

**Publication:** [Professional Planner](#)

**Date:** 3 November 2016

## Is superannuation a part of your clients' estate plans?



November 3, 2016

According to IOOF, superannuation can be an overlooked part of estate planning. However where competing beneficiaries have a claim to a deceased member's death benefits, a well-documented estate plan can be a vital to solving estate conflicts.

Here we look at two recent cases brought before the Superannuation Complaints Tribunal (SCT) which demonstrate the problems that can arise when a comprehensive estate plan is not in place.

### **Case 1: Depends on the dependant's dependence**

The member joined the fund and completed a non-binding nomination in favour of his three children, who were all under 18 at the time. Ten years later, the member remarried without ever updating his non-binding nomination. The member died after two years of marriage (and three of living together).

The Trustee of the super fund determined to pay the deceased member's benefit to the estate, of which the widow was the sole beneficiary. The three adult children from the member's first marriage complained that they should have received the benefit.

At the time of the member's death, the three children:

- were age 26, 28 and 29
- did not live with the member
- earned their own income and were not financially dependent upon him.

They complained that the majority of the member's \$47,000 death benefit had been accumulated before the member married the widow and that their father had always wanted them to benefit from his life's work.

The member made his Will a month prior to his death (when he was seriously ill) and nominated the widow as the sole beneficiary. The member's estate consisted of a vehicle plus the matrimonial home valued at \$340,000 (over which there was a joint

\$130,000 mortgage in the names of the member and the widow). The widow had been granted probate but had not been able to administer the estate as it had no funds.

The evidence presented to the SCT demonstrated that the member and the widow were financially interdependent since their marriage. In addition the widow had illnesses which reduced her current income earning ability such that she relied on Government benefits of \$244 per week. The widow was also in arrears on the mortgage and council rates of over \$16,000.

The SCT determined that the three adult children should not receive any of the benefit, even though they were named on a non-binding nomination.

**The three adult children should not receive any benefit, said the SCT.**

In addition, the SCT determined that the Trustee should have made payment directly to the widow, rather than to the estate. It was not fair and reasonable that the widow did not receive the entire superannuation benefit.

**Case 2: De facto dilemma**

The Trustee of the super fund determined to pay the deceased member's benefit to his de facto spouse. The mother of the deceased member complained that the partner did not meet the definition of a de facto spouse.

The member died at age 31, had never married and did not have a Will or a death benefit nomination. At the time of his death, he was living with his partner and had done so for five months.

The mother maintained that to qualify as a de facto spouse, the member and the partner needed to have lived together for at least two years. If there was no de facto relationship, the mother was the only next of kin and would have received the member's death benefit proceeds under the laws of intestacy. The mother did not claim to be financially dependent on the member at the time of his death, however she stated that she had an expectation of support from her son in her old age.

Under the Family Law Act, a couple is defined as being in a de facto relationship if:

- they are not married to each other
- are not related by family, and
- they have a relationship as a couple living together on a genuine domestic basis.

There are a range of factors that determine if the couple are in a de facto relationship. No particular factor must be met, rather all of the circumstances must be considered.

In determining whether two people meet the definition of a de facto couple, there is no requirement for the relationship to have existed for any specific time. However, in order for a de facto to apply to the Family Court for a property settlement on

dissolution of the relationship, there is generally an expectation that the couple have been in a de facto relationship for at least two years, or have a child together.

More importantly, superannuation law does not use the term de facto. Rather, a spouse is defined as including:

- 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.

The fund's trust deed used the same definition. Accordingly, it was only necessary for the partner to demonstrate:

- that she lived together with the member (undisputed)
- on a genuine domestic basis (undisputed), and
- in a relationship as a couple (undisputed).

As there is no pre-requisite that the relationship existed for any defined length of time, it was only required to demonstrate that it existed at the date of death of the member.

The SCT determined that the partner met that definition of a spouse and that the benefit should be paid to her in full.