

proudly supported by



actlaw
society

2025 Wills and Estates Conference

ACT LAW SOCIETY

WEDNESDAY 22 OCTOBER 2025

Challenging the decision of annuation trustees



Renée Bianchi

2025 Wills and Estate Conference

What the presentation will cover

- The steps of making a claim
- How does one challenge a decision of a superannuation trustee?
- What is required at each stage?
- What does fair and reasonable decision-making by a trustee look like?
- Superannuation and estate disputes

What should you be looking at?

- The relevant Trust Deed/Rules
- *Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act)*
- *Superannuation Industry (Supervision) Regulations 1994 (Cth) (SIS Regs)*
- *Income Tax Assessment Act 1997 (Cth)*
- *Corporations Act 2001 (Cth)*

What is a death benefit?

- A payment made after a member of a superannuation fund dies
- Superannuation account balance + any insurance
- Does not automatically form part of their estate
- **Purpose = primarily to provide for those dependants who were financially reliant on the deceased at or around the time of death; and who might have expected continuing financial support or had a right to look to the deceased for ongoing financial support had they not died**
- Its purpose is not to right past wrongs e.g. did not pay child support, repay loans for assistance provided to deceased member, or pay funeral costs

Death benefit nominations - types

- Determines what discretion trustee has
- Binding or non-binding or no nomination
- Lapsing or non-lapsing
- What advice should you be giving to your client?
 - complete a nomination, preferably a binding one
 - complete following the Fund's instructions so it is valid

Who can claim a death benefit?

- Dictated by the Trust Deed/Rules and legislation
- Eligible dependant or legal personal representative
- Who is a **dependant**? (see section 10 SIS Act)
 - Spouse including same-sex and de facto
 - Child including adopted, step, or ex-nuptial children, and children of the deceased member's spouse (regardless of age or financial dependency)
 - financial dependant
 - interdependency relationship

Definitions – section 10 SIS Act

- **Dependant** - includes the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship
- **Child** – includes (a) an adopted child, a stepchild or an ex-nuptial child of the person; and (b) a child of the person's spouse; and someone who is a child of the person within the meaning of the *Family Law Act 1975* (Cth)
- **Spouse** – includes (a) another person (whether of the same sex or different sex) with whom the person is in a relationship with that is registered; and (b) another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple
- **Legal personal representative** – 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

Financial dependency

- A 'financial dependant' = a person to whom another person contributes all or a major amount of necessary financial support
- If the level of financial support is insignificant or minor, then the person cannot be regarded as a dependant
- Would have continued to rely on that member for financial support
- Regular financial contributions for such things as everyday living expenses, rent/mortgage, clothing, food, utilities, medical expenses

Interdependency relationship – s 10A SIS Act

- Must show:
 - close personal relationship;
 - live together;
 - one or each provides the other with financial support; and
 - one or each provides the other with domestic support and personal care.
- Close personal relationship = ongoing commitment to emotional support and wellbeing.
- Domestic support and personal care = frequent and ongoing nature.
- Not flatmates or provide care as part of employment
- May or may not be related
- Exception in s 10A(2) SIS Act

Making a claim with the Fund

- Fund will have basic forms - submissions and supporting documents
- Require death certificate and will (if there is one)
- Trustee will try and determine dependants
- Consider each claim on its merits
- Interim decision – notify all parties – usually 28 days to object
- Fair and reasonable decision making by trustee
- Being identified as a dependant does not necessarily entitle a person to a portion of the benefit

Making a claim – what is required?

- What is the relationship with the deceased member? How are you a dependant? What category do you fall into?
- Put your best case forward – important for next steps
- Can be required in the form of a statutory declaration
- This is the time to put forward as much evidence as possible
- Trustee may require evidence/stat decs from others

Spouse

- Marriage certificate
- Details as to relationship with deceased member including such things as length of relationship, financial situation, children, future plans
- If separated but not divorced – any ongoing relationship, financial dependency
- Easiest to demonstrate and preferred recipient by trustees

De facto spouse

- *Roy v Sturgeon* (1986) 11 NSWLR 454 per Powell J:
 - Duration of relationship
 - Nature and extent of common residence
 - Whether sexual relationship existed
 - Degree of financial dependence or interdependence – evidence of joint finances or transfer of funds
 - Ownership, use and acquisition of property or any other assets
 - Degree of mutual commitment to a shared life
 - Care and support of children
 - Reputation and public aspects of relationship
- Told others about relationship including government (e.g. Centrelink)

Child

- Birth certificate or adoption certificate/order
- If step-child – marriage certificate
- If ex-nuptial - birth certificate
- Relationship with deceased – for e.g. photos, cards, shared interests
- Any financial dependence – evidence supporting same

Financial dependence

- Statutory declaration going to frequency and amount of financial support and how relied upon deceased
- Also cover relationship with deceased – more than just financial support?
- Evidence showing regular payments of expenses or regular transfers of funds - bank statements, evidence of payments (receipts for bills, etc)
- Financial support for things such as rent/mortgage, food, clothing, utilities, insurance, repairs and alterations to home education or medical expenses, child support payments

Interdependency

- SIS Act s 10A(3) and SIS Regs 1.04AAAA
- Evidence of a shared life:
 - nature of relationship
 - living together
 - financial support
 - domestic support and person care
- Evidence such as statutory declarations, bank statements, photos, shared bills
- Generally, do not include parent-child relationships

Trustee's decision

- Generally, spouse unless had financial dependants at time of death
- No spouse, no financial dependants other than children, no interdependency relationship then to children based on financial need
- No spouse, but interdependency relationship – treated like spouse
- Interdependency relationship and financial dependants – based on financial need
- LPR – usually only if no dependants at time of death
 - Generally, require copy of grant before payment can be made
 - No LPR or decide not to pay LPR, then non-dependant relatives (i.e. not financially dependant) – shared equally, not based on financial need

Trustee is not required to provide reasons for its decision

Fair and reasonable decision-making

- Trustee needs to pay death benefit according to its Deed/Rules and SIS Act
- Those who can receive – dependants and LPR
- Only paid to a non-dependant if trustee unable to locate a dependant or LPR “after making reasonable enquiries”(SIS Regs 6.22)
- A trustee exercising a discretion is not required to give reasons (*Mandie v Memart Nominees Pty Ltd* [2014] VSC 290)
- **Made in good faith, upon real and genuine consideration, and in accordance with the purposes for which the discretion was conferred** (*Karger v Paul* [1984] VR 161 at 163-164 per McGarvie J)
- The circumstances of the case – dictates extent of duty of trustee to properly inform itself of the facts (*Wan v BT Funds Management Limited* [2022] FCA 302)

Fair and reasonable decision-making cont.

- The trustee needs to ensure sufficient material is before them → important factor to remember when considering what evidence to put before the trustee
- If a trustee does not provide reasons, this does not mean the exercise of its discretion cannot be reviewed
 - then examine the evidence before the trustee – the enquiries they made, the information they had, the reasons for, and manner of, exercising their discretion
 - The Court examines whether the discretion was exercised, not how it was exercised. (*Karger v Paul* [1984] VR 161 at 164)

Internal dispute resolution

- Object to interim/proposed decision of Trustee – 28 days to place objection
- Was the trustee's decision fair and reasonable in the circumstances?
- Basis for objection:
 - did trustee consider all information before it?
 - did trustee consider information from all dependants/give them an opportunity to provide information?
 - trustee needs to have considered all forms of dependency
- Submissions on why prefer one interest over another → important for next stage
- Trustee 90 days after receipt of objection to review and make final decision
- Final decision – 28 days after receipt to make complaint to AFCA

Australian Financial Complaints Authority

- Dissatisfied with Fund's internal review – application to AFCA
- Independent review of Trustee's decision
- Try and resolve complaint by informal means – conciliation
- AFCA must:
 - comply with its rules and law
 - consider whether trustee's decision is fair and reasonable
 - not make a determination that is contrary to law or the trust deed
- What do they look at?
 - available documents (**materials provided by the parties**)
 - the recollection of the parties
 - all relevant circumstances
- Greater weight given to documents created at the time

Australian Financial Complaints Authority cont.

- Corporations Act:
 - s 1053 – what superannuation complaints can be made
 - s 1054 – can join others to complaint
 - s 1054A – can obtain information and documents
- Section 1055 determination when AFCA:
 - must affirm if thinks trustee's decision was fair and reasonable in its operation in relation to the complainant and any other person joined; or
 - vary or set aside (substitute or remit) if satisfied that decision is unfair or unreasonable, or both

Australian Financial Complaints Authority cont.

- Only role is to decide **if the trustee's decision under review was fair and reasonable in its operation in relation to the complainant and any other joined party**
- The issue is not what decision AFCA would have made
- AFCA must give written reasons (Corporations Act s 1055A)
- AFCA will begin considering the complaint as soon as it establishes that the two prescribed 28-day timeframes for objecting to the superannuation have been met

Federal Court

- Dissatisfied with AFCA's determination – 28 days to appeal
- Appeal from decision of AFCA on a question of law (Corporations Act s 1057)
- Look to the nature, scope and purpose of the discretion in issue
- Difficult one to demonstrate if wide discretionary power given to trustee
- Affirm or set aside AFCA determination or remit to be determined again by AFCA
- Not the Court's role to assess the fairness or reasonableness of the trustee's decision (*Wareham v Marsella* (2020) 61 VR 262, [2020] VSCA 92)

Other superannuation complaints

- Application for insurance held through superannuation
- Disability claim, including where the claim involves insurance cover held through the superannuation fund
- An unreasonable delay in paying a benefit

Estate Disputes and other

- Family provision when awaiting determination of trustee – how/if factored into provision
- Ensure consistency across evidence
- Notional estate (NSW) - death benefit designated as notional estate and/or holder of benefit may be joined to proceedings
- Depending on type of superannuation fund – seek removal of trustee, then open to new trustee to make decision
- Trustee seeking judicial advice whether justified in paying death benefit as proposed

Tax implications on death benefit payment

- Dependant – no tax payable
- Non-dependant – tax payable
- LPR – tax payable will depend on status of beneficiary (dependant or not)
 - S 302-195 ITAA
 - S 302-60
 - S 302-10
- This may be taken into account by trustee when deciding who to pay death benefit to

Key takeaways

- Do a Binding Death Benefit Nomination if want to dictate where benefit goes
- Strong submission with supporting evidence at the beginning
- The earlier a lawyer is involved, the better
- Fair and reasonable decision-making – good faith, real and genuine consideration
- Timeframes for objecting to decision and to appeal



Thank You



Law Society of the Australian Capital Territory
Level 4, 1 Farrell Place, Canberra City ACT 2601
Phone 02 6274 0333 | memberconnect@actlawsociety.asn.au

actlawsociety.asn.au