BRINE v CARTER

ITS IMPLICATIONS FOR SUPERANNUATION ESTATE PLANNING

THE ELEVENTH ANNUAL

ESTATE PLANNING CONFERENCE

The Langham, Melbourne

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Greg Welden

Welden & Coluccio Lawyers

The Estate Specialists

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

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194A Prospect Road, Prospect SA 5082
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greg@welcolawyers.com.au
jason@welcolawyers.com.au

About the Author

Greg Welden LLB GCLP

Born in Adelaide, Greg Welden was educated at Pooraka Primary School, and later Nailsworth High School. He graduated in 1993 and from here commenced his Law Degree at Flinders University. Admitted to the Supreme Court of South Australia in 1998.

The early years of his career were spent in Port Augusta where he developed a solid grounding in all facets of the Law. He returned to his home town of Adelaide in 2007, where, working in both small and large firms, he was able to develop his passion for Estate Law. Today, Greg shares with clients an intimate knowledge of all facets of Estate Planning and Estate Administration, including complex asset protection strategies, business succession planning, complicated Probate matters in all circumstances, estate administration and litigation including Inheritance Claims and Probate Disputes.

In 2015 Greg was recognised in Doyles Guide as a leading Wills & Estates Litigation Lawyer and repeated that feat in 2016 with the firm also recognised in the South Australian category of leading Wills & Estates Litigation Law Firms.

As a member of the Law Society of South Australia he actively participates on the Succession Law Committee and regularly provides seminars to members of the public, community groups, professional bodies including other solicitors and has written articles in publications for solicitors dedicated to Estate Planning

Thanks must go to the following people who's previous articles and papers assisted in the constructions of this paper;

1. *Jennifer Dixon & Michael Labiris of Moores Legal – Executor's obligation to claim Superannuation Death Benefits – 15 February 2016;*
2. *Heather Gray of Hall & Wilcox – Advising a Willmaker on Superannuation – 10-11 March 2016;*
3. *Michael Bennett of Wentworth Selborne Chambers – Superannuation Death Benefit Planning – 11 March 2016*

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
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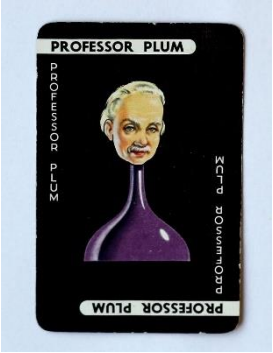
WELDEN & COLUCCIO lawyers



BRINE v CARTER

Its Implications for Superannuation Estate Planning

(also known as "*Who gets the Professor's Super?*")

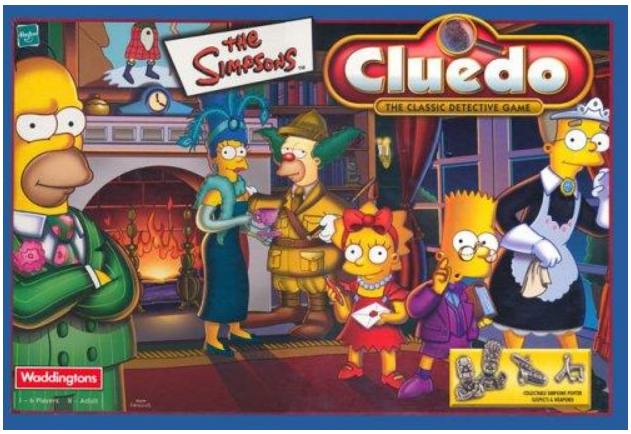
Introduction

The 2014 Queensland Supreme Court decision in *McIntosh v McIntosh*[1] examined the conflict of an administrator of a deceased estate claiming superannuation benefits directly for herself, in her personal capacity, rather than requesting the fund pay the proceeds into the deceased estate.

The recent South Australian Supreme Court judgement of *Brine v Carter*[2] considered whether the same conflict arises with an executor.

In *Brine v Carter*, Professor Brine died with two superannuation accounts with UniSuper. Pursuant to this last Will the Professor appointed his three children and his de facto partner, Ms Carter, as his executors. Ms Carter applied to UniSuper for the death benefit to be paid directly to her in her personal capacity. The other executors sought an order requiring (*among other things*) that Ms Carter account to the estate of their late father for the superannuation benefit she received citing the conflict of interest caused by her being an executor of the Professor's estate.

Let me introduce to you this year's hottest game for Christmas……



"Cluedo 2…..
Who gets the Professor's Super?"[3]

[1] [2014] QSC 99
[2] [2015] SASC 205
[3] Soon to be trademarked!

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jason@welcolawyers.com.au

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Let's start with the end at the beginning

In conclusion Justice Blue found:

1. *Ms Carter, as an executor, was in a position of conflict in relation to Professor Brine's superannuation benefits;*

   So merely being appointed as an executor is not enough to absolve a person from a conflict in claiming the superannuation for themselves (as opposed to claiming it for the estate).

   If a person who wishes to claim the superannuation is appointed as executor and there is no provision expressly authorising them to act in that way they should consider renouncing their appointment as executor or in the alternative get the consent of the other executors[4] or, at a minimum, ensure the other executors are informed about the superannuation arrangements and are given the opportunity to claim the superannuation for the estate.

2. *The mere fact Ms Carter was appointed an executor did not by itself mean she was authorised to act in that position of conflict in relation to the superannuation benefits*;

   At the very least if a testator wishes their appointed executor to also receive their superannuation benefits personally (and directly), they should include an express provision in their Will confirming that person can claim the superannuation personally despite being in a position of conflict.

3. *As the other executors acted on behalf of the estate in claiming the superannuation benefits from UniSuper, they consented to Ms Carter claiming the death benefit despite the conflict*;

   This was only relevant as you will see from the specific facts of this case, as a result of all parties having knowledge of all the relevant facts.

4. *Ms Carter was not liable to account to the estate for the benefit*.

   Again, this was heavily dependent on the specific facts of this case.

The law about the extent to which an executor or administrator has a conflict and can claim superannuation benefits for themselves is developing and the case of *Brine v Carter,* as we will see, was heavily driven by its own facts as most case law is.

I believe there is not yet any authority about whether such a conflict arises where a person has the third role of decision maker in the superannuation fund, or where there are documents in place directing benefit payments that are intended to be binding but are in fact not. The law in this area will continue to develop.

What should occur if Ms Carter was the remaining trustee of a Self-Managed Superannuation Fund ("SMSF") and by consequence the decision maker, with discretion,

[4] That of course assumes there are other executors appointed under the Will

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

concerning the payment of the deceased's fund balance? The fund deed would no doubt allow for payment to the deceased's spouse, therefore a valid decision prescribed by the deed. If Ms Carter had been the sole controller of a SMSF and exercised the discretion in her own favour, then subject to the terms of the deed (including whether there is a provision allowing the trustee to act in a position of conflict) and whether an application had been made on behalf of the estate, she may have been more likely to have been found liable to account.

Or alternatively, and perhaps more interestingly, what if the deceased had executed a purported Binding Death Benefit Nomination ("BDBN") to pay a benefit to their estate however, the trustee (spouse/beneficiary/executor and so on…) deemed the nomination invalid and retained complete discretion?

As if estate planning for complex clients' affairs are not already difficult enough, advisers must now ensure clients' arrangements are structured so that executors and/or administrators are not *unintentionally* prevented or precluded (or criticised) from claiming superannuation.

There are also lessons to learn as advisors to executors in how (and when) they should act in order to avoid or placate conflict.

There is perhaps no area of law than administering the estate of a deceased family member where conflicts regularly arise. Where once these conflicts were not known, ignored or forgotten, eagle eyed beneficiaries and their advisors are finding ways to challenge the payment of superannuation.

Australia is on the threshold of a significant transfer of wealth between generations. Over the next 15-25 years, the value of wealth transferred between generations will be measured in the hundreds of billions of dollars.

In addition to this tsunami of intergenerational transfer of wealth that approaches, the complexity of wealth structures means a significant proportion of that wealth transfer will occur in the sphere of superannuation.

In 2014, it was found in the decision of *McIntosh v McIntosh* that an administrator of an estate was obliged to account to an estate for superannuation death benefits paid by an industry fund to her in her personal capacity. The basis of the decision was the conflicted position in which the administrator had *voluntarily* put herself. This decision was widely regarded as having no application to an executor, whose appointment by the will-maker was viewed as implicitly authorising such a conflict.

Now, the decision of *Brine v Carter* draws executors into the same questions and creates significant potential consequences for will makers and those drafting them in relation to:

1. choice of executor;

2. clauses in Wills;

3. the use of reversionary pensions and binding nominations;

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

4. to use, or refrain from using, binding death benefit nomination forms;

5. advice to give potential executors to deceased estates where they may also be entitled to claim superannuation benefits personally.

McIntosh v McIntosh

In *McIntosh v McIntosh*, the deceased died intestate. His next of kin were his mother and father, who were divorced, non-the-less they were, equally, to share in their deceased son's estate by operation of intestacy. With the consent of the father, the mother obtained Letters of Administration on 24 September 2013. On 30 September 2013, the mother made applications to the deceased's three external superannuation funds as a dependant of the deceased[5] for superannuation benefits to be paid to her personally.

The trustees of the funds exercised their discretion and made determinations paying the mother personally.

The Queensland Supreme Court found that part of the duty of the administrator of an estate when calling in the estate was to claim any superannuation death benefits, to in effect maximise the value of the estate, for division between the beneficiaries.

Atkinson J held that Mrs McIntosh, by independently claiming payment of the fund to herself, was in breach of her fiduciary duty for which she may be held liable and as such Mrs McIntosh breached her duties as an administrator and had to account to the estate for the benefits she received. Atkinson J said:

> *It is essential to fiduciary duties that they include the core or irreducible minimum duties necessary for the legal personal representatives to perform their obligations "honestly and in good faith for the benefit of the beneficiaries."…*
>
> *In this case there was a clear conflict of duty and interest contrary to her fiduciary duties as administrator. When the applicant made application to each of the superannuation funds for the moneys to be paid to her personally rather than to the estate, she was preferring her own interests to her duty as legal personal representative to make an application for the funds to be paid to her as legal personal representative. She was in a situation of conflict which she resolved in favour of her own interests. As such she acted … in breach of her fiduciary duty as administrator of the estate …*
>
> *An administrator of an intestate estate has a duty to apply for payment of superannuation funds to the estate. The administrator has no proprietary right to the funds but has standing to compel the trustees of the fund to exercise their discretion to pay out the funds.…*

[5] On the basis of an interdependent relationship

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

It is axiomatic that the legal personal representative would, if he or she did not have a conflict, make an application for the payment of the superannuation to the deceased member's legal personal representative. That application would be made as part of the administrator's duty to get in the estate. Unless the application is made and is successful the funds do not become part of the estate.…

The failure of the applicant to apply for payment to herself as legal personal representative was in breach of her fiduciary duty to act in the best interests of the estate, for which she may be held liable by the court.[6]

Brine v Carter

1. Professor Brine was survived by his de facto Ms Carter and 3 sons from a prior relationship, namely, Martin Lindsay Brine, Matthew Charles Brine and Daniel James Brine ("Brine brothers").

2. In his Will the Professor appointed Ms Carter and the 3 sons as executors and provided a life interest for Ms Carter in his principal place of residence in Adelaide and another property and gave the rest of his estate to his sons and grandchildren.

3. Professor Brine left 2 member accounts with UniSuper.

    a. an indexed pension (a defined benefit account) which was only able to be paid to a spouse on death; and

    b. a Felix Pension account which was able to be paid to a spouse, children or the estate of the deceased.

4. Professor Brine had provided a *non binding nomination* during his lifetime to UniSuper, and indicated that Ms Carter was his spouse for the defined benefit pension and that his preferred recipient of the Flexi Pension was his estate.

    There existed the ability for the Professor to complete a binding death benefit nomination form with UniSuper prior to his death (but not at the time he arranged his superannuation affairs and indicated his preferred beneficiary), the forms were readily available and no more or less complicated than any other retail industry superannuation fund nomination form.

    There was no comment in the judgement concerning this aspect although there was some evidence and legal argument (obviously not deemed worthy of inclusion in the judgement).

5. For some months, Ms Carter was found to have failed to disclose the extent of the superannuation benefits to the Brine brothers and that the estate, and additionally, each of the sons, were a potential beneficiary of the Flexi Pension.

[6] At [69]-[71], [73], [78]

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

6. Once the Brine brothers found out about the super and the potential claims that existed, the 3 of them claimed the benefit as executors of the estate.

   Despite being entitled to also claim independently as children of the deceased Professor they elected not to do so, quite rightly they would (a) placed themselves also in conflict which they complained of and (b) were unlikely to have had any success given the facts.

7. UniSuper exercised its discretion in favour of Ms Carter.

The Court relevantly found:

1. an executor has a duty to collect assets of the estate;

2. an executor is in a fiduciary position where they must not, without prior authorisation, use knowledge or an opportunity for their own personal interest, or pursue a personal benefit where it conflicts with their duty;

3. the obligation is not limited to profits arising from the use of the fiduciary position;

4. a breach of these obligations results in an obligation to account to the person to whom the obligation is owed and which has been received by reason of the use of knowledge or opportunity and arises irrespective of an absence of bad faith; and

5. a fiduciary would not be liable if they were authorised to act in a position of conflict, either expressly or by implication from the circumstances of his or her appointment or by the informed consent of the beneficiaries.[7]

Importantly, unlike in *McIntosh v McIntosh*, the Court found that there was no distinction between an administrator and an executor in this regard. The Court found that the usual implication of consent to act in a conflicted position afforded to an executor does not apply to superannuation claims because those positions needed to be contrasted with "*a sophisticated superannuation policy governed by a complex trust deed in which the trustee has discretionary functions*."[8] The UniSuper Consolidated Trust Deed is, at present, 122 pages long.

In other words even the Professor was unlikely to have appointed Ms Carter as executor in circumstances where he was aware of her right to claim personally his Flexi Super and as such implicitly authorised her to act irrespective of that conflict.

Once the Brine brothers were aware of their ability to claim and allowed Ms Carter to continue pursuing her own claim and continue as an executor, the Court found that they consented to her doing so, and as such, from that moment forward there was no breach of her fiduciary obligations.

[7] Jennifer Dixon & Michael Labiris of Moores Legal – Executor's obligation to claim Superannuation Death Benefits – 15 February 2016

[8] [2015] SASC 205 at 24

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

Ms Carter she was not required to account to the estate for the benefits paid to her, because the Brine brothers had made a claim and the trustee had exercised its discretion so that there was not sufficient connection between any breach and the benefit received. In other words the Court found that it was inevitable that the superannuation fund would decide to pay the benefits to the dependant spouse.

The Court noted that had the Brine brothers not been aware of their right to claim the superannuation death benefits, either personally, or as executors prior to Ms Carter receiving such benefits, and consequently not made a claim, Ms Carter would have been liable to account.

Implications

For testators who want their spouse to benefit from their super but have different beneficiaries in their estate (hello second relationships), they should consider taking steps to mitigate the risk of a conflict of interest arising. This could include an express authority in the Will regarding the spouse claiming and receiving death benefits personally.

For executors who wish to claim a superannuation death benefit they could consider renouncing their right to be an executor or at the very least inform all other executors of their intentions, obtain their consent, and should the facts require it, recuse themselves from acting as executor for the purpose of claiming the super for the estate.

For testators who want certainty about who receives their superannuation benefits, the cases illustrate the significance of a valid binding nomination or reversionary pension.

Validity is key[9] and recent issues going against validity include:

1. documents invalidly signed or completed;

2. the document used not being the document set out by the trust deed which must be used;

3. no evidence of the nomination (form or election) being accepted by the trustees;

4. attempting to appoint non-dependants;

5. documents expired after the member has lost capacity; and

6. documents prepared after an invalid deed of variation or invalid appointment of a trustee.

A significant proportion of standard, pre-packaged documents that exist are rarely valid.

A member's interest in a superannuation fund of course does not automatically form part of their estate. This fact is often misunderstood in practice. However, in the context of estate planning and superannuation, there are a number of considerations, including:

[9] See for example SMSFD 2008/3, *Munro v Munro* [2015] QSC 61 & *Donovan v Donovan* [2009] QSC 26

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

1. when benefits must be paid and who can receive the benefits;

2. in what form should those benefits be taken; and

3. the taxation implications for the beneficiaries.

Some Super Basics

What is a '*death benefit*'?

Regulation 6.21 of the Superannuation Industry (Supervision) Regulations 1994 (Cth) ("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. Except where there is an effective death benefit nomination, the superannuation fund's trustee has discretion as to which dependants it should distribute a deceased's benefits. As will be seen, this is a wide discretion.

The term '*superannuation death benefit*' is defined in section 307.5 of 1997 Income Tax Assessment Act (see Appendix A). Amongst other things, item 1 in column 3 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*.'

Payment of death benefits

Regulation 6.22 of the SIS Regulations provides that a payment from a superannuation fund in consequence of the death of 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.

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 affected by either a lump sum payment, an income stream, or a combination of the two.

Timing of payment of death benefits

Sub 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.

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

Lump sum payments

Section 302.60 of the 1997 Tax 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 of the dependant. However, if a lump sum is paid to a person that is not a dependant, then the tax-free component will not be subject to tax[10] 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 Tax Act provides for a tax offset mechanism; this ensures that the rate of tax on the untaxed element of the tax-free component does not exceed 30% (plus Medicare levy), whereas the rate of tax on the taxed element of 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%

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

So who is a dependent?

The term '*death benefits dependent*' for taxation purposes is defined in section 302.195 of the 1997 Tax Act, as such a '*death benefit dependant*' with respect to a deceased includes:

1. the deceased's spouse;

2. the deceased's former spouse;

3. the deceased's child, provided that at the time of death the child is under the age of 18;

[10] See s302-140 of the 1997 Tax Act

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

4. a person with whom the deceased had an '*interdependency relationship*' just before the deceased died; and

5. any other person who was a '*dependant*' of the deceased just before the death of the deceased.

Interdependency relationship

The term '*interdependency relationship*' is provided for in section 302.200 of the 1997 Tax Act:

> *(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.*

That is, two individuals have an independency relationship if they satisfy all of the following conditions:

1. they have a close personal relationship;

2. they live together;

3. one or each of them provides the other with financial support; and

4. one or each of them provides the other with domestic support and personal care.

Provisions for a Binding Death Benefit Nomination

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:*

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

WELDEN & COLUCCIO lawyers

(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.

Carter v Brine or Brine v Carter

There are in fact 4 judgements concerning Professor Brine's estate.

Carter v Brine[11] deals with issues and questions involving equity, implied trusts, equitable remedies and equitable compensation wrapped up in an inheritance family provision claim.

Brine v Carter[12] involves the same facts and in fact is a judgement derived from the same evidence and trial but deals discreetly with the issue of who is entitled to receive superannuation and discusses general principles concerning fiduciary obligations and fiduciary duties.

Carter v Brine (No 2)[13] is the costs decision arriving from the implied trusts case.

Brine v Carter (No 2)[14] is the costs decision arriving from the superannuation dispute.

An appeal was launched the Full Court of the Supreme Court of South Australia concerning the substantive orders that arose out of the implied trusts case and an appeal on the outcome of costs in the superannuation dispute however, both have now been abandoned.

[11] [2015] SASC 204
[12] [2015] SASC 205
[13] [2016] SASC 36
[14] [2016] SASC 37

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

The Facts – Part I (other stuff)

Professor Brine died in December 2012.

He left to Ms Carter life interests in his principal residence in Adelaide at the date of his death, a French townhouse and (subject to 40% of any rental being payable to one of his sons) an English apartment.

He left the residue of his estate to his sons and grandchildren.

Ms Carter entered into a relationship with Professor Brine in 1989. Until they retired in 1997, Ms Carter lived and worked in Leicester and Professor Brine lived and worked in Adelaide. They spent significant time together but the majority of their time apart. From 1997, they lived together as domestic partners, initially in Australia, England and France and from mid 2001 onwards primarily in Australia. Throughout their relationship, each maintained their own properties, investments and bank accounts and paid their own income into their own bank accounts.

In the substantive judgement there were (although more than) 4 critical issues to be decided.

Issue #1 – The French Townhouse

In 1989, Ms Carter and Professor Brine purchased a thirteenth century townhouse in France as tenants in common. They each contributed half of the purchase price. They renovated it over the ensuing years. Ms Carter claimed that she contributed more to the renovation and holding costs than Professor Brine. She adduced evidence from an accountant that she contributed 83% of those costs. She claimed that a *proprietary estoppel by acquiescence* arose in her favour against the estate such that she became entitled to a beneficial interest as joint tenant and upon Professor Brine's death to the entire ownership.

In the alternative, she claimed that a *failed joint endeavour contribution constructive trust* arose pursuant to which she was entitled to return of the excess of her contributions above 50% together with interest.

The cause of action of proprietary estoppel by acquiescence failed.

The cause of action of failed joint endeavour contribution constructive trust also failed.

Issue #2 – The Leicester Apartment

In 1999, Ms Carter and Professor Brine purchased an apartment in Leicester as tenants in common in the ratio 60/40. They fitted it out in 2000. From 2004 to 2012 (with one break) they rented it out. They also incurred holding costs. Ms Carter claimed that she contributed approximately 75% of the purchase price, fit out costs and holding costs in relation to the apartment. She claimed that a *failed joint endeavour contribution constructive trust* arose pursuant to which she is entitled to return of the excess of her contributions over 60% of the renovation and holding costs together with interest.

The cause of action of failed joint endeavour contribution constructive trust failed.

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

Issue #3 – Gilles Street, Adelaide – residence & block

At the beginning of the relationship, Professor Brine owned a house in Gilles Street and a vacant block next door. Renovations were undertaken to the house between 1997 and 2009, including a rear extension constructed at a cost of approximately $200,000. Ms Carter claimed that she contributed 20% to the total costs of the renovations of about $250,000.

In 2011, Professor Brine was granted development approval to construct a duplex house on the vacant block in Gilles Street. The parties contributed approximately equally to the cost of construction. At Professor Brine's death, costs totalling approximately $160,000 had been incurred in the partial construction of the duplex house.

Ms Carter claimed that *proprietary estoppel by encouragement* arose such that she became beneficially entitled to an interest as a joint tenant in the Gilles Street house and block and upon Professor Brine's death to the entire beneficial ownership or alternatively as tenants in common.

In the alternative, she claimed that a *failed joint endeavour contribution constructive trust* arose pursuant to which she was entitled to return of her contributions together with interest.

The cause of action of proprietary estoppel by encouragement in respect of the Gilles Street properties failed.

The cause of action of failed joint endeavour contribution constructive trust in respect to the Gilles Street properties failed.

The cause of action of proprietary estoppel by encouragement was made out in respect of the Gilles Street block such that a declaration was made by the Court that the estate holds the Gilles Street block subject to a construction trust as to a 50% interest as tenant in common in favour of Ms Carter.

Issue #4 – Inheritance (Family Provision) Act claim

Ms Carter claimed that, by reason of Professor Brine's testamentary dispositions, she was left without adequate provision for her proper maintenance, education or advancement in life and claimed under the South Australian *Inheritance (Family Provision) Act* 1972[15].

[15] Section 7 of the *Inheritance (Family Provision) Act* 1972 (SA)

7—Spouse and persons entitled may obtain order for maintenance etc out of estate of deceased person

(1) Where—

(a) a person has died domiciled in the State or owning real or personal property in the State; and

(b) by reason of his testamentary dispositions or the operation of the laws of intestacy or both, a person entitled to claim the benefit of this Act is left without adequate provision for his proper maintenance, education or advancement in life,

the Court may in its discretion, upon application by or on behalf of a person so entitled, order that such provision as the Court thinks fit be made out of the estate of the deceased person for the maintenance, education or advancement of the person so entitled.

……

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

The Court found that Ms Carter was not left without adequate provision for her proper maintenance, education or advancement in life by reason of Professor Brine's testamentary dispositions.

The net value of the assets of the estate was $3,924,000. Professor Brine's income immediately before his death was approximately $65,000 per annum. The net value of Ms Carter's assets immediately before Professor Brine's death was approximately $1,490,000 and immediately after his death was approximately $2,046,000. Ms Carter's net income immediately after Professor Brine's death was $65,000 per annum (excluding the Flexi Pension).

As a result of receiving Professor Brine's entitlement to the Indexed Pension payments and the Flexi Pension benefit, Ms Carter effectively "inherited" all of Professor Brine's income and retained her own independent income. Ms Carter did not give evidence of her expenditure.

The Court found that the reduction in the Indexed Pension payments of 37.5% was more than offset by the fact that her now combined income is no longer required to also meet expenses of Professor Brine. In other words, Ms Carter has the benefit of at least the same income as she had before Professor Brine's death and she not have a drain on that income by the Professor himself due to his death.

It was noted that Ms Carter is entitled to live for her lifetime in the Gilles Street house by way of a life interest provision in the Will. If she chose to do so, the Court found that she had more than sufficient assets to meet the expenses of a life tenant to meet and to live a comfortable life in the manner to which she became accustomed while living with the Professor.

As a result of a combination of Ms Carter's own assets, the bequests of the life interests by Professor Brine's will and her "inheriting" Professor Brine's superannuation, Ms Carter was deemed to be able to maintain her lifestyle out of her own resources.

Legal trust principles

The substantive case examined in some detail equitable doctrines and the relationship between them upon which Ms Carter claimed that trusts arose which lead to her being entitled to equitable compensation.

The judgement provides a useful and succinct examination.

Proprietary estoppel by encouragement

The elements of proprietary estoppel by encouragement are[16]:

1. a representation by the defendant to the plaintiff that the plaintiff has or will have a proprietary interest in property owned wholly or partly by the defendant

[16] *Riches v Hogben* [1985] 2 Qd R 292; *Giumelli v Giumelli* (1999) 196 CLR 101; *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483.

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

(representation);

2. the plaintiff forms an assumption that he or she has or will have a proprietary interest in that property (assumption);

3. the conduct of the defendant in making the representation causes or materially contributes to the formation of that assumption by the plaintiff (reliance);

4. the plaintiff takes action in change of his or her position in reliance on that assumption (inducement);

5. the plaintiff would suffer detriment if the defendant were permitted to depart from the assumption (detriment);

6. it would be unjust or unconscionable for the defendant to depart from the assumption (unconscionability).

Proprietary estoppel by acquiescence

The elements of proprietary estoppel by acquiescence are[17]:

1. the plaintiff forms an assumption that he or she has or will have a proprietary interest in property owned wholly or partly by the defendant (assumption);

2. the defendant knows that the plaintiff has formed that assumption, it is erroneous and the plaintiff is acting on it but remains silent when the defendant has a duty to inform the plaintiff that the assumption is erroneous (representation by silence);

3. the conduct of the defendant in remaining silent in that knowledge and in breach of that duty causes or materially contributes to the continuation of that assumption by the plaintiff (reliance);

4. the defendant takes action in change of his or her position in reliance on that assumption (inducement);

5. the plaintiff would suffer detriment if the defendant were permitted to depart from the assumption (detriment);

6. it would in all the circumstances be unconscionable for the defendant to depart from the assumption (unconscionability).

Constructive trust: failed joint endeavour contributions

The elements of the failed joint endeavour contribution constructive trust as identified by the High Court are:

[17] *Willmott v Barber* (1880) 15 Ch D 96; *Svenson v Payne* (1945) 71 CLR 531; *Dewhirst v Edwards* [1983] 1 NSWLR 34; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Australian Olympic Committee Inc v The Big Fights Inc* (1999) 46 IPR 53

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

1. the parties are parties to a consensual relationship in the nature of a commercial, domestic or other partnership (not necessarily comprising a partnership recognised by common law or a relationship otherwise having legal status or incidents);

2. one or both parties acquire or apply property for the purpose of the relationship and a joint endeavour between the parties;

3. one party on the basis and for the purpose of that joint endeavour makes a contribution to the acquisition or enhancement of the value of the property additional to that party's proportionate share (if any) in the property according to principles;

4. the joint endeavour fails or collapses without attributable fault of either party;

5. the failure or collapse occurs in circumstances in which it was not specifically intended that the second party would enjoy the benefit of the first party's additional contributions;

6. it would be unconscionable for the second party to deny the constructive trust.

The Facts – Part II (superannuation)

On 15 January 2001, Professor Brine applied to UniSuper to restructure his lump sum superannuation entitlement to receive a regular monthly Allocated Pension of $26,122 per annum against the capital balance of his Flexi Pension.

He wrote on the application form that his preferred beneficiary upon death was his estate, having made provision for his children in his will and the funds remaining were to be applied to the provisions of his will. At that time (2001) UniSuper did not offer to their members the ability to nominate a beneficiary via a binding nomination form.

He wrote a covering letter saying that in respect of his Indexed Pension his de facto spouse was Ms Carter.

UniSuper is the super fund dedicated to people working in Australia's higher education and research sector.

As of 2004 the UniSuper fund trust deed was amended to allow members to complete a BDBN form, they are readily available, both non-binding preferred beneficiary nomination forms as well as binding death benefit nomination forms.

There was no communication between the Professor and UniSuper from 2001 until his death other than the receipt of his Felix Pension Statements which, for the years 2007, 2008 and 2009, included in small print a notation that members can make a BDBN (interestingly the statements thereafter did not provide this notation).

On 14 December 2012, Professor Brine suffered a heart attack while on site at the Gilles Street block as at the date of death, Professor Brine owned the following property (subject to Ms Carter's equitable claims in the action) and had the following liabilities:

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

Assets		Value
440 Gilles Street		$1,750,000
446 Gilles Street		$1,150,000
Warrandyte land		$720,000
Pakenham land		$294,000
McGrath Flat block		$85,000
French townhouse 50% interest	€150,000	$179,447
English apartment 40% interest	£80,000	$118,361
RBS bank account and credit card	£60,980	$93,299
Barclays bank account	£12,898	$19,082
Westpac bank accounts		$1,818
Shares		$38,909
Vehicles and household goods		$74,239

Liabilities	
Westpac credit cards	-$3,159
Construction invoices	-$11,182
UniSuper Flexi Pension	$542,425 (subject to Ms Carter's claim)

Joint Assets		
HSBC Aust accounts joint 50% interest		$6,056
HSBC French accounts joint 50% interest	€251	$300
HSBC UK account joint 50% interest	£270	$413
McGrath Flat land joint 20% interest		$50,000

Total	**$5,094,008**

Timeline of Significant Events

On **10 January 2013**, Ms Carter telephoned UniSuper.

A customer service operator at UniSuper, Ann, told Ms Carter that there was a defined benefit Indexed Pension account numbered 112267 which did not have a residual value and upon death 62.5% of the original pension was payable to, *and only to*, a surviving spouse or dependent or disabled child.

Ann said that there was *also* a Flexi Pension account numbered 800112267 which could be paid to children, *not necessarily dependent children*, or the estate or a surviving spouse.

On **16 January 2013** solicitors were retained for the estate. By her conduct in appointing solicitors for the estate, Ms Carter accepted her appointment as executor on that date. There is commentary on whether Ms Carter accepted her appointment as executor pursuant to the Will at some earlier date[18] but it was not necessary to decide that point.

[18] The 4 executors had met in December 2012 at the Gilles Street property to discuss the terms of the Will in a general sense, it can be inferred that this event alone was insufficient for Ms Carter to have said to have *accepted her appointment as executor* at that time

194A Prospect Road, Prospect SA 5082
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T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

On **12 February 2013**, one of Professor Brine's sons, Martin, and Ms Carter met with the estate solicitors. Ms Carter said that she was proposing to apply for Professor Brine's superannuation. Ms Carter said that she believed that Professor Brine's superannuation fell outside the Will and in response the solicitor said that *usually* superannuation was outside the estate.

The very next day on **13 February 2013**, Ms Carter sent an email to Professor Brine's other 2 sons, Matthew and Daniel (forwarded later to Martin), in the following terms:

> *I am writing regarding John's UniSuper which is outside of the Will. The Trustees of the fund have discretion as to whom it should be paid, but as John's spouse it appears that I am the only person with a right to make a claim. It is payable only to 'spouse, dependent and disabled children'.*
> *I have mentioned this already to Martin and Pam McEwin who are both comfortable with my claim.*
>
> *In order to claim, I need to include a Statutory Declaration from all of the executors to say that he had no other 'dependents' than myself. I find the form a little ambiguous since the same form is required to be completed by both the claimant and the executors. However, I am reliably informed that this is the correct one for you.*
>
> *So, please would you print out the form and complete it, have it witnessed, then post it back to me so that I can include it with my application*….
>
> *Of course, I should be most grateful if you would do this as soon as possible.*

On **19 February 2013**, the estate solicitors wrote a letter to the 4 executors. The letter stated that it was part of an executor's duty to ascertain what assets are part, or potentially, part of an estate and it was therefore appropriate that they determine what status the UniSuper superannuation had. It would, as a matter of course, be prudent for the executors to be aware whether any superannuation benefit was a defined benefit scheme where there was no discretion on the trustee and must be paid to a spouse, or if a nomination was made of which type, binding or non-binding.

Ms Carter sent an email to Daniel copied to Martin and Matthew, it was not clear what exact date this occurred but within the judgement/commentary, this event occurs subsequent to the 19 February 2013 letter, the email read;

> *John's UniSuper is in two parts.*
>
> *The one, Defined Benefit, which has no residual value but a portion of which can only be paid to a surviving spouse (including de facto). The other, Flexi Pension, which has a residual value and is payable to current spouse (including de facto) and/or other dependents (which must be either children who were financially dependent on John at the date he died or disabled children). The latter part is outside the Will not only in that it was not mentioned in the Will but primarily because its distribution is solely at the discretion of the Trustees of UniSuper, and they have indicated in*

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

John's case they will consider what dependents John had at the date of his death (again this is only his spouse or dependent children), and if more than one, then how it will be distributed among these potential beneficiaries.

The Brine brothers' case was that Ms Carter misled them by failing to disclose that the estate was an eligible beneficiary of the lump sum superannuation benefit which she was aware of in January 2013 from her conversation with Ann from UniSuper, and by her positive representations made in her emails.

On the 3 occasions it arose, Ms Carter represented to the other executors that the only eligible beneficiaries were spouses and dependent or disabled children. She thereby implicitly represented that the estate was not an eligible beneficiary.

On **27 February 2013**, Ms Carter signed a Statement of Dependants form from UniSuper, sent to UniSuper, who received it on 7 March 2013.

On **4 March 2013**, Matthew telephoned UniSuper and spoke with a claims officer who confirmed that Professor Brine had two separate pensions and that the account balance of the Flexi Pension was $556,463. Matthew was informed that Professor Brine had signed a *non-binding preferred nomination* in favour of his estate in relation to the Flexi Pension, but the trustee would exercise its own discretion and financial dependency usually took precedence.

4 March 2013 is a critical date in the proceedings, from this date onwards it was noted that the Brine brothers' were on notice and had specific, independent, knowledge about their rights as potential individual beneficiaries to the superannuation benefits, or as claimants in their capacity as executors.

On **24 March 2013**, Martin signed a Statement of Dependants form and on 30 March prepared a joint statement by his brothers and himself submitting that the Flexi Pension should be paid to the estate in accordance with Professor Brine's preferred beneficiary nomination.

On **6 August 2013**, the Insurance Management Committee of UniSuper resolved that 100% of the Flexi Pension, then valued at $564,992, be paid to Ms Carter as de facto spouse and that the Indexed Pension be paid to Ms Carter.

On **19 September 2013**, the Brine brothers sent to UniSuper a notice of dispute on behalf of 3 of the executors of the estate with the fourth executor (Ms Carter) not objecting. The notice of dispute contended that the trustee should have exercised its discretion in favour of the estate in accordance with Professor Brine's April 2001 preferred nomination.

On **15 November 2013**, probate was granted in respect of Professor Brine's Will.

On **27 November 2013**, Matthew lodged with the Superannuation Complaints Tribunal a registration of complaint form in respect of UniSuper's decision to pay the Flexi Pension death benefit to Ms Carter.

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

On **12 February 2014**, the Insurance Committee of UniSuper reviewed and affirmed the decisions of the Insurance Management Committee to pay the Flexi Pension death benefit to Ms Carter.

On **23 January 2015**, the Superannuation Complaints Tribunal dismissed Matthew's Complaint.

On **22 April 2015**, UniSuper paid to Ms Carter the Flexi Pension death benefit of $630,299.

Findings of credibility affected Mrs Carter significantly.

Ms Carter gave evidence in chief that at the time of her meeting with the estate solicitors and Martin on 12 February 2013 and her telephone discussion with the solicitor on 18 February 2013 she was *not* aware of the size of the death benefit for the Flexi Pension.

This was important evidence for her defence of the action because it was part of the Brine brothers' case that Ms Carter misled them in February 2013 by failing to disclose the size of the death benefit of which she was aware.

The Court rejected Ms Carter's evidence and found that on 10 January 2013 she had located a bundle of UniSuper documents that included the statement for January to June 2012 that showed the account balance as at 30 June 2012 and on which Professor Brine had written the account balance as at 17 October 2012.

Ms Carter expressed urgency several times to UniSuper about receiving the forms and processing her application. The Court found that Ms Carter was careful during the 10 January 2013 conversation to ascertain all relevant details of **both** pensions, including monthly amounts, to whom they were potentially payable and how claims were made and processed and expressed urgency to UniSuper several times thereafter.

Unconvincing and evasive was how the Court described Ms Carter's evidence about these critical issues.

The Brine brothers contended that Ms Carter failed to disclose to her fellow executors initially that there were two superannuation benefits and failed to disclose at all the amount of the lump sum benefit or that the estate and adult children, not just dependant children, of the deceased were eligible beneficiaries.

They contended that she misled them by representing that only spouses, dependent and disabled children were eligible beneficiaries.

They contended that she breached her fiduciary duty by pursuing her personal interests in conflict with her duties as an executor and that she was obliged to account to the estate for the benefit she received.

In defence of the Brine brothers' claim Ms Carter claimed;

1. she was implicitly authorised by Professor Brine's Will to act in her personal interest notwithstanding her position of conflict;

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

2. that the Brine brothers consented to her conduct;

3. that the Brine brothers' action is an abuse of process and relied on defences of estoppel and laches;

4. there was no causal connection between any breach of duty, if found, and the benefit she received.

Finally, Ms Carter sought relief for any breach of duty, if found, pursuant to section 56 of the South Australian *Trustee Act* 1936[19] which provides as follows;

> ***56—Jurisdiction of Supreme Court in cases of breach of trust***
>
> *If it appears to the Supreme Court—*
> *(a) that a trustee is, or may be, personally liable for any breach of trust (whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act); but*
> *(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the said court in the matter in which he has committed such breach,*
> *then the said court may relieve the trustee, either wholly or partly, from personal liability for the breach of trust.*

In detail the Court held as follows;

1. the action by the Brine bothers was not an abuse of process;

2. the Brine brothers were not precluded from bringing the action by estoppel or laches;

3. that Ms Carter did mislead her fellow executors up to 4 March 2013;

4. that Ms Carter breached her fiduciary duties up to 4 March 2013;

5. that Professor Brine did **not** authorise Ms Carter's conduct;

6. the Brine brothers did not consent to Ms Carter's conduct up to 4 March 2013;

7. that Ms Carter did **not** breach her fiduciary duties after 4 March 2013;

8. the Brine brothers consented to Ms Carter's conduct after 4 March 2013;

9. that Ms Carter's breach of fiduciary duty before 4 March 2013 did not have any causal connection with the benefit she ultimately received; and

[19] Similar discretion appears in section 85 *Trustee Act* 1925 (NSW) (excusable breaches of trust), section 67 *Trustee Act* 1958 (Vic), section 76 *Trusts Act* 1973 (Qld)

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

10. that no occasion arises to excuse Ms Carter under section 56 of the *Trustee Act* 1936.

Abuse of process

Ms Carter contended that the Brine brothers' action was an abuse of process. She said that the Brine brothers did not, before the payment of the superannuation benefit in April 2015, raise the issue of conflict of interest in relation to Professor Brine's superannuation.

The claim of abuse of process failed.

In *PNJ v The Queen*[20], French CJ, Gummow, Hayne, Crennan and Kiefel JJ said:

> *It is not possible to describe exhaustively what will constitute an abuse of process. It may be accepted, however, that many cases of abuse of process will exhibit at least one of three characteristics:*
> *(a) the invoking of a court's processes for an illegitimate or collateral purpose;*
> *(b) the use of the court's procedures would be unjustifiably oppressive to a party; or*
> *(c) the use of the court's procedures would bring the administration of justice into disrepute*.

Ms Carter relied on the second category, contending that the claim was unjustifiably oppressive to her. The Court decided that the bringing of the action was not oppressive to Ms Carter and stated that if the Brine brothers were indeed estopped from bringing such action, then estoppel will preclude it being brought, if not, there is nothing oppressive about the bringing of the action.

In any event, the Brine brothers were ignorant of the true position as to the estate being an eligible beneficiary and the amount of the Flexi Pension benefit until 4 March 2013. Ms Carter was aware of the true position but did not disclose it to the remaining 3 executors. Although they may have been suspicious, the Brine brothers did not learn that Ms Carter had been aware of the true position until after the Court action was commenced.

On the Brine brothers' case, Ms Carter breached her duty by not disclosing to them the true position and by misrepresenting it, Ms Carter could not, in reply, rely on her own conduct which on the present hypothesis is in breach of duty, to advance an abuse of process argument based on oppressive conduct.

Estoppel

Ms Carter contended that the Brine brothers were estopped from bringing the claim by *estoppel by conduct* in that the Brine brothers did not before the payment of the superannuation benefit in April 2015 raise the issue of conflict of interest.

The defence of estoppel failed.

[20] [2009] HCA 6, (2009) 83 ALJR 384

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

In her defence Ms Carter stated that in reliance of no issue being raised she:

1. lodged the Statement of Dependants form with UniSuper;

2. did not participate in lodging the notice of dispute by the remaining 3 executors; and

3. did not renounce her office as executor.

The Court had already found that Ms Carter was anxious to lodge the Statement of Dependants form as quickly as possible from 10 January 2013 and followed up UniSuper repeatedly until she in fact received the form, she did not rely on anything said or not said by the Brine brothers in acting in that way.

As to the second and third points outlined above, it was a matter for Ms Carter to form her own view whether she was acting in breach of her duties as executor. It was stated that Ms Carter was not entitled to breach them (if she did) merely because her fellow executors did not allege that she was breaching her duties.

Breach of fiduciary duty

The Brine brothers contended that Ms Carter breached her fiduciary duties.

Legal principles

An executor owes a duty to identify, secure and collect assets of the estate[21].

An executor is a fiduciary who owes fiduciary duties[22].

A fiduciary generally owes a fiduciary duty not without prior authorisation, as such there are two limbs of the conflict rule insofar as it involves conflicts between duty and interest:

1. to use knowledge or an opportunity arising out of their fiduciary position for their personal interests (*the first limb*); [23]

2. to pursue a personal benefit in circumstances in which there is a real or significant possibility of conflict between their fiduciary duty and personal interest (*the second limb*).[24]

In *Chan v Zacharia*[25], Deane J (with whom Brennan and Dawson JJ agreed) said:

[21] *Re Chirnside* [1956] VLR 295; Re Atkinson [1971] VR 612
[22] *Re-Stewart* [2003] 1 NZLR 809; *Johnson v Trotter* [2006] NSWSC 67
[23] *Chan v Zacharia* (1984) 154 CLR 178; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; *Pilmer v Duke Group Limited (In Liquidation)* [2001] HCA 31, (2001) 207 CLR 165
[24] *Chan v Zacharia* (1984) 154 CLR 178; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; *Pilmer v Duke Group Limited (In Liquidation)* (2001) 207 CLR 165
[25] (1984) 154 CLR 178

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

> *The variations between more precise formulations of the principle governing the liability to account are largely the result of the fact that what is conveniently regarded as the one "fundamental rule" embodies two themes. The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage… Stated comprehensively in terms of the liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it. Any such benefit or gain is held by the fiduciary as constructive trustee. That constructive trust arises from the fact that a personal benefit or gain has been so obtained or received and it is immaterial that there was no absence of good faith or damage to the person to whom the fiduciary obligation was owed. In some, perhaps most, cases, the constructive trust will be consequent upon an actual breach of fiduciary duty: e.g., an active pursuit of personal interest in disregard of fiduciary duty or a misuse of fiduciary power for personal gain. In other cases, however, there may be no breach of fiduciary duty unless and until there is an actual failure by the fiduciary to account for the relevant benefit or gain: e.g., the receipt of an unsolicited personal payment from a third party as a consequence of what was an honest and conscientious performance of a fiduciary duty. The principle governing the liability to account for a benefit or gain as a constructive trustee is applicable to fiduciaries generally...*

In *Hospital Products Ltd v United States Surgical Corporation*[26], Mason J expressed the first limb in the following terms:

> *The rule that a fiduciary is not entitled to make a profit without the informed consent of the person to whom the fiduciary duty is owed is not limited to profits which arise from the use of the fiduciary position or of the opportunity or knowledge gained from it...*

In a passage subsequently cited with approval by McHugh, Gummow, Hayne and Callinan JJ in *Pilmer v Duke Group Limited (In Liquidation)*[27] expressed the second limb in the following terms:

[26] (1984) 156 CLR 41
[27] (2001) 207 CLR 165

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

> *Accordingly, the fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect.*[28]

In relation to the first limb of the conflict rule where a fiduciary uses knowledge or an opportunity arising out of their fiduciary position for their personal interests, there is not usually a need for flexibility, although even in this case a remedy may not be granted where the connection between the benefit and the knowledge or opportunity is insubstantial.

However, in relation to the second limb, where the circumstances in which there is a possibility of conflict can be infinitely variable, there is a greater need for flexibility.

A fiduciary is not liable to account for a personal benefit where the fiduciary has been authorised to act in the manner in which they have acted:

1. expressly by the instrument creating the fiduciary duty or by implication arising from the circumstances of his or her appointment; or

2. by the informed consent of the beneficiary.

In *Chan v Zacharia*[29], Deane J said:

> *The liability to account as a constructive trustee will not arise where the person under the fiduciary duty has been duly authorized, either by the instrument or agreement creating the fiduciary duty or by the circumstances of his appointment or by the informed and effective assent of the person to whom the obligation is owed, to act in the manner in which he has acted.*[30]

Conduct to 4 March 2013

Ms Carter as an executor owed a duty to disclose this information known to her to the other executors. She owed a duty not to pursue a personal benefit in circumstances in which there was a conflict between her duty and her personal interest.

She made positive representations that the only eligible beneficiaries were spouses and dependent or disabled children. While the other executors remained ignorant of the true position, she was advancing her own interests by obtaining information from UniSuper, expressing urgency and lodging a claim for payment of the benefit to herself.

Mrs McIntosh was an administrator whereas Ms Carter was an executor, both owe the same fiduciary duties. If Ms Carter had disclosed what she knew about the superannuation benefits, recused herself from acting as executor in relation to them and left the other three

[28] At 103
[29] (1984) 154 CLR 178
[30] At 204

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

executors to act alone on behalf of the estate in relation to them, she would not have acted in breach of her fiduciary duties and there would be an important distinction between her situation and that of Mrs McIntosh.

Should Professor Brine have completed a BDBN?

How often do we see pro-forma documents seemingly attempt to provide for binding nominations of beneficiaries to superannuation funds, both retail and SMSF which, in reality, can be ambiguous and lead to further uncertainty. The forms commonly state everything to my spouse and if he/she fails to survive me to the legal personal representative of my estate and that's if they achieve the first hurdle of being a valid document prescribed by the fund's trust deed.

A further issue relates to the inflexibility of binding death benefit nominations. They circumscribe an otherwise available discretion of the fund trustee. This could cause issues if:

1. a member has lost capacity and is unable to amend a binding nomination;

2. circumstances change (such as deaths, births, marriages or relationship falling apart);

3. the law (in particular the tax law) changes, perhaps once non-dependants become dependant with a change in legislation (or by the effluxion of time itself);

4. the nomination is to the estate and the prospect of a family provision claim is significant.

For these reasons a binding nomination are discouraged until it is considered, on appropriate material, the right course for a particular client given their particular personal and financial circumstances which will change over time and must be reflected upon many times during the testator's lifetime.

Circumstances where a binding nomination are encouraged are:

1. a blended family exists and second marriages cause the member to want their superannuation benefits to go to children of a prior relationship or alternatively they want the second spouse to receive the fund without fear of an inheritance claim;

2. the potential beneficiaries are young children and via the estate the testator can control the fund with the choice of executor/trustee rather than potentially having the fund make payment to an estranged spouse/parent of the young children;

3. where there are debts in the estate which a testator wishes to be discharged in advance of (or as a condition of) a gift to a spouse or another[31];

4. where a testamentary trust or superannuation proceeds trust has been established and section 102AG of the 1997 Tax Act will afford substantial tax benefits going forward through that trust.

[31] I acknowledge there may be difficulties faced with respect to receipt of insurance payments by the estate

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

A binding nomination, at least so far as they relate to a self managed superannuation fund, is only limited by the payment standards of the SIS Act and SIS Regulations, trust law, the fund deed and the commercial drivers of any taxation consequences. Therefore, providing the fund deed and the binding nomination are appropriately worded there is no reason why the nomination cannot:

1. direct specific assets to be paid in specie to a particular member;

2. give other direction to the trustee with respect to the payment of death benefits;

3. provide for the form of the payment of a death benefit (for example, by way of a pension on certain terms or by way of a lump sum);

4. contemplating that a member may have more than one spouse (if this happened to be the case);

5. providing the payment of certain assets be subject to life interests or occupancy rights (this commonly occurs in a will).[32]

What are the advantages of using a BDBN?

In many circumstances, there are significant advantages to a client in having a BDBN in place:

1. A properly drawn BDBN provides certainty as to how the member's death benefit will be distributed. In the absence of a BDBN, the trustee of the fund will be required to allocate the benefit among the dependants of the member as the trustee thinks fit.

   If the member does not have complete certainty as to who will be acting as a trustee (or trustee director) and how they will exercise that discretion, they can have no certainty that the benefits will be paid in the way they intend.

2. Preparing a BDBN to sit together with a will allows the member's legal advisers to deal with their assets as a whole, and to ensure that intended beneficiaries will inherit under the will or receive benefits from the SMSF in the intended amounts or proportions.

3. A BDBN can be prepared with tax implications in mind, avoiding the risk that those making decisions about the death benefit allocation might do so without proper tax advice and create unnecessary tax burdens.

4. A BDBN can be used strategically to direct that a particular asset held within an SMSF is distributed (or not distributed) in specie to a named beneficiary, or to achieve another specific goal.

[32] Michael Bennett of Wentworth Selborne Chambers – Superannuation Death Benefit Planning – 11 March 2016

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

What are the disadvantages of using a BDBN?

1. If a BDBN is not properly drawn, or formal requirements under the trust deed are not managed correctly, it will be open to challenge. The trustee may be obliged to approach the Court to seek directions as to how to proceed, or disappointed beneficiaries might initiate proceedings seeking to have the BDBN declared invalid and that can have disastrous effects on all participants to such litigation with regards to costs, delay and family breakdown.

2. Tax laws may change during the life of a BDBN, such that an allocation of benefits that was tax effective when the document was drafted has become ineffective.

3. The member's circumstances may change, rendering a BDBN inappropriate. For example, the member might separate from a spouse who is to receive the whole of their death benefit under a BDBN, but fail to revoke the BDBN before their death.

4. If the member's will and BDBN have been made together, they will most likely need to be reviewed and changed together. If a new will is made by a member without alerting the lawyer to the existence of a BDBN, this may distort the overall position such that a family member receives far more or less than was intended. There may be nothing that can be done to rectify the situation, other than to initiate negotiations between all beneficiaries with a view to seeking their agreement to a redistribution of assets.

How should advisers decide whether to recommend that a Binding Death Benefit Nomination be made?

All things being equal, it generally seems reasonable to favour flexibility over inflexibility (that is, to refrain from making a BDBN).

Rarely will a member know, when considering their estate planning, what their circumstances and those of their beneficiaries will be when their will and any BDBN take effect. Equally, it is impossible to predict what the tax laws will provide and what regulatory restrictions might apply in respect of their superannuation interests. All such factors favour flexibility to allow for discretionary decisions to be made at the appropriate time, once such factors are known and considered appropriately.

Of course, all things are never equal, and there may often be powerful reasons to recommend that a BDBN be made.

Factors to take into account when considering whether it is appropriate for a BDBN to be made include the following:

1. Are there special family circumstances? For example, are there children from an earlier or later marriage who must be provided for out of the individual's superannuation benefits, or other persons who might be expected to make claims?

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

2. Does the individual have volatile personal circumstances? Will flexibility nurture litigation and dispute as opposed to the rigidity of a binding nomination?

3. Does the individual want to make particular provision for one or more persons where this would be problematic if done through the estate? There may be a high likelihood of an inheritance claim if significant funds are funnelled towards the deceased estate which is to be avoided if possible.

4. Can there be a high degree of confidence as to who will be acting as trustee/trustee director after the member's death (is there at least one trusted 'back-up' in place should the person/s expected to take on the role be unable to act)?

5. Are there significant tax issues (such as a large fund with a minimal tax free component)? It may be appropriate to allow flexibility such that the most tax effective solution can be derived at post death.

6. Does the individual wish to benefit someone who is not a dependant, and can therefore only receive a benefit through the estate? Certainty via a binding nomination cannot be achieved direct to that non dependant and hence certainty can be gained by directing the super proceeds to the estate and making specific provision within the will.

Advisers should consider all of these issues together with their client before reaching a view as to whether a BDBN should be made.[33]

Consent by Appointment

Ms Carter contended that as Professor Brine appointed her as an executor knowing that she was, in her capacity as his de facto spouse and an executor to his estate, were eligible beneficiaries of his Flexi Pension superannuation benefit, that he thereby consented to her acting in a position of conflict between her self-interest and her duty to the estate.

In the New South Wales Court of Appeal in *Mordecai v Mordecai*[34] Hope JA referred to such an exception in the following terms:

> *That exception is where a testator or settlor, with knowledge of the facts, imposes on a trustee a duty which is inconsistent with a pre-existing interest or duty which he has in another capacity. In that situation the trustee is not thereby debarred from accepting the trust or from performing the duties which are imposed under it.*[35]

This principle has been applied where a testator appointed as executors persons who were partners of the executor[36], fellow director shareholders of a company in which the testator

[33] Heather Gray of Hall & Wilcox – Advising a Willmaker on Superannuation – 10-11 March 2016
[34] (1988) 12 NSWLR 58
[35] At 66-67
[36] *Vyse v Foster* (1874) LR 7 HL 318; *Hordern v Hordern* [1910] AC 465

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

held shares[37], lessees of the testator's land[38] or a lessee with an option to purchase the testator's land[39].

In all of those examples the pre-existing relationship of partnership, directorship, lease and so on were simple and obvious to the testator. This is to be contrasted with a sophisticated superannuation policy governed by a complex trust deed in which the trustee has discretionary functions. While Professor Brine knew and intended that Ms Carter was the beneficiary of his Indexed Pension superannuation benefit, there is no reason to infer that he knew that she was an eligible beneficiary of his Flexi Pension superannuation benefit. Even if he had such knowledge, there is no reason to infer that he intended Ms Carter to claim the benefit of his Flexi Pension superannuation benefit in her personal capacity or to authorise her to pursue her personal interest in competition with the estate, after all he had positively indicated, albeit by way of a non-binding preferred nomination of beneficiary, the benefit of his Flexi Pension should benefit his estate.

The circumstances whereby he appointed her as executor do not give rise to a necessary implication that she was authorised to act in a position of conflict of interest in this respect.

Transpose this to a SMSF scenario where it might be argued that as the testator/deceased/member of a fund, has appointed their spouse as executor in the will and made no nomination of beneficiary in the SMSF that some form of consent arose for the spouse to claim/pay the deceased member's benefits to themselves?

I don't think so!

Even if Professor Brine's appointment of Ms Carter were regarded as conferring some authority on her to act as executor notwithstanding her pursuit of a claim to the superannuation in her personal capacity, that could not be regarded as authorising her to fail to disclose her knowledge to her fellow executors or to mislead them about the superannuation entitlement.

As has been said, one option to resolve the conflict would have been to inform her fellow executors of the existence of the Flexi Pension and their right to claim.

Another possible step that can be taken to address these issue is to include a conflict clause in the Will that expressly authorises the executor to also pay, or apply to receive, the superannuation benefits personally, perhaps along the following lines;

> *any person who is my executor shall not be prohibited from applying in his or her own name and right for the payment of any superannuation, life insurance or other like benefit which might become payable to my estate.*

Conduct after 4 March 2013

Prima facie position

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[37] *Princess Ann of Hesse v Field* [1963] NSWR 998
[38] *Sergeant v National Westminster Board plc* (1991) 61 P&CR 518
[39] *Re Mulholland's Will Trusts* [1949] 1 All ER 460

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

On 4 March 2013, as a result of Matthew's telephone conversation with UniSuper, the other executors knew the amount of the Flexi Pension superannuation benefit and knew that both the estate and adult children of Professor Brine were eligible beneficiaries.

From mid-March 2013 onwards, by their conduct it was effectively agreed between the 4 executors that in respect of the superannuation benefit the Brine brothers would act as if there were 3 executors and would act on behalf of the estate while Ms Carter would recuse herself from acting as executor for that discreet purpose only and would be entitled to pursue her own interest in seeking payment of the benefit in her personal capacity.

This was in circumstances in which the Brine brothers themselves had a potential conflict of interest between their duty as executors and their personal interest by reason of being eligible beneficiaries as children of Professor Brine albeit they did not pursue that personal interest and made no claim to UniSuper in their personal capacities as children.

After 4 March 2013 Ms Carter did not act in breach of her fiduciary duties by continuing to pursue her claim to payment of the superannuation in her personal capacity as de facto spouse of Professor Brine.

Consent

By their conduct the Brine brothers, as the remaining executors, from mid-March 2013 assumed conduct on behalf of the estate of claims to UniSuper that the superannuation benefit should be paid to the estate. By this time, they had become aware of all relevant facts and circumstances. By their conduct, the Brine brothers consented to Ms Carter from mid-March 2013 pursuing her own interests by claiming payment of the benefit in her personal capacity without resigning as an executor.

Liability to account

As a matter of principle, liability to account for a benefit received when there had been a breach of the second limb of the conflict rule ought also to depend on some connection between the breach and the profit.

No recommendation was made by the relevant UniSuper officer until July 2013 and no decision was made by the relevant UniSuper committee until August 2013. At those dates all effective claims had been made and were under consideration. In these circumstances, there was no connection between Ms Carter's breach of duty prior to 4 March 2013 and the benefit she ultimately received.

The position would have been different if the other executors had not learnt the true position and UniSuper had decided to pay the superannuation to Ms Carter in the absence of any competing contention on behalf or in favour of the estate. The prospective possibility that the trustee would have exercised its discretion in favour of the estate if there had been a contention made on behalf of the estate (*without the wisdom of hindsight based on the actual recommendations and decisions by the UniSuper officers and committees)* was remote given the consistent statements made by the UniSuper officers to Ms Carter, Martin and Matthew about the general exercise of the trustee's decision and the evidence of the estate solicitors that with experience trustees of superannuation funds have not exercised

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

their discretion in favour of the estate where there was a competing claim by a spouse.

Nevertheless, if no competing contention had been advanced on behalf of or in favour of the estate, equity would not have enquired into the prospect that the discretion would have been exercised in favour of the estate and Ms Carter would have been liable to account. The position would have been the same as in *McIntosh v McIntosh*.

Does the conflict extend to control of a Self Managed Super Fund?

In the SMSF context, practitioners should be aware of this case, and consider its implications where a beneficiary is also the executor of the deceased person's estate. Careful planning should greatly assist in making sure that this type of difficulty does not arise. However, where confronted with a similar fact situation, advisers may need to consider whether, for example, the relevant executor should renounce their right to obtain probate, or, having obtained a grant of probate, should hand over the role to another person or trustee company in accordance with the legislation in the relevant jurisdiction.

The same person can have multiple capacities, executor, beneficiary, trustee and the conflicts that arise may not be able to be resolved depending on;

1. The SMSF Trust Deed and terms;

2. Any BDBN;

3. The terms of any Will (with respect to authorising action despite the existence of such conflict);

4. Competing beneficiaries.

What about adding Attorney to the list of capacities a person may have?

A person holding an EPOA for a member of a superannuation fund (including an SMSF) would have power to perform certain functions on behalf of the member, such as making contributions, withdrawing benefits, nominating pension or commutation draws, changing pension terms and conditions (such as reversionary beneficiaries), investment choice and making or revoking a binding death benefit nomination.

It is important that an EPOA is not limited to the extent that it would prevent the attorney from acting for the member in connection with their superannuation affairs. Whilst this may not technically prevent the attorney from being appointed to the position of trustee or trustee director (because they would not hold that position under the EPOA, but via a separate appointment to office) – such a limitation may prevent other dealings with the SMSF that would enable the appointment to be made.

Similarly to drafting appropriate clauses in wills to either indicate or authorise actions in positions of conflict, appropriate clauses positively identifying authorised actions with super funds should be included with EPOAs.

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

Conflicts

(a) *My attorneys may enter into financial transactions on my behalf, notwithstanding:*

(i) *that there may be a conflict, or which results in conflict, between:*
(A) *the duty of my attorneys toward me; or*
(B) *the interests of my attorneys, or a relation, business associate or close friend of my attorneys; or*
(C) *another duty of my attorneys;*

……

Superannuation powers

(b) *My attorneys, may (with the exception of ####)*

(i) *enter into any financial transaction, notwithstanding that there may be a conflict, or which results in conflict, between:*
(A) *the duty of my attorneys toward me;*
(B) *the interests of my attorneys, or a relation, business associate or close friend of my attorneys; or*
(C) *another duty of my attorneys.*

(ii) *act in my stead to exercise any powers or discretions in respect of any Superannuation Fund of which I may be a member including, without limitation, power to affirm any current binding death benefit nomination.*

……..

Online providers will merely ask details of the relevant parties and produce a document for a small fee. Importantly, however, because the enduring power of attorney continues once the principal has lost capacity there are additional requirements for the witnessing of the execution of that document by the principal.

Relevance for Self-Managed Superannuation Funds

To qualify as a SMSF each member of the fund must either be
a trustee of the fund or a director of the fund's corporate trustee. This threshold requirement for the very existence as an self-managed superannuation fund makes the use of an enduring power of attorney very important.

Subsection 17A(3) the SIS Act provides that an fund will continue to be an self-managed superannuation fund where, amongst other things:

(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

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

WELDEN & COLUCCIO lawyers

> *(ii) the legal personal representative has an enduring power of attorney in respect of the member of the fund;*

The term '*legal personal representative*' is defined at s10(1) of the SISA as follows

> *... 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.*

The effect of these provisions is that:

1. the enduring power of attorney is the key to allowing a fund to continue to qualify as an SMSF notwithstanding that the member may not be acting as trustee of the fund; and

2. the enduring power of attorney "*relief*" can be invoked to assist not only when the member is under a legal disability. It is also clear that leaving the enduring power of attorney, once executed, in a drawer is insufficient.

Where the attorney is to act for the principal in the context of a SMSF, subject to the following, the principal must resign as a trustee of the fund (or director of its corporate trustee) and the attorney be appointed in the principal's place.

That is, the attorney is in lieu of, rather than in addition to, the principal.

Relevantly the Commissioner of Taxation states, in Self-Managed Superannuation Fund Ruling SMSF 2012/2 at [8] and [9]:

> *[t]he appointment of the legal personal representative as a trustee and the removal of the member must be in accordance with the [fund's] trust deed, the SISA and any other relevant legislation...*
> *...*
> *where a corporate trustee is involved, any removal and appointment must also be properly made under any constitution for the corporate trustee and the Corporations Act 2001.*

So the fund deed and the *Corporations Act* 2001 (Cth) are also relevant.

If the SMSF has a corporate trustee and the member does not want to step down as a director of that company, provided that the enduring power of attorney is correctly drafted for that purpose the attorney can be appointed as an alternate director on the board of the trustee company.

Where the attorney is an alternate director only, the member can stay on as a director of the fund trustee, although, without limitation, the alternate director will only be able to perform the duties of a director while those duties are not being performed by the member director.

Additional fiduciaries arise in the EPOA context as the testator has not yet died and as such beneficiaries may not yet be entitled to a share of the estate until death occurs.

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

One might speculate about what could occur, for instance an attorney seemingly having the authority to act by re-affirming an existing BDBM but allowing that nomination to lapse (thereby becoming non-binding [perhaps on themselves as trustee]) and then exercising discretion to then personally benefit. *What if the lapsing was non-intentional?*

Brine v Carter (No 2)[40]

Each party to the litigation concerning superannuation sought an order that the other party pay their costs of action.

It was held that the Brine brothers should pay at least part of Ms Carter's costs of the action because the event was ultimately decided in her favour. However, Ms Carter's costs that are to be paid by the Brine brothers should be reduced by 50% to reflect the fact that Ms Carter failed on the majority of issues in the action and in respect of the issues on which evidence was required.

In conclusion the Court declared that the Brine brothers should pay 50% of Ms Carter's costs of action on the usual party/party basis.

Conclusion

As discussed above, the discretion of the trustee of a superannuation fund to chose the recipient of a superannuation death benefit is a core principal central to estate planning, particularly where the benefits are in an SMSF.

The recent cases have significant practical implications. In particular, the cases may result in the following:

1. Where the superannuation benefits are in a retail or industry superannuation fund, the trustee of the fund will, out of an abundance of caution, refuse to pay or not even consider paying the superannuation death benefit personally to a person who is also the executor or administrator of the estate.

   If this position is adopted by the trustees of retail and industry superannuation funds, there is concern that:

   a. where the surviving spouse is also the executor of the estate (as is usually the case), the superannuation fund trustee will not pay the superannuation death benefit to the surviving spouse as a pension, which will potentially result in additional tax being payable; and

   b. the estate being the default payment option for the superannuation death benefit, even though this may not be the desired outcome.

2. An increase in the number of challenges to the trustee's exercise of discretion where the beneficiary of the superannuation death benefit is also the executor or in the case of an SMSF, the controller of the SMSF.

[40] [2016] SASC 37

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

As a result, we should be cautious where a person who may wish to be considered as a beneficiary of superannuation benefits is involved with making the decision, or may be the executor or administrator of the estate.

Advisers must ensure clients' arrangements are structured so executors and administrators are not unintentionally prevented from claiming superannuation. There are a variety of steps advisers can take to ensure benefits are paid to intended recipients despite conflicts that may occur.

You should take away the following points from *Brine v Carter*.

1. Merely being appointed as an executor is not enough to absolve a person from a conflict in claiming the superannuation for themselves (as opposed to claiming it for the estate).

2. If a person wants their executor to receive their superannuation, they should include an express provision the Will confirming the person can claim the superannuation despite being in a position of conflict.

3. If a person who wishes to claim the superannuation is appointed as executor and there is no provision authorising them to do so they should consider renouncing their appointment as executor.

4. If an executor wishes to claim the deceased's superannuation benefits and there is no clause in the Will authorising this, they should preferably get the consent of the other executors or, at a minimum, ensure the other executors are informed about the superannuation arrangements and are given the opportunity to claim the superannuation for the estate.

To overcome these issue, there are a variety of steps we can take to ensure the benefits are paid as intended despite the fact that there may be a conflict.

1. Appoint someone other than the intended recipient of the superannuation death benefit as the executor. This can be quite difficult as it is common for the intended recipient of the superannuation death benefit to be the obvious choice as the executor (for example, the surviving spouse).

   However, where there is another suitable person to act as the executor, this is a potential option as it removes the conflict completely, perhaps the solicitor as executor?

2. Remove the superannuation trustee's discretion and force the superannuation death benefit payment to the intended recipient by way of binding nomination, reversionary pension or specific trust deed provision.

   Although this option deals with the conflict issue, it does not address the usual concerns that arise when making a decision on how the superannuation death benefit is payable in advance of the death of the member.

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

3. Provide the trustee with a direction or non-binding nomination that clearly authorises the trustee of the superannuation fund to pay the superannuation death benefit to a person in a conflict position.

   Although this nomination will not be binding on the trustee, it may be sufficient to remove the concern regarding the potential conflict.

4. Include a clause in the Will that expressly authorises the executor to also pay or apply to receive the superannuation death benefit personally.

   However, it will be critical that this clause does not authorise **every** conflict as this could have unintended consequences, for example, you do not want to authorise one child to apply for the superannuation benefits where it is intended to be split between all the deceased's children equally.

   > *"except as otherwise provided in this my Will, any gift to any person who is named as my executor is not dependant on that person acting as my executor or trustee and any person who is my executor shall not be prohibited from applying in his or her own name and right for the payment of any superannuation, life insurance or other like benefit which might become payable to my estate"*

   As a result, where a conflict clause in a Will is to be inserted, it should be very specific and expressly authorises a conflict in a limited situation.

5. Finally, the will maker must understand the conflict and they are allowing the person to claim the superannuation benefit despite it. One important aspect of the decision in *Brine v Carter* was that Professor Brine would not have understood the complex superannuation arrangements and therefore in appointing Ms Carter as an executor could not be said to authorise her to act in that position of conflict.

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au

WELDEN & COLUCCIO lawyers

Appendix A

Item	Column 1 Superannuation benefit type	Column 2 Superannuation member benefit	Column 3 Superannuation death benefit
1.	***superannuation fund payment***	A payment to you from a superannuation fund because you are a fund member.	A payment to you from a superannuation fund, after another person's death, because the other person was a fund member.
2.	***RSA payment***	A payment to you from an RSA because you are the holder of the RSA.	A payment to you from an RSA, after another person's death, because the other person was the holder of the RSA.
3.	***approved deposit fund payment***	A payment to you from an approved deposit fund because you are a depositor with the fund.	A payment to you from an approved deposit fund after another person's death, because the other person was a depositor with the fund.
4.	***small superannuation account payment***	A payment to you under section 63, 64, 65, 66, 67 or 67A, or subsection 76(6), of the *Small Superannuation Accounts Act 1995*. (These provisions authorise payment of money held under the Act.)	A payment to you under section 68 or subsection 76(7) of the *Small Superannuation Accounts Act 1995*. (These provisions authorise payment of money held under the Act to the legal personal representative of the deceased.)
5.	***unclaimed money payment***	A payment to you: (a) under subsection 17(1), (2) or (2AB), 20F(1) or 20H(2), (2AA) or (2A), section 24E or subsection 24G(2) or (3A) of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* ; or (b) as mentioned in subsection 18(4) or (5) of that Act; otherwise than because of another person's death	A payment to you: (a) under subsection 17(1), (2), (2AB) or (2AC), 20H(2), (2AA), (2A) or (3) or 24G(2), (3A) or (3B) of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* ; or (b) as mentioned in subsection 18(4) or (5) of that Act; because of another person's death.
6.	***superannuation co-contribution benefit payment***	A payment to you under paragraph 15(1)(c) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*.	A payment to you under paragraph 15(1)(d) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*.
7.	***superannuation guarantee payment***	A payment to you under section 65A or 66 of the *Superannuation Guarantee (Administration) Act 1992* . (This provides for money collected under the Act to be paid to a person who retires because of incapacity or invalidity.)	A payment to you under section 67 of the *Superannuation Guarantee (Administration) Act 1992* . (This provides for money collected under the Act to be paid to the legal personal representative of the deceased.)
8.	***superannuation annuity payment***	A payment to you: (a) from a superannuation annuity; or (b) arising from the commutation of a superannuation annuity; because you are the annuitant.	A payment to you: (a) from a superannuation annuity; or (b) arising from the commutation of a superannuation annuity; because of the death of the annuitant.

194A Prospect Road, Prospect SA 5082
PO Box 1016, Prospect East SA 5082
T. 08 7225 8703 F. 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au