee of the Fund in a bone fide manner, they carry the burden of proving that assertions on the balance of probabilities. They have made no attempt to discharge that burden other than by asserting that an inference is to be drawn as to Mr Conti's reasons from the terms of the letter of advice received from Norton & Smailes. No attempt was made to adduce evidence as to the respective financial positions of Mrs Conti's children, as compared to Mr Conti, and Mr Conti was not cross-examined on his Affidavit. If and to the extent that Mrs Conti's wishes were relevant to the exercise of the discretion, as the Master pointed out, the evidence with respect to her wishes was equivocal, given the terms of the Will are inconsistent with binding beneficiary nomination forms which she executed both before and after her Will. It is therefore impossible to draw an inference of lack of bona fides from, for example, an assertive failure to take into account the clear and unequivocal wishes of a deceased.*

> *It was open to Mr Conti to consider that the subsequent execution of the binding nomination meant that the expression of intension in the Will had been superseded, and was no longer worthy of weight as an expression of the intention of the deceased member as to what should happen on her death.*

1.15 The Western Australian Court of Appeal noted that the Deceased had made binding beneficiaries nomination forms, which had both lapsed. Those nomination forms nominated Mr Conti as the recipient of a death benefit from the Fund. Martin CJ at [74] considered that:

> *There is a cogent argument to the effect that the beneficiary nomination form is executed by Mrs Conti, although deprived of their characteristic as being binding beneficiary nominations by the lapse of time, nevertheless, satisfied the requirement of identifying a person nominated by her as a person she wished to receive her benefit in the event of her death, which is an apt way of describing the role of a Nominated Dependent.*

1.16 As a result, Martin CJ considered that (given the lapsed nomination forms) the only way that the executors could succeed in their argument of lack of bona fides was to demonstrate that the *"... Mr Conti, in his capacity as trustee, failed to address the question of whether it would be inequitable or inappropriate to pay the benefit to himself..."* ([75]).

1.17 However, Martin CJ considered that that question did not need to be resolved as there was no evidence capable of sustaining the conclusion that the exercise of the discretion miscarried ([76]).

1.18 Martin CJ at [77] observed that:

> *In the course of presenting oral argument on these issues, Senior Counsel for the executors advanced a nuanced position not previously evident in either the pleadings, the proceedings before the Master, the grounds of appeal or the written submissions in support of those grounds. It was asserted that it should be concluded that there was in fact no exercise of discretion by the trustee, but rather, Mr Conti simply determined that he should have the benefit of Mrs Conti's interests in the Fund for himself. Assuming, for the sake of argument, that it is open, notwithstanding the way in which the case was conducted before the Master, it is difficult to see how this proposition adds anything to the executors' fundamental argument, which is to the effect that it should be concluded the exercise of the trustee's discretion miscarried because he did not give full and proper consideration to the competing interests of the prospective beneficiaries as required by the principle enunciated in Karger v Paul as developed by the High Court in Finch v Telstra Super Pty Ltd. But whichever way the argument is presented, it must fail on the evidence.*

1.19 Martin CJ observed that Mr Conti's evidence advanced a series of propositions, which was based on information that he received in advice from solicitors. These propositions included that the executors (in their capacity as children of the deceased) only have a right to be considered by the trustee in the exercise of the discretion of who to pay out any death benefit ([79]).

1.20 The executor's argument (which was not accepted) was that Mr Conti acted pursuant to the legal advice, but excluding that portion of the advice which refers to the right of Mrs Conti's children to be considered in the exercise of the trustee's discretion. The Court considered that *"there is simply no basis in evidence for drawing any inference to that effect"* ([80]).

1.21 It was also noted that there was a clause in the trust deed which provides that a trustee may exercise a power or a right even where there is a conflict of interest, provided that the power of right is exercised in a bona fide manner. There was no argument that that particular provision was offended.

2. Pensions and death of a member – what takes precedence – the pension or the binding death benefit?

2.1 Whilst issues surrounding binding death benefit nominations, or the exercise of a trustee's discretion to pay out a death benefit have been ventilated, an issue that has not been fully explored are the implications of a deceased member of a superannuation fund who was in receipt of a pension.

2.2 In particular, what takes precedence, a binding death benefit nomination, or the terms of a pension?

2.3 Subsection 59(1A) of the SIS Act provides that:

> *... the governing rules of a superannuation entity may, subject to a trustee of the entity complying with any conditions contained in the regulations, permit a member of the entity,* ***by notice given to a trustee of the entity in accordance with the regulations, to require a trustee of the entity to provide any benefits in respect of the member on or after the member's death to a person or persons mentioned in the notice****, being the legal personal representative or a dependant or dependants of the member.* [emphasis added]

2.4 Further, Sub-Regulation 6.17A(4) of the SIS Regulations provides that if certain other Sub-Regulations are satisfied (the satisfaction of which I may determine upon receiving further instructions), then a trustee of a superannuation fund ***must*** pay a benefit on or after the death of a member in accordance with a (binding) death benefit notice.

2.5 The Commissioner, in Self Managed Superannuation Fund Determination SMSFD 2008/3, entitled *Self Managed Superannuation Fund: is there any restriction in the Superannuation Industry (Supervision) legislation on a self managed superannuation fund trustee accepting from a member a binding nomination of the receipts of any benefits payable in the event of the member's death?* considers that both section 59 of the SIS Act, and Regulation 6.17A of the SIS Regulations do not apply to self-managed superannuation funds.

2.6 Further there is a view that if the Deceased had made a genuine 'reversionary pension', then the reversionary pensioner (pursuant to the terms of the reversionary pension) will override any nomination made in a binding death benefit nomination. This is because a pension is seen as a contractual arrangement, which overrides (or suspends) the operation of the trust deed.

2.7 In this regard, the Australian Taxation Office's (**'ATO'**) superannuation technical minutes of March 2010 (**'the Technical Minutes'**), the ATO considered the following scenario:

> *A member of a SMSF was in receipt of an account based pension in which his Wife was nominated as the reversionary. He also completed a valid BDBN in favour of his daughters. Following his death, the trustees are unsure which should take precedence - the reversionary nomination or the BDBN*

2.8 In such a circumstance (i.e. where there is a reversionary pension and binding death benefit nomination in place), there are three potential outcomes, either:

2.16.1 the pension remains on foot and the pension to the Wife continues until such time as the Wife dies. When that occurs, then balance in the original Deceased's account is then available for the trustees (of the Fund) to payout as a death benefit (as per the original Nomination); or

2.16.2 the pension remains on foot and now belongs to the Wife. In the event of the Wife's death, the benefits will be paid to the Wife's beneficiaries or to the Wife's estate; or

2.16.3 the reversionary element cannot fetter the trustee's powers and they are bound to stop the pension to the Wife and distribute the benefits as per the Nomination. Any contractual requirement is not able to be overturned by the requirements of the trustee to follow the law or the deed.

2.9 The ATO's view (which it should be noted is not necessarily the correct legal position) that in such a circumstance:

> *However, we would suggest that a pension that is a genuine reversionary pension, that is, one which under the terms and conditions established at the commencement of the pension reverts to a nominated (or determinable) beneficiary must be paid to* the reversioner*. It is only where a trustee has a discretion as to the beneficiary who is entitled to receive the deceased member's benefits and the form in which the benefits are payable that a death benefit nomination is relevant. It must be remembered that section 59 of the SIS Act and regulation 6.17A of the SISR are necessary because of the general trust law principle that beneficiaries cannot direct trustees in the performance of their trust.*

2.10 The issue is not free from doubt, and will depend upon (amongst other things):

2.10.1 the terms of the Fund's deed;

2.10.2 the terms of the Nomination; and

2.10.3 the terms of any pension, and whether it was a reversionary pension.

3. The New South Wales notional estate regime and superannuation

3.1 Whilst superannuation does not form part of the estate, it may form part of the "notional estate" pursuant to Chapter 3 of the *Succession Act 2006 (NSW)*.

3.2 The succession act allows a Court to make a "family provision order" in relation to an "eligible person" where:

- the Court is satisfied that "adequate provision for the proper maintenance, education or advancement in the life of the person" has not been made by the Will of the deceased person, or by operation of the Will's intestacy in relation to the estate of the deceased person or both (subsection 59(1) of the *Succession Act*; and
- the Court thinks that provision "out of" the estate of a deceased person ought to be made for the maintenance, education or advancement in life of the eligible person (subsection 59(2) of the *Succession Act*).

3.3 Further, subsection 63(5) of the *Succession Act* provides that the Court may make a family provision order "in relation to":

- property that is not part of the estate of the deceased person; or
- property that has been distributed,

if it is designated as "notional estate" of the deceased person by Court order made under Part 3.3 of the *Succession Act.*

3.4 Section 78 of the *Succession Act* provides that a Court may make an order designating property as "notional estate":

- only if a family provision order is made, and the actual estate cannot cover the provision;
- to cover the costs in the event that a claim is successful.

3.5 Section 80 of the *Succession Act* provides that the Court may make a notional estate order which designates property specified in the order as "notional estate" if the Court is satisfied that the deceased entered into a "relevant property transaction" before the deceased's death, and that that transaction is a transaction to which the section applies. The kinds of transactions that constitute "relevant property transactions" are contained in sections 75 and 76 of the *Succession Act*.

3.6 Subsection 80(2) provides that section 80 applies to relevant property transactions if:

- the transaction took effect within three years before the date of death of the deceased, and was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased for the maintenance, education or advancement in life of any person who was entitled to apply for a family provision order;
- transaction that took effect within one year before the date of death of the deceased and was entered into when the deceased had a moral obligation to make adequate provision, by Will or otherwise, for the proper maintenance, education or advance in life of any person who is entitled to apply for a family provision order which was substantially greater than any moral obligation the deceased to enter into the transaction;
- a transaction took effect or is to take effect on or after the deceased's death.

3.7 Section 75 of the *Succession Act* provides for transactions that are relevant property transactions:

> ***75 Transactions that are relevant property transactions***
>
> *(cf FPA 22 (1), (3) and (7))*
>
> *(1) A person enters into a relevant property transaction if the person does, directly or indirectly, or does not do, any act that (immediately or at some later time) results in property being:*

(a) held by another person (whether or not as trustee), or

(b) subject to a trust,

and full valuable consideration is not given to the person for doing or not doing the act.

(2) The fact that a person has entered into a relevant property transaction affecting property does not prevent the person from being taken to have entered into another relevant property transaction if the person subsequently does, or does not do, an act affecting the same property the subject of the first transaction.

(3) The making of a will by a person, or the omission of a person to make a will, does not constitute an act or omission for the purposes of subsection (1), except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to property that is not in the person's estate.

3.8 Section 76 of the *Succession Act* provides for examples of relevant property transactions being as follows:

76 Examples of relevant property transactions

(cf FPA 22 (4))

(1) The circumstances set out in subsection (2), subject to full valuable consideration not being given, constitute the basis of a relevant property transaction for the purposes of section 75.

(2) The circumstances are as follows:

(a) if a person is entitled to exercise a power to appoint, or dispose of, property that is not in the person's estate and does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that the property becomes held by another person (whether or not as trustee) or subject to a trust or another person (immediately or at some later time) becomes, or continues to be, entitled to exercise the power,

(b) if a person holds an interest in property as a joint tenant and the person does not sever that interest before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that, on the person's death, the property becomes, by operation of the right of survivorship, held by another person (whether or not as trustee) or subject to a trust,

(c) if a person holds an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, and the person is entitled to exercise a power to extinguish the other interest in the property and the power is not exercised before the person ceases (because of death or the occurrence of any other event) to be so entitled with the result that the other interest in the property continues to be so held or subject to the trust,

(d) if a person is entitled, in relation to a life assurance policy on the person's life under which money is payable on the person's death or if some other event occurs to a person other than the legal representative of the person's estate, to exercise a power:

(i) to substitute a person or a trust for the person to whom, or trust subject to which, money is payable under the policy, or

(ii) to surrender or otherwise deal with the policy,

and the person does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so,

(e) if a person who is a member of, or a participant in, a body (corporate or unincorporate), association, scheme, fund or plan, dies and property (immediately or at some later time) becomes held by another person (whether or not as trustee) or subject to a trust because of the person's membership or participation and the person's death or the occurrence of any other event,

(f) if a person enters into a contract disposing of property out of the person's estate, whether or not the disposition is to take effect before, on or after the person's death or under the person's will or otherwise.

(3) Nothing in this section prevents any other act or omission from constituting the basis of a relevant property transaction for the purposes of section 75.

(4) For the purposes of this Chapter, in the circumstances described in subsection (2) (b), a person is not given full or any valuable consideration for not severing an interest in property held as a joint tenant merely because, by not severing that interest, the person retains, until his or her death, the benefit of the right of survivorship in respect of that property.

3.9 Given the scope of "relevant property transactions", the act or omission of making a binding death benefit nomination (or changing a binding death benefit nomination) would be sufficient to be a relevant property transaction with the result that the death benefit would be within the scope of a notional estate order.

4. Estate planning and superannuation generally

4.1 A member's interest in a superannuation fund does not automatically form part of their estate.

4.2 In the context of estate planning and superannuation, there are a number of considerations, including:

- when benefits must be paid?
- who can receive the benefits?

- in what form should those benefits be taken? and
- the taxation implications for the beneficiaries?

What is a 'death benefit'?

4.3 Regulation 6.21 of the SIS Regulations provides that a trustee of a regulated superannuation fund is required to cash a member's benefit **as soon as practicable** after a member's death.

4.4 The term "as soon as practicable" is not defined for the purposes of Regulation 6.21 of the SIS Regulations.

4.5 Except if there is an effective death benefit nomination, the superannuation fund's trustee has a discretion as to which dependants it should distribute a deceased's benefits.

4.6 The term 'superannuation death benefit' is defined in section 307-5 of the 1997 Act. Amongst other things, item 1 of column 3 in that section defines a 'superannuation death benefit as '*A payment to you from a superannuation fund, after another person's death, because the other person was a fund member.*'

4.7 Section 307-10 of the 1997 Act sets out the payments which are not considered 'superannuation death benefits'.

Payment of death benefits

4.8 A payment from a superannuation fund in consequence of the death or a member can be paid either:

1. directly to a beneficiary; or
2. to the executor of the deceased's estate or a trustee of a testamentary trust, with the amounts then paid to a beneficiary as a distribution from the estate or the trust.

4.9 Broadly speaking, upon death a member's superannuation interest is transferred from the member's fund, being a 'death benefit'. Subject to the terms of the particular trust deed of the superannuation fund, the transfer may be effected by either a lump sum payment, an income stream, or both.

4.10 Regulation 6.21(2) of the SIS Regulations provides that a lump sum must not be paid in more than two instalments.

4.11 Further, there are limitations with respect to the payment of income streams.

Timing of payment of death benefits

4.12 Regulation 6.21(1) of the SIS Regulations provides that '*… a member's benefits in a regulated superannuation fund must be cashed as soon as practicable after the member dies.*' That is, there is no prescribed time in which a death benefit must be paid. All that is required is that the payment must be made as soon as practicable after death.

Lump sum payments

4.13 Section 302-60 of the 1997 Act provides that lump sum payments received by a dependant of the deceased is tax free. The amount is treated as non-assessable non-exempt income.

4.14 However, if a lump sum is paid to a non-dependant, then the tax free component will not be subject to tax (see section 302-140 of the 1997 Act), but the taxable component of the lump sum is included in the recipient's assessable income and subject to tax at marginal rates. Section 302-145 of the 1997 Act provides for a tax offset mechanism, that ensures that the rate of tax on the tax free component does not exceed 30% (plus Medicare levy), whereas the rate of tax on the tax free component does not exceed 15% (plus Medicare levy).

Superannuation lump sum death benefit	**Dependent**	**Non-dependent**	
		Taxed element	**Untaxed element**
Tax free component	Tax free	Tax free	Tax free
Taxable component	Tax free	15%	30%

4.15 The possible methods of transfer of a member's interest upon death depend on the character of the recipient, with the possibilities being:

Recipient	Permitted benefit
Spouse	Either or both a lump sum and/or income stream
Dependent children under the age of 18	Either or both a lump sum and/or income stream. However, income stream must cease at 25.
Non-dependent children over the age of 18	Lump sum
Dependent children between 18 and 25	Either or both a lump sum and/or income stream. However, income stream must cease at 25.
Dependent child over the age of 25	Lump sum
Dependent grandchildren	Either or both a lump sum and/or income stream
Non-dependent grandchildren	Lump sum (made via estate)
Non-dependent (i.e. not child or spouse)	Lump sum (made via the estate)
Estate	Lump sum

Income streams

4.16 Section 302-65 of the 1997 Act provides that a superannuation income stream is tax free if either the deceased or the dependant is aged at least 60 as at the time of death.

4.17 If a superannuation income stream is paid to a dependent upon death, and neither the deceased or the dependant are aged at least 60 at the time of death, then:

- that part of the income stream which is the ***tax free component*** is tax free;
- that part of the income stream which is paid from a ***taxed component*** is assessable income for the dependent. The dependent is entitled to a tax offset which is equal to 15% of the element taxed in the fund. The income stream becomes tax free when the recipient turns 60 years of age;
- that part of the income stream which is paid from an ***untaxed component*** is assessable income for the dependent. The dependent will receive a tax offset of only 10%, but only when they attain the age of 60.

4.18 A non-dependent is unable to receive a superannuation income stream. Such income streams must be commuted, and paid to the non-dependant as a lump sum.

Who is a dependent?

4.19 The term 'dependent' for taxation purposes is defined in section 302-195 of the 1997 Act. Subsection 302-195 of the 1997 Act provides that:

> *'(1) A **death benefits dependant**, of a person who has died, is:*
>
> *(a) the deceased person's spouse or former spouse; or*
>
> *(b) the deceased person's child, aged less than 18; or*
>
> *(c) any other person with whom the deceased person had an interdependency relationship under section 302-200 just before he or she died; or*
>
> *(d) any other person who was a dependent of the deceased person just before he or she died. '*

4.20 That is, a 'death benefit dependant' with respect to a deceased includes:

- the deceased's spouse;
- the deceased's former spouse;
- the deceased's child, provided that at the time of death the child is under the age of 18;
- a person with whom the deceased had an 'interdependency relationship' just before the deceased died;
- any other person who was a 'dependant' of the deceased just before the death of the deceased; and
- under section 302-195 of the 1997 Act, a death benefits dependant also includes a person who receives a superannuation pension or annuity if the annuity or pension commenced before 1 July 2007 as a result of the death of another person.

Interdependency relationship

4.21 The term 'interdependency relationship' for the purposes of paragraph 302-195(1)(c) of the 1997 Act is provided for in section 302-200 of the 1997 Act:

'What is an interdependency relationship?

*(1) Two persons (whether or not related by family) have an **interdependency relationship** under this section if:*

(a) they have a close personal relationship; and

(b) they live together; and

(c) one or each of them provides the other with financial support; and

(d) one or each of them provides the other with domestic support and personal care.

*(2) In addition, 2 persons (whether or not related by family) also have an **interdependency relationship** under this section if:*

(a) they have a close personal relationship; and

(b) they do not satisfy one or more of the requirements of an interdependency relationship mentioned in paragraphs (1)(b), (c) and (d); and

(c) the reason they do not satisfy those requirements is that either or both of them suffer from a physical, intellectual or psychiatric disability.

(3) The regulations may specify:

*(a) matters that are, or are not, to be taken into account in determining under subsection (1) or (2) whether 2 persons have an **interdependency relationship** under this section; and*

*(b) circumstances in which 2 persons have, or do not have, an **interdependency relationship** under this section.'*

4.22 That is, two individuals have an independency relationship if they satisfy ***all*** of the following conditions (see section 302-200 of the 1997 Act):

- they have a close personal relationship;
- they live together;
- one or each of them provides the other with financial support; and
- one or each of them provides the other with domestic support and personal care.

Life insurance and superannuation funds

4.23 An important part of a financial plan is life insurance. Generally speaking, a life insurance payout can:

1. form part of the deceased's estate;
2. be directed to a specific beneficiary; or
3. be paid to the policy owner.

4.24 The purpose of life insurance is to provide a lump sum benefit upon death of the life insurer. Life insurance which is 'term insurance' is guaranteed to be renewable (i.e. the policy cannot be changed) whilst the premiums continue to be paid. Such a policy can be held within a superannuation fund, with the result that upon death of the individual insured, the proceeds are paid to the fund. This has the result of increasing the death benefit payable.

4.25 Upon death, the proceeds of life insurance policies held by the superannuation fund are paid directly to the fund (as the policy owner). The proceeds are allocated to the member's fund as a taxable component.

4.26 The death benefit is paid tax free as a lump sum to a death benefit dependent. However, such a payment made to a non-financial dependant will be taxable (with no low rate threshold for the taxable component.

4.27 The taxable component paid from insurance proceeds may be either a taxed component or an untaxed component. A higher rate of tax is payable on an untaxed component received by a non-death benefit dependent. If:

- the superannuation fund **has not** claimed a tax deduction for the premiums paid for the insurance policy, then the ***taxable component*** is a ***taxed component***; and
- the superannuation fund **has** claimed a tax deduction for the premiums paid for the insurance policy, then the ***taxable component*** is an ***untaxed component***.

4.28 Further, in the year that a death benefit is made, the trustee can choose to claim a deduction for the future service period of that member instead of claiming a tax deduction for the premium paid on the insurance policy. This strategy will only be beneficial if the fund is in accumulation (i.e. tax paying) phase, and not income phase.

Binding nominations in the context of self-managed superannuation fund

4.29 Section 59 of the SIS Act provides that:

'(1) Subject to subsection (1A), the governing rules of a superannuation entity other than a self managed superannuation fund must not permit a discretion under those rules that is exercisable by a person other than a trustee of the entity to be exercised unless:

(a) those rules require the consent of the trustee, or the trustees, of the entity to the exercise of that discretion; or

(b) if the entity is an employer-sponsored fund:

(i) the exercise of the discretion relates to the contributions that an employer-sponsor will, after the discretion is exercised, be required or permitted to pay to the fund; or

(ii) the exercise of the discretion relates solely to a decision to terminate the fund; or

(iii) the circumstances in which the discretion was exercised are covered by regulations made for the purposes of this subparagraph.

(1A) Despite subsection (1), the governing rules of a superannuation entity may, subject to a trustee of the entity complying with any conditions contained in the regulations, permit a member of the entity, by notice given to a trustee of the entity in accordance with the regulations, to require a trustee of the entity to provide any benefits in respect of the member on or after the member's death to a person or persons mentioned in the notice, being the legal personal representative or a dependant or dependants of the member.

(2) If the governing rules of a superannuation entity are inconsistent with subsection (1), that subsection prevails, and the governing rules are, to the extent of the inconsistency, invalid.'

4.30 Further, section 31 of the SIS Act provides that regulations may be made so as to provide operating standards for superannuation fund. Relevantly, Regulation 6.17A of the *Superannuation Industry (Supervision) Regulations 1993* (Cth) provides that:

'6.17A Payment of benefit on or after death of member (Act, s 59 (1A))

(1) For subsections 31(1) and 32(1) of the Act, the standard set out in subregulation (4) is applicable to the operation of regulated superannuation funds and approved deposit funds.

(2) For subsection 59(1A) of the Act, the governing rules of a fund may permit a member of the fund to require the trustee to provide any benefits in respect of the member, on or after the death of the member, to the legal personal representative or a dependant of the member if the trustee gives to the member information under subregulation (3).

(3) The trustee must give to the member information that the trustee reasonably believes the member reasonably needs for the purpose of

understanding the right of that member to require the trustee to provide the benefits.

(4) Subject to subregulation (4A), and regulations 6.17B, 7A.17 and 7A.18, if the governing rules of a fund permit a member of the fund to require the trustee to provide any benefits in accordance with subregulation (2), the trustee must pay a benefit in respect of the member, on or after the death of the member, to the person or persons mentioned in a notice given to the trustee by the member if:

(a) the person, or each of the persons, mentioned in the notice is the legal personal representative or a dependent of the member; and

(b) the proportion of the benefit that will be paid to that person, or to each of those persons, is certain or readily ascertainable from the notice; and

(c) the notice is in accordance with subregulation (6); and

(d) the notice is in effect.

(4A) The trustee is not required to comply with subregulation (4) if the trustee:

(a) is subject to a court order that has the effect of restraining or prohibiting the trustee from paying a benefit in respect of the member in accordance with a notice of the kind described in that subregulation; or

(b) is aware that the member of the fund is subject to a court order that:

(i) requires the member to amend or revoke a notice of that kind that the member has given the trustee; or

(ii) has the effect of restraining or prohibiting the member from giving a notice of that kind.

(5) A member who gives notice under subregulation (4) may:

(a) confirm the notice by giving to the trustee a written notice, signed, and dated, by the member, to that effect; or

(b) amend, or revoke, the notice by giving to the trustee notice, in accordance with subregulation (6), of the amendment or revocation.

(6) For paragraphs (4) (c) and (5) (b), the notice:

(a) must be in writing; and

(b) must be signed, and dated, by the member in the presence of 2 witnesses, being persons:

(i) each of whom has turned 18; and

(ii) neither of whom is a person mentioned in the notice; and

(c) must contain a declaration signed, and dated, by the witnesses stating that the notice was signed by the member in their presence.

(7) Unless sooner revoked by the member, a notice under subregulation (4) ceases to have effect:

(a) at the end of the period of 3 years after the day it was first signed, or last confirmed or amended, by the member; or

(b) if the governing rules of the fund fix a shorter period — at the end of that period.'

4.31 However, in Self Managed Superannuation Funds SMSFD 2008/3, entitled *Self Managed Superannuation Funds: is there any restriction in the Superannuation Industry (Supervision) legislation on a self managed superannuation fund trustee accepting from a member a binding nomination of the recipients of any benefits payable in the event of the member's death?*, the Commissioner of Taxation observed that:

> *'Section 59 of the Superannuation Industry (Supervision) Act 1993 (SISA) and regulation 6.17A of the Superannuation Industry (Supervision) Regulations 1994 (SISR) do not apply to self managed superannuation funds (SMSFs). This means that the governing rules of an SMSF may permit members to make death benefit nominations that are binding on the trustee, whether or not in circumstances that accord with the rules in regulation 6.17A of the SISR.*
>
> *2. However, a death benefit nomination is not binding on the trustee to the extent that it nominates a person who cannot receive a benefit in*

accordance with the operating standards in the SISR. The relevant operating standards are mentioned in Appendix 1 of this Determination.'

4.32 As a result, before a death benefit nomination is made, regard should be given to the particular constituent documents for the fund so as to determine what (if any) death benefit nominations can be made. In the event that the constituent documents are silent on the matter, then no nomination can be made.

4.33 Further, if the constituent documents provide that binding death benefit nominations may be made under the SIS Act, and because the relevant binding death benefit rules in the SIS Act do not apply to self-managed superannuation funds, such a provision will not allow a member to make such nominations.

4.34 It should be noted that the jurisdiction of the Superannuation Complaints Tribunal does not extend to decisions made by trustees of self-managed superannuation funds or certain public sector superannuation schemes. As a result, self-managed superannuation funds are a valuable mechanism to ensure that a death benefit is paid as directed by the deceased member.

4.35 Further, because death benefits are not dealt with under a will, legal challenges can be greatly reduced by directing payments from a self-managed superannuation fund upon death directly to a person specified by the deceased, as opposed to having such payments directed to the estate of the deceased.

5. Section 35 of the Succession Act 2006 (NSW)

5.1 Section 35 of the *Succession Act 2006 (NSW)* may have unintended taxation consequences in the event that a death benefit is paid through an estate.

5.2 Regulation 6.21 of the *Superannuation Industry (Supervision) Regulations 2004 (Cth)* (SIS Regulations) provides that *"... a member's benefits in a regulated superannuation fund must be cashed as soon as practicable after the member dies."* The form in which a benefit may be cashed is provided for in regulation 6.21(2) of the SIS Regulations, which includes a single lump sum (or an interim lump sum or one or more pensions).

5.3 Regulation 6.22 (2) of the SIS Regulations provides that a death benefit may be paid to either:

- the members legal personal representative;
- one or more of the member's dependents.

5.4 That is, a death benefit, being a lump sum, may be paid to a member's legal personal representative, which means it is in effect paid into the estate. Of course, it is not automatically the case that a death benefit forms part of the estate (see for example *McFadden v Public Trustee for Victoria* [1981] 1 NSWLR 15).

5.5 However, if a death benefit is paid into an estate then section 35 of the *Succession Act* needs to be considered. That section provides:

> *(1) If a disposition of property is made to a person who dies within 30 days of after the testator's death, or, if that or another person for survival appears in the Will, or, if that or another period for survival appears in the Will, the Will is to take effect as if the person had died immediately before the Testator; or*
> *(2) This section does not apply if a contrary intention appears in the Will;*
> *(3) A general requirement or condition that a beneficiary survive the testator does not indicate contrary intention for the purpose of this section.*

5.6 Section 35 of the *Succession Act* comes into play when considering whether the final recipient of the death benefit (or parts of the death benefit) are death benefit dependents. Section 302-10 of the 1997 Act provides that:

> *(1) This section applies to you if:*
>
> *(a) You are the trustee of a deceased estate; and*
> *(b) You receive a superannuation death benefit in your capacity as trustee.*
>
> *(2) To the extent that one or more beneficiaries of the estate who were death benefit dependents of the deceased have benefited or may be expected to benefit, from the superannuation death benefit:*
>
> *(a) the benefit is treated as if it had been paid to you as a person who was a death benefits dependent of the deceased; and*
> *(b) the benefit is taken to be income to which no beneficiary is presently entitled.*
>
> *(3) To the extent that one or more beneficiaries of the estate who were not death benefits dependents of a deceased have benefited or may be expected to benefit, from the superannuation death benefit:*
>
> *(a) the benefit is treated as if it had been paid to you as a person who was not a death benefits dependent of the deceased; and*
> *(b) the benefit is taken to be income to which no beneficiary is presently entitled.*

5.7 That is, if a superannuation death benefit is paid to an estate, then the executor of that estate needs to determine whether the ultimate recipient of the death benefit is a "death benefits dependent" or not. If the ultimate recipient is not a death benefit dependent, then the taxable component (taxed element) (being the concessional contributions of the

deceased member) is subject to tax at 16.5%. Alternatively, if the actual or expected recipient of the death benefit dependent is a "death benefit dependent", then the death benefit will be tax free.

5.8 For example, if in the deceased's Will, the whole of the estate goes to the deceased's spouse, (who is a "death benefit dependent"), then any death benefit paid by a trustee of a superannuation fund into the estate should not be subject to tax. This is because the death benefit will, (or at least is expected to) be paid to the spouse (the death benefit dependent).

5.9 However, in the event that section 35 of the *Succession Act* is not displaced, and the spouse is deemed to have predeceased the deceased on the basis of section 35 (for example if section 35 has not been displaced, and the surviving spouse does not survive the predeceasing spouse by 30 days), then it cannot be said that it is expected that the surviving spouse will receive the superannuation death benefit.

5.10 However, if section 35 is displaced in the Will (for example, if the Will specifically says that section 35 of the *Succession Act* does not apply), and the surviving spouse does not survive the former spouse by 30 days, then subject to the period in which the death benefit is within an unadministered estate, it may just be that it is expected that the surviving spouse does benefit, or that it goes to the surviving spouses estate and dealt with that way (that is tax free).

6. Succession post-mortem and testamentary succession

6.1 The act of nominating a beneficiary who is to take a death benefit is an example of succession post-mortem, which is not the same as testamentary succession.

6.2 In *Williams v Federal Commissioner of Taxation* (1950) 81 CLR 359, a contract of life insurance appointed the insured's wife a beneficiary to whom the money should be paid, to be held by her on certain trusts. Williams J did not accept the contention that such a contract was testamentary. The fact that the insured's death was the event which made the insurer's promise to pay the widow operative, did not make the contract testamentary. Williams J at [370] observed the following contentions:

> *It is contended for the appellants that since Craig by his Will appointed his widow sole executrix and gave her his whole estate, she, immediately on his death, became beneficially entitled in possession to the whole of his assets subject to the payment thereout of any other assets of his death duties, funeral and testamentary expenses. Accordingly, she acquired under the Will an immediate beneficial interest in the insurance monies on payment as well as a legal interest under the Deed and she was under no obligation to pay them to herself as Executrix but entitled to retain them for her own use and benefit.*

> *The monies therefore never became part of the actual personal estate of the deceased. On the other hand, it is contended for the respondent that Craig was the complete legal and beneficial owner of the policy at the time of his death, that the Deed of Appointment was a mere revocable mandate to collect the monies which was revoked by Craig's death, and that if it gave the widow any rights it was testamentary in character and void because it had not been executed as a Will.*

6.3 Williams J at [379] held that:

> *The simplest way to dispose of these contentions will to be state shortly what I conceive to be the true legal position. In my opinion the deed is not a mere mandate for the widow to receive the monies which was revoked by Craig's death and is not of a testamentary character. The authority for the widow to claim the monies when they became payable on Craig's death is part of the contract made between the Insurance Office and Craig, and his part of the contract would like any other part be varied only by the mutual consent of the parties. Mrs Craig survived her husband, and he did not revoke the deed in his lifetime, so that under this contract she was the proper payee of the monies. Further the deed is not a testamentary document for it is no objection to the validity of a deed that the death of a person is the event upon which an obligation is to be fulfilled. The promises which it contained are covenants by the wife to collect the insurance monies on Craig's death and apply them as therein provided. Such covenants are not testaments… It follows that in my opinion the insurance monies were lawfully paid to the widow by the Insurance Office. The widow was not a party to the contract of insurance and could not enforce it, but it was enforceable either by Craig and his personal representatives or by the Insurance Office, and the Insurance Office was entitled to insist on his contractual right to pay the monies to the widow and to no one else. On payment the widow became the legal owner of the monies and, if a deed had not provided for their disposition, the question would then have arisen as to the beneficial ownership…*

6.4 Dixon and Evatt JJ in *Russell v Scott* (1936) 55 CLR 440 also observed that succession post-mortem is not the same as testamentary succession. *Russell v Scott* concerned a joint bank account which was in the name of an elderly lady and her nephew. The nephew, assisted his aunt during her lifetime, but did not contribute into the account. The account was kept in funds by the payment from the aunt's investments. The account was used solely for the purposes of supplying the aunt's needs. In this regard, the nephew withdrew money as and when the aunt needed, with withdrawal slips being signed by both the aunt and the nephew. Dixon and Evatt JJ at [450] observed that:

> *She… [the aunt] … also desired that her nephew should benefit by having whatever should stand at the credit of the account at her death, and by means of the account she intended to effectuate this desire. But until her death the account was to be used for the purpose of supplying her wants.*

6.5 That is, the aunt intended (and told the nephew and others) that any balance remaining in the account upon her death would pass to her nephew. It was a finding of fact that the

aunt intended her nephew to take beneficially whatever balance stood to the credit of the account upon her death.

6.6 The contest was whether the nephew (as survivor) took the balance of the account, or whether the nephew held the balance in the account pursuant to a resulting trust in favour of the aunt and her estate.

6.7 It was held that the presumption of a resulting trust in favour of the aunt and her estate was rebutted. The nephew's legal right by survivorship to the balance of the account prevailed, and was not the subject of any resulting trust.

6.8 Dixon and Evatt JJ at [453] – [455] observed that:

> *In principle, there is no reason why, when at law a chose in action accrues to the survivor of two persons in whom it was jointly vested, equity should fix the survivor with a result in the trust in favour of the personal representative for the deceased who furnished the value it possesses, if the chose in action was so vested by the deceased with the purpose of imparting beneficial ownership to the survivor on his death. The reason which is assigned for such a resulting trust rests at bottom upon the notion that the deceased, by intending to reserve the right in her lifetime of applying all or any of the money in the account for her own purposes and by continuing in fact to continue to enjoy the use of that money, retain the full beneficial ownership of the property which in law vested in herself and her nephew jointly in consequence of the account standing in the names of both of them. For it is said that the deceased's intention that her nephew on surviving her should take the amount of the bank account is a testamentary wish to which effect could be given only by a duly executed Will. This must mean that, while retaining full beneficial property in a corpus, she intended that on her death some other person should succeed her to property in that corpus or to some interest therein in which he was not before entitled if absolutely or contingently, and to which the law gave him not title to succeed.* ***It is only in this sense that an intention to benefit can be said to be testamentary. Law in equity supply many means by which the enjoyment of property may be made to pass on death. Succession post-mortem is not the same as testamentary succession. But what can be accomplished only by a Will is a voluntary transmission on death of an interest which up to the moment of death belongs absolutely and indefeasibly to the deceased. This was not true of the chose in action created by opening and maintaining the joint bank account.*** *At law, of course, it was joint property which would accrue to the survivor. In equity, the deceased was entitled in her lifetime so as to deal with the contractual rights conferred by the chose in action as to destroy all its value, namely, by withdrawing all the money at credit. But the elastic or flexible conceptions of equitable proprietary rights or interest do not require that, because this is so, the joint owner of the chose in action should in respect of the legal right vested in him be treated as a trustee to the entire extent of every possible kind of beneficial interest or enjoyment. Doubtless a trustee he was during her lifetime, but the resulting trust upon which he held did not extend further than the donor intended; it did not exhaust the entire legal interest in every*

contingency. In the contingency of his surviving the donor and of the account then containing money, his legal interest was allowed to take effect unfettered by a trust. In respect of his jus accrescendi his conscience could not be bound. For the resulting trust would be inconsistent with the true intention of that person upon whose presumed purpose it must depend. That is, testamentary succession is what can be accomplished only by Will, being the voluntary transmission on death of an interest which up to the moment of death belongs absolutely and indefeasibly to the deceased.

7. Nomination of beneficiary of a death benefit – McFadden v Public Trustee for Victoria (1981) 1 NSWLR 15

7.1 *McFadden v Public Trustee for Victoria* (1981) 1 NSWLR 15 was an application by trustees under a contributory life assurance and pension scheme for employees, who were seeking declarations and judicial advice relation to the destination of funds which came into their hands as a consequence of the death of an employee who was, at the time of his death, a member of the scheme.

7.2 The employees' pension scheme was set up by way of a deed, executed by, and rules adopted by, an employer and trustee. Employees were permitted to join the scheme by becoming contributors.

7.3 Pursuant to the scheme, the trustee would purchase and maintain (out of funds provided by the employer and partly by the employee), a policy of assurance which provided a lump sum payable upon the death of a contributing employee provided that the death occurred before the employee attained the age of 65. The rules of the scheme provided that the lump sum was held by the trustees *"… upon trust for such dependent or dependants of the contributor hereinafter called "the designated beneficiary" as the contributor shall have by writing under his hand which shall be deposited with the Trustees prior to his death and shall be revokable or by Will or Codicil appointed for the sole use and benefit of the designated beneficiary".*

7.4 Holland J held that neither:

- the act of an employee in joining the scheme, nor the nomination made by a contributing employee in exercise of the right reserved by the rules of the scheme in relation to the death benefit, was a testamentary disposition which required execution and attestation as for a valid Will;
- the act of an employee in becoming a member of the scheme was that of entering into an immediately binding contract for the creation of a trust with respect to future property (being the death benefit), which may or may not happen.

7.5 Holland J at [30] observed of the act of joining the scheme:

> *In my opinion, the submission that the deceased's act of joining in the scheme was testamentary is to be rejected because his act, shortly stated, was an act of participation in the setting up of a trust inter vivos as to the subject property. Therefore, the deceased did not have to execute the deed in the manner acquired for a valid Will in order to make the deed effective.*

7.6 Further, at [30] Holland J observed of the right to nominate a beneficiary:

> *The submission that the exercise by the deceased of the right to nominate a beneficiary… was testamentary must, in my opinion, also be rejected. Viewed as a term of a subsisting trust, the right is of the nature of a power of appointment inter vivos reserved or given by a trust instrument to the settlor or some other donee.*

7.7 Holland J at [30] further observed that:

> *The law has long accepted such powers as being valid even if the power is not only to appoint but also to revoke one appointment and make another ad infinitum. If open to revocation and reappointment, the power confers a right of determining the beneficiary of a trust which is ambulatory until the death of the donee of the power but that does not invalidate the power.* The property is regarded has having been already disposed of inter vivos by having been made the subject of the trust and the last exercise of the power subsisting at the death of the person in whom the power is vested is treated as having, at the date of such exercise, completed the disposition by filling in a blank in the trust in his lifetime. Thus it is not the death of the donee of the power that consummates the disposition. It is the exercise of the power prior to death.

7.8 That is, Holland J considered that the nomination of a beneficiary who is to take upon the death of a member of a superannuation scheme, is a power of appointment. That power is exercised by the nominator. The disposition of the relevant property follows the exercise of the power, but the power may be revoked before death.

7.9 On that basis, a nominated beneficiary would have a vested (in interest but not in possession) interest, and which is defeasible.

7.10 Holland J further observes at [30] that:

> *Another feature of the doctrine of powers is that the donor may stipulate the manner of exercise and, if he does so, the stipulated manner, whatever it be and no other, will be an effective exercise of power. The only qualification here is that one of the methods or method of exercise stipulated is by Will and there is an attempt to exercise the power by that method, the attempt will not be valid unless the requirements for due execution of a Will are satisfied.*

7.11 That is, regard needs to be given to the manner in which the power may be exercised. The rules with respect to testamentary nominations may apply if the method of exercising the power requires that such rules apply.

7.12 In the context of superannuation, the effect of Regulation 6.17A of the SIS Regulations, which requires two adult witnesses who are not beneficiaries, to witness a death benefit nomination.

7.13 Clearly, in the context of a nominated beneficiary, where there is a power to revoke and reappoint, the rights of the beneficiary is vested (in interest but not in possession) defeasible and (possibly) contingent.

7.14 Holland J at [29]-[30] observed that the *"… disposition of the property does not require or await the death of the contributor. The property is disposed of in the contributor's lifetime, disposed of by his having become a party to a contractual scheme an inevitable consequence of which is a creation of this trust".*

8. Reviewing a trustee's discretion

8.1 The payment of a death benefit is a power. Broadly speaking, there are two types of powers, being *"mere powers"* and *"trust powers"*.

8.2 Generally speaking, a "*mere power"* is a discretionary power which a trustee may exercise. In the event that a trustee does not exercise a mere power, then the express provisions of a trust deed may apply.

8.3 An example of a *"mere power"* is a power to appoint income in a discretionary trust. A trustee is not obliged to appoint the income, and if no appointment is made, then the takers in default will be entitled to the income.

8.4 However, a *"trust power"* is one in which a trustee is required to exercise.

8.5 Lord Upjohn in <u>*Re Gulbenkian's Settlements*</u> (1970) AC 580 at [510] observed of the difference between a *"mere power"* and a *"trust power"* as being:

> *The basic difference between a mere power and a trust power is that in the first case, trustees owe no duty to exercise it and the relevant fund or income falls to be dealt with in accordance with the trusts in default of the exercise, whereas in the second case the trustee must exercise a power and in default the Court will.*

8.6 Assuming that the trust deed allows, and there is no fettering of the trustee's discretion (such as a binding death benefit nomination), the discretion of a trustee of a superannuation fund to determine to whom a death benefit will be appointed upon a member's death, is a *"trust power"*.

9. Giving a reason for the exercise of discretion

9.1 Broadly speaking, unless a trustee chooses to give reasons for the exercise of a discretion, the exercise of their discretion cannot be examined. In turn, trustees are not obliged to disclose to beneficiaries their reasons for exercising a power. In *Karger v Paul* [1984] VR 161 it was observed that:

> *It is an established general principle that unless trustees choose to give reasons for the exercise of a discretion, their exercise of a discretion can not be examined or reviewed by a Court so long as they act in good faith and without an ulterior purpose… For the reasons given above, I would add the further requirement, so obvious that it is often not mentioned, that they act upon real and general consideration. … In the case of an absolute and unrestricted discretion such as the discretion in the present case, the general principle is given unqualified operation…*
>
> *The policy which underlies the principle was discussed by Lord Truro LC in Re Beloved Wilkes' Charity. In Re Londonderry's Settlement… Harman LC explained the principle as follows:*
>
> > *"… Trustees exercising a discretionary power not bound to disclose to their beneficiaries the reasons actuating them in coming to a decision. This is a long-standing principle and rests largely, I think, on the view that nobody could be called upon to accept a trusteeship involving the exercise of a discretion unless, in the absence of bad faith, he was not liable to have his motives or his reasons called in question either by the beneficiaries or by the Court. To this there is added a rider, namely that if trustees do give reasons, their soundness can be considered by* the Court.

9.2 That is, pursuant to the principle in *Karger v Paul*, a Court will generally not review a trustee's discretionary decision except where:

- the trustee failed to act honestly and in good faith;
- the trustee failed to act upon a genuine consideration;
- the trustee failed to exercise a power with due consideration for its proper purpose; or
- the trustee gave reasons and those reasons were not sound.

9.3 According to the reasoning in *Telstra Super Pty Ltd v Flegeltaub* (2000) 2 VR 276, in the event that a trustee's decision is one that no reasonable trustee could have made, on the material that was before it, then a Court may infer that the decision breaches one of the *Karger v Paul* principles.

9.4 In *Finch v Telstra Super Pty Ltd* (2010 – 2011) 242 CLR 254, the High Court was required to consider whether the principle in *Karger v Paul* applied to superannuation fund trustees.

9.5 The applicant in *Finch v Telstra Super Pty Ltd* argued that the principle in *Karger v Paul* do not apply to superannuation trusts, and at the very least do not apply in relation to substantial matters like claims to total and permanent invalidity benefits ([58]). The reasons for this submission were:

- at [59]:

  "First, the context in which Karger v Paul principles grew up is one in which settlors donated assets on trust and selected trustees to administer those trusts. Usually the beneficiaries were few, usually the beneficiaries were volunteers. Without the protection given by Karger v Paul principles it might be difficult to attract people to hold the gratuitous office of trustee. In contrast, trustees of superannuation funds are typically corporations holding vast assets which they seek to administer in professional fashion under tight statutory regulation. The members are not volunteers or objects of bounty. Both employers and members contribute to the fund, sometimes pursuant to the contracts of employment, and, now, pursuant to statute law. Significant members of Judges have therefore questioned the application of Karger v Paul principles to superannuation funds. The applicant submitted that those Judges who had applied Karger v Paul in superannuation trust area had been wrong to do so.":

- at [60]:

  "Secondly, s52(1) and (2)(b) of the Supervision Act provide that where the superannuation trust rules do not contain a covenant by the trustee to exercise to the following effect, the rules will be taken to contain:

  "to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide".

- At [61]:

  "Thirdly, superannuation funds are not in truth discretionary trusts".

- At [62]:

  "Fourthly, s14(2) of the Superannuation (Resolution of Complaints) Act 1993 (Cth) (the Complaints Act) gives rights to members to complain to the Superannuation Complaints Tribunal about decisions of superannuation trustees which are unfair or unreasonable. The Tribunal may affirm the decision, may remit or vary it, or may set it aside and substitute a new decision… (s37(3)); there is an "appeal" to the Federal Court of Australia on a question of law (s46(1)). Here the applicant was out of time in complying with the time limit fixed by s14 for making a complaint to the Tribunal: in such case as the general law should be modified so as to conform to the statute. The Karger v Paul principles are too narrow and too difficult to satisfy in relation to superannuation trusts, and do not adequately protect the important interests of beneficiaries in having the decisions of the trustees properly controlled. The applicant therefore submitted that the Court should hold that the decision of superannuation fund trustee should be set aside if it were not "fair and reasonable".

9.6 The High Court (French CJ, Gummow, Hayden, Crennan and Bell JJ) held that the principles in *Karger v Paul* apply in the context of superannuation funds, subject to one qualification. The qualification was that the duty of trustees to properly inform themselves is more intense in the case of superannuation funds than the case of other trusts (see paragraphs [57] – [66]).

9.7 At [66] the High Court held that:

> *Byrne J's… [being that the principle in Karger v Paul applied to superannuation funds]… reasoning is, however, reinforced by one qualification to Karger v Paul principles in the present context. There is no doubt that under Karger v Paul principles, particularly as they have been applied to superannuation funds, the decision of a trustee may be reviewable for want of "properly informed consideration". If the consideration is not properly informed, it is not genuine. The duty of trustees properly to inform themselves is more intense in superannuation trusts in the form of the Deed than in trusts of the Karger v Paul type. It is extremely important to the beneficiaries of superannuation trusts that where they are entitled to benefits, those benefits be paid… In the Deed there was a power to take into account "information, evidence and advice the Trustee may consider relevant", and that power was coupled with a duty to do so. It would be bizarre if knowingly to exclude relevant information from consideration were not a breach of duty. And failure to seek relevant information in order to resolve conflicting bodies of material, is also a breach of duty. The Scheme is a strict trust. A beneficiary is entitled as of right to a benefit provided the beneficiary satisfies any necessary condition of the benefit… The duty of a trustee in forming an opinion of the present type is a duty to form a fair and reasonable opinion, or even a duty to form a correct opinion, there is because of the importance of the opinion and its place in the Scheme a high duty on the Trustee to make inquiries for "information, evidence and advice" which the Trustee may consider relevant. The existence of that duty in a more intense form than exists under Karger v Paul principles in their standard application is further support for the correctness of Byrne J's decision.*

9.8 As a result of the High Court's observation in *Finch v Telstra Super* it should be ensured that before a trustee of a superannuation fund exercises a discretionary power, it "intensely" informs themselves properly.

9.9 Given the responsibilities of a "trust power" in the context of a death benefit payment, the trustee should do the following:

- Consider the precise terms of the power. Not only should the trustee consider to whom it is entitled to pay a death benefit pursuant to the SIS Regulations, but consider the scope of potential appointees in the Trust Deed (for example, consider whether the term "dependents" has a different meaning in a Trust Deed);
- Ascertain the persons who are entitled to have the death benefit appointed to them;

- Obtain information in relation to those people entitled to have a death benefit appointed to them.

- Given the above information, the trustee should decide to whom (in what amounts) the death benefit is to be appointed, and record their decision in the minutes of their meeting (and not necessarily the reasons for the decision).

10. Reviewing a trustee's discretion - Katz v Grossman [2005] NSWSC 934

10.1 It should also be noted that if the decision as to who will receive the death benefit is made by the remaining trustee(s) of the self-managed superannuation fund, the death benefit may be paid in a way which is contrary to the deceased member's wishes. Consideration should be given to the decision in *Katz v Grossman* [2005] NSWSC 934, which according to the first sentence of the judgement was: '*…a contest between a brother and a sister over the control of a superannuation trust fund established at the behest of their late father Ervin Katz. The assets of the fund exceed $1 million.*'

10.2 *Katz v Grossman* is authority for the proposition that in the event that binding directions are not provided to the trustee of a self-managed superannuation fund, then the trustee of a fund has complete discretion with respect to dealings with superannuation benefits. Such discretion includes the trustee providing the benefits to themselves, notwithstanding that they are not dependants of the deceased.

10.3 Ervin Katz was a member of the E. Katz Employees Trust Fund, which was a self-managed superannuation fund. Both Mr Katz and his daughter, Linda Ann Grossman were trustees of the self-managed superannuation fund. Mr Katz had made a non-binding nomination, in which he expressed the desire for his death benefit to be divided equally amongst his daughter (the co-trustee) and his son.

10.4 However, following the death of Mr Katz, Mrs Grossman appointed her husband as a co-trustee. The trustees then resolved to pay the whole of Mr Katz's death benefit to Mrs Grossman.

10.5 Mr Katz's son took action in the New South Wales Supreme Court arguing that:

- Mr Katz had not validly appointed Mrs Grossman as a trustee; and that

- Mrs Grossman was not validly appointed as a member.

10.6 With respect to the first issue, after reviewing the terms of the superannuation fund's deed, the relevant documentation and consideration of the *Trustee Act 1925* (NSW) ,

Smart AJ held that Ms Grossman had been validly appointed. As a result, Mrs Grossman's decisions were held to be valid, which included the payment of the death benefit referable to Mr Katz's interest in the fund to herself.

10.7 With respect to the issue of whether Mrs Grossman was validly appointed as a member of the fund, Smart AJ considered that because the fund's deed required an appointment as a member to be effective the trustee had to consent to it, as there was no documentary evidence which showed that the trustee had consented to Mrs Grossman becoming a member, it was held that Mrs Grossman was not a member of the fund.

10.8 As a result, in order to ensure that the wishes of a member with respect to the payment of their interest in a self-managed superannuation fund occurs, either a binding death benefit nomination should be executed, or there should be a trust deed direction which provides for such wishes.

11. Eligibility of a nominated beneficiary to receive a death benefit – Munro v Munro [2015] QSC 61

11.1 In *Munro v Munro* [2015] QSC 61 the Queensland Supreme Court considered the terms of a binding death benefit nomination made by a deceased, where the deceased seemingly intended to bind the trustee of himself and his superannuation fund to ensure that the any death benefit was paid to his estate upon his death.

11.2 The deceased established a self-managed superfund with his second wife in 2009. Shortly after that establishment, the deceased caused a binding death benefit nomination (or so the deceased thought) which nominated the "Trustee of Deceased Estate" to receive the death benefit upon the deceased's death.

11.3 The deceased also prepared a Will, which directed $350,000 of the superannuation benefit that was to be paid to the estate and would then pass to the deceased's second wife if she survived him. The remainder would be paid to the deceased's two daughters from his first marriage equally. At the time of the deceased's death (in 2011) the deceased had nominal other assets which formed part of his estate. After the deceased's death, the deceased's second wife (who was the trustee of the self-managed superannuation fund) contended that the binding death benefit nomination was not binding on her, as it did not comply with the relevant legislation and fund deed. The second wife contended as a result of that, she was entitled to exercise her discretion (as trustee of the fund) to pay all the benefits to herself as a surviving spouse.

11.4 The deceased's daughters made an application to the Queensland Supreme Court, seeking orders that the binding death benefit nomination was valid.

11.5 The Court held that the binding death benefit nomination was not valid.

11.6 The Court held that by the deceased nominating "trustee of deceased estate" to receive the death benefit, and in the circumstances where the relevant trustee of the nomination form provided that if a member wanted to nominate their estate to receive their death benefit, they must specifically nominate their "legal personal representative" on the binding death benefit nomination form. It was further held that the relevant superannuation legislation provides only that a person's legal personal representative, or dependent of the deceased, could receive a superannuation death benefit. As a result, it was held that a trustee appointed under a Will (such as a trustee of a testamentary trust) would not be the eligible recipient of a binding death benefit nomination.

11.7 It was observed that whilst the terms "legal personal representative" and "trustee" may at times be interchanged, they represent different roles. As a result, it was held that by nominating "trustee of deceased estate" instead of a legal personal representative, the deceased did not comply with the terms of the deed nor the legislation.

11.8 As a result, the upshot is that the second wife was able to exercise a discretion in her favour to obtain the whole of the death benefit.

Denis Barlin
Barrister
13 Wentworth Selborne Chambers