



Super and your estate planning

It's official: super isn't part of your estate. A recent Federal Court Decision highlights the risk of failing to consider one of your biggest assets – your super – as part of your estate plan.

The recent Federal Court Decision in *Stock (as Executor of the Will of Mandie, Deceased) v N.M. Superannuation Proprietary Limited* [2015] FCA 612 confirms that:

- Your superannuation fund does not form part of your estate, and is therefore not subject to the terms of your Will; and
- If there is no binding death benefit nomination in place at the time of your death, the trustee of your fund has the discretion to decide who benefits from your super, provided their decision is 'fair and reasonable'.

Background

David Mandie died in 2011. He was survived by his three children, Ian, Stephen and Evelyn. At the time of his death, David was estimated by the BRW Rich 200 list to be worth \$289 million. His death made the national papers, and the Richmond Football Club lost their number 1 ticket holder.

David had made a Will that gave his residual estate to his daughter Evelyn and explained in detail why his sons had been excluded as beneficiaries. He also had in place a binding death benefits nomination naming his wife Minnie (who died before him) as beneficiary of his super fund but had made no additional nomination. David had not updated the nomination after Minnie's death...

Even prior to David's death, his family had been in conflict over the distribution of his wealth. In 1995 David, Minnie and their two sons, Ian and Stephen, reached a settlement about questions of compensation to Ian and Stephen for their contributions to the business (contributions described by an independent expert as "unacceptable and generally unsound"). A term of the agreement was that neither Ian nor Stephen "have any further rights against [their parents] or their respective estates..."

After their father's death, Ian and Stephen filed proceedings in the Supreme Court of Victoria seeking further provision from their father's estate. Just prior to the trial date, Ian and Stephen discontinued the proceedings, without giving a reason. But it did not end there...

Court appeal

In 2015 Evelyn appealed a decision by the Superannuation Complaints Tribunal ('SCT') to uphold a decision by the trustees of David's superannuation fund to divide David's superannuation death benefits equally between his three children.

Under the terms of the super fund's trust deed, if there was no valid binding death benefit nomination at the date of death, the trustees had the discretion to pay the member's death benefits to either his dependants or his legal personal representative (his executors).

Since David's wife Minnie had predeceased him and the binding death benefits nomination David had made (to Minnie) was invalid, the trustees had made a decision to distribute the death benefits between Ian, Stephen and Evelyn. The SCT had upheld this decision.



Evelyn, as one of the executors of David's estate, argued in the Federal Court proceedings that:

- The agreement made in 1995 prevented her brothers from benefiting from her father's estate; and
- Therefore, the death benefits should be paid to her as her father's legal personal representative (i.e., executor).

The trustees of the super fund had taken the view that, under the terms of the super fund trust deed, they were obligated to distribute David's death benefits to his dependants as a priority, and only to his legal personal representatives if there were no dependants.

The legal position

In reviewing the trustees' decision, the SCT had made the following determinations:

- A superannuation fund trustee is not bound to follow the directions of a Will, because superannuation is not an asset of the estate;
- It was not the role of a super fund trustee to resolve any real or perceived issues relating to a deceased member's estate by payment of death benefits – i.e., they need not look to what has occurred under the deceased's Will when deciding where to send the benefits; and
- In general, a super fund trustee does not pay death benefits to the estate of a deceased member unless there are no dependants or there is a valid binding death benefits nomination in favour of the estate.

The SCT affirmed the decision of the trustees of David's super fund. The Federal Court of Australia agreed with the SCT and denied the appeal by the executors of the estate. In dismissing the appeal, the court found "*it was not unreasonable for the Trustee to follow its general practice in the circumstances of the present case*".

What are the consequences?

It's now quite clear that your super doesn't form part of your estate – either from a strict legal sense, or in a practical sense – and does not tie-in with the terms of your Will. It also stresses the importance of having an up-to-date and valid binding death benefits nomination in place for your super benefits.

What next?

We are experienced in advising on all aspects of estate planning – especially super.

If you would like to speak to someone about developing a comprehensive estate plan, call us on **1300 654 590** or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.