

## WHEN ESTATES LAW & FAMILY LAW COLLIDE

The unfortunate circumstances of suicide by drowning was the subject of *Decision 637143* of the Australian Financial Complaints Authority (**AFCA**). This decision provides an excellent example of the interplay between estates law and family law. This article summarises the case and highlights the errors made by the deceased in his inaction regarding both his matrimonial and testamentary. It will also highlight how the areas of family law and estate law are interconnected and can impact one another. Finally, this article provides some guidance as to the steps you should take regarding your estate if you have recently separated from your partner.

### What was decision 637143 about?

A member of AustralianSuper superannuation fund went missing in March 2015. The Coroner later found that he had committed suicide by drowning. The deceased was survived by his two adult children and his wife, from whom he had been separated for approximately 19 months at the time of his death. The deceased had not made a binding death benefit nomination (**BDBN**) prior to his death. The deceased had a Will, but that Will did not include his superannuation. It is important to note that your superannuation does not automatically form part of your estate, to be dealt with in accordance with the terms of your will.

#### *What is a BDBN?*

- A BDBN nomination is a written direction from a member to their superannuation trustee setting out how they wish some or all of their superannuation **death benefits** to be distributed. The **nomination** is generally valid for a maximum of three years and lapses if it is not renewed.
- It should be noted that only a 'dependent' can be nominated in a BDBN. A dependent includes a member's spouse or child, a person financially dependent on the member, a person in an interdependency relationship with the member or the member's Legal Personal Representative (the executor or administrator of the deceased's estate).
- A BDBN does not last indefinitely. Each super fund may differ in how long its BDBNs will last. A BDBN will generally last 3 years. A new BDBN will need to be provided to the super fund after this time has elapsed.

The deceased's estranged wife made an application to the trustee of the super fund to be paid the deceased's death benefit. The trustee initially agreed to pay the death benefit to his

estranged wife. Upon receiving a complaint from one of the deceased's adult children, however, the trustee amended its decision. The amended decision was to pay the death benefit to the deceased's children in equal shares. The estranged wife then complained to the AFCA about the decision. The AFCA decided that 50% of death benefit should be paid to the wife, with the remaining 50% being split equally between the two children.

In coming to its decision, the AFCA placed importance on the fact that deceased and his estranged wife had not completed a property settlement and that she had an expectation of an adjustment of property interests, which may have included receiving funds from him in a financial settlement, had he not died. The AFCA also considered that the deceased's children were adults, and not his financial dependents.

### What could (and should) the deceased have done?

#### *In a family law sense*

- The deceased did not finalise his divorce.
- The deceased did not file a property settlement with his estranged wife in a timely fashion.

#### *In an estates law sense*

- The deceased had not made a BDBN in favour of his children.

### How are estates law and family law related?

As can be seen in this matter, estates law and family law can be closely connected. Had the deceased at least completed his property settlement before his death, AFCA would have most likely upheld the decision of the trustee. This is because the estranged wife would have already received an adjustment of property interests in her favour. Had this been done, the trustee would most likely have been of the view that it was not appropriate to provide any or all the deceased's superannuation to the estranged wife as she would have already received financial provision.

Regardless of whether AFCA maintained the original decision of the trustee in super, the estranged wife would have been an eligible person to seek further provision from the deceased's estate. However, case law shows that if have already been provided for in a property settlement, you will be far less likely to receive further provision from the estate of a deceased person as you will already have been provided for by the deceased. The interplay between family law and estates law is also evident with respect to claims for family provision.

If a person dies leaving a spouse, separated or not, that spouse, or indeed a former spouse, can make a claim for further provision. Of course, this would depend on various factors

including the value of the estate, the financial position of the claimant and the financial position of the other beneficiaries. If, other than the superannuation death benefit, the deceased had minimal assets, the superannuation could be clawed back by the estate and deemed 'notional estate' in NSW. This would mean that the deceased's children may lose some or all of the superannuation BDBN. NSW is the only Australian state or territory that has notional estate provisions, meaning that this situation would only happen in NSW.

Even if the deceased and his estranged wife had completed a property settlement, in this case, she could still make a claim on the deceased's estate for further provision. Although, if a person making a family provision claim already had a property settlement, the chances of that person receiving provision from the estate is low.

#### What to keep in mind with respect to your estate if you are separating from your partner?

- It is always best to complete a formal property settlement, and divorce, as soon as possible if you have separated from your partner. Otherwise, a situation like this is more likely to occur.
- You should update your Will as soon as you separate, and again after your divorce if your divorce comes later. This is because a divorce revokes a gift to a former spouse.
- Provide your super fund with a BDBN and ensure that you diarise its expiry so you can provide a new BDBN to your super fund before the original BDBN expires.

We hope this article has armed you with some vital information to help safeguard your estate if you are separating from your partner. For further enquiries regarding Wills & Estates please fill out a Blanchfield Nicholls enquiry form, available [here](#).