






CONFLICTS IN SMSFS – WHAT HAVE THE CASES TAUGHT US?

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#NC2020



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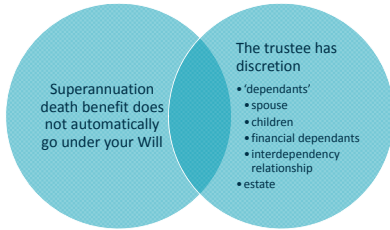
Scott is a partner in Brisbane law firm Cooper Grace Ward. He and his team specialise in assisting clients and their other advisers with a range of business and personal issues including tax and superannuation (particularly SMSFs) advice, estate planning, administration and disputes; family businesses, business structuring, business succession arrangements, asset protection and restructuring. Scott has a particular interest in how these areas interact with self-managed superannuation funds and the impact of and on these structures. He is a director of the SMSF Association and a SMSF Specialist Advisor™ with the SMSF Association, a Chartered Tax Adviser, a member of the Society of Trust and Estate Practitioners. Scott been selected by his peers for inclusion in the Eleventh Edition of Best Lawyers in Australia in the practice areas of: Superannuation Law, Trusts and Estates and Wealth Management / Succession Planning/Practice. He was named the 2018 Brisbane Wealth Management/Succession Planning practice "Lawyer of the Year" and the 2019 Superannuation "Lawyer of the Year". Scott has been listed in Doyle's Guide for Queensland: Tax lawyers as a recommended practitioner, and Estate Planning lawyers as a leading practitioner. He has a Bachelor of Laws (Hons) and a Bachelor of Business (Accy) from the Queensland University of Technology. Scott also has also completed the Certificate of Superannuation Management and the Diploma of Superannuation Management run through ASFA and Macquarie University, and the Foundation Diploma of Financial Planning.



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- How can we limit the trustee's discretion
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- But wait, there's a free set of steak knives coming...
- Case study

Super and estate planning – the starting point



Limiting discretion




- Trusteeship
- BDBN
- Reversionary pension
- Trust deed
- Incorrect death benefit payment process
- Conflicts!

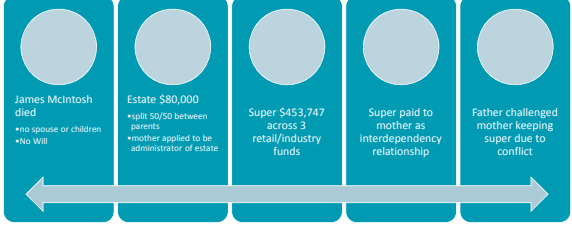
Conflicts




Where the executor is also a super beneficiary

- Claim super for themselves?
- Claim super for the estate?

The first case – *McIntosh v McIntosh* [2014] QSC 99 



- James McIntosh died**
 - no spouse or children
 - No Will
- Estate \$80,000**
 - split 50/50 between parents
 - mother applied to be administrator of estate
- Super \$453,747 across 3 retail/industry funds**
- Super paid to mother as interdependency relationship**
- Father challenged mother keeping super due to conflict**


McIntosh v McIntosh 

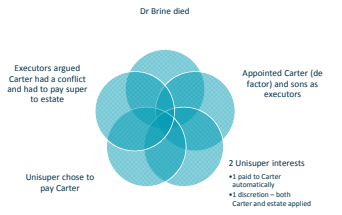
'Clear conflict of duty and interest contrary to her fiduciary duties as administrator'

- appointed as administrator first
- then claimed super
- did not disclose the conflict to the Court when applied

'The failure to apply for payment to herself as legal personal representative was in breach of her fiduciary duty to act in the best interests of then estate'

Ordered to account to the estate for the death benefit (half goes to father)

The second case – *Brine v Carter* [2015] SASC 205 



Dr Brine died

Executors argued Carter had a conflict and had to pay super to estate

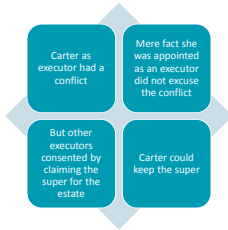
Unisuper chose to pay Carter

Appointed Carter (de factor) and sons as executors

2 Unisuper interests

- 1 paid to Carter automatically
- 1 discretion – both Carter and estate applied

Brine v Carter

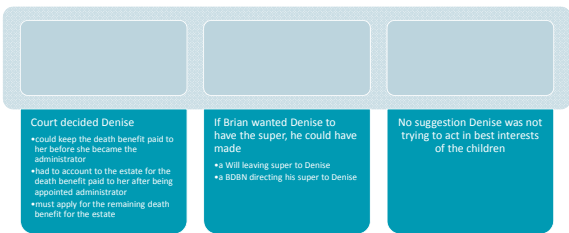


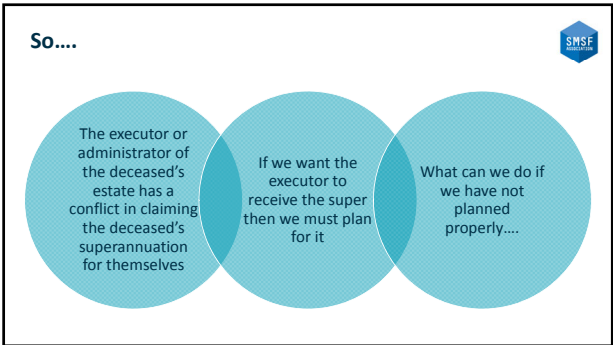
The third case – *Burgess v Burgess* [2018] WASC 279

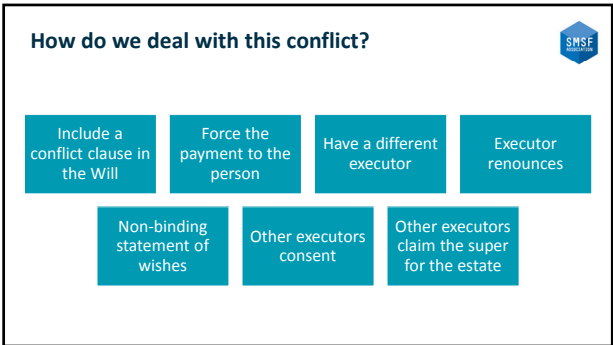


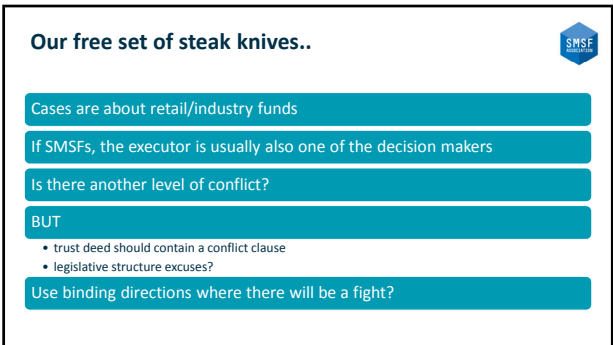
- Brian died leaving widow Denise and 2 young children
- Denise became administrator of his estate
- 4 retail super accounts
 - \$85,000 paid to Denise before became administrator
 - \$338,000 paid to Denise after she became administrator
 - 1 paid to estate
 - \$160,000 left to pay
- No Will – children entitled to some estate

Burgess v Burgess









Case study

Charles comes to see you
He wants to divide his assets between Camilla, William and Harry on death
After discussion, he decides
 his super should go to Camilla along with their main residence
 the rest of his estate is to be split 50/50 between William and Harry
Camilla has raised the possibility of receiving her inheritance using
a testamentary trust to protect from a new spouse or Laura
Charles is also concerned about Simon challenging his estate



Case study

Charles has \$2.5 million in super in the House of Windsor SMSF
Camilla and Charles are the individual trustees and the only members
Charles is not drawing a pension
Camilla, William and Harry all do not get along
What should Charles do?



Time for voting

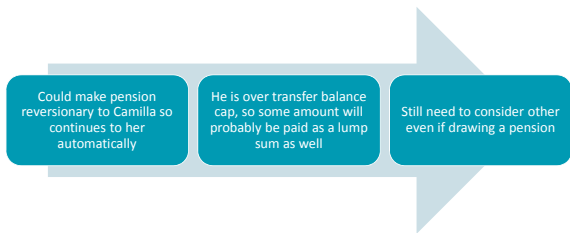


Case study

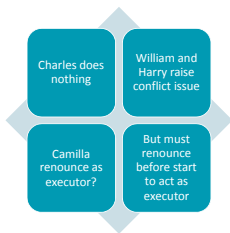


Do nothing	Camilla is not executor	BDBN to Camilla	BDBN to estate	Conflict clause in Will
<ul style="list-style-type: none"> Camilla as executor has conflict in paying super to herself must claim for estate (challenge risk) ask for consent? 	<ul style="list-style-type: none"> then who? or one of a number of executors? 	<ul style="list-style-type: none"> removes conflict argument cannot pay to estate 	<ul style="list-style-type: none"> removes conflict argument cannot pay to Camilla direct risk of estate challenge cannot pay as a pension 	<ul style="list-style-type: none"> Camilla can remain executor Camilla can keep flexibility

If Charles was in pension phase



Case study



Re Marsella



Don't forget the need for the trustees to act in good faith

Write to beneficiaries and ask for submissions?

Another push toward binding documents to remove the trustee discretion?

Conclusion



Conflicts are a real issue being raised in files

Will it stop the superannuation going where we want it to?

Take action at the planning stage

Be alert at the payment stage

Be aware of the unlitigated conflict

Are you case number 4....

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