SUPREME COURT OF QUEENSLAND

CITATION:	*McIntosh v McIntosh* [2014] QSC 99
PARTIES:	**ELIZABETH JOY McINTOSH** (applicant) **v** **JOHN McINTOSH** (respondent)
FILE NO/S:	SC 8510/13
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	16 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	23 April 2014
JUDGE:	Atkinson J
ORDER:	**The applicant is required to account to the estate of James Joseph McIntosh deceased for the superannuation benefits referred to in paragraph 40 of the affidavit of Elizabeth Joy McIntosh filed on 26 March 2014.**
CATCHWORDS:	SUCCESSION – PERSONAL REPRESENTATIVES – RIGHTS, POWERS AND DUTIES – GETTING IN AND REALISING THE ESTATE – where the son of the applicant and respondent died intestate – where the applicant was appointed as administrator of the estate – where the applicant sought the payment of superannuation death benefits to herself personally – whether the applicant was in breach of her duty under s 52 of the Succession Act 1981 (Qld) to get in the assets of the estate EQUITY – GENERAL PRINCIPLES – FIDUCIARY OBLIGATIONS – FIDUCIARY DUTY – ACCOUNT FOR BENEFITS GAINED – where the applicant administrator sought the payment of superannuation death benefits to herself personally – whether the applicant breached her fiduciary duty not to allow a conflict of personal interest and duty to occur – whether the applicant should be brought to account for the superannuation benefits

Succession Act 1981 (Qld), s 6, s 31, s 50, s 52, s 55A
Superannuation Industry (Supervision) Act 1993 (Cth), s 10, s 10A
Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 6.22
Trusts Act 1973 (Qld), s 96
Uniform Civil Procedure Rules 1999 (Qld), r 610

Armitage v Nurse [1998] Ch 241, cited
Bath v British & Malayan Trustees Ltd [1969] 2 NSWR 114, cited
Breen v Williams (1996) 186 CLR 71, cited
Bristol and West Building Society v Mothew [1998] Ch 1, cited
Butler v Meriga [1904] St R Qd 248, cited
Calvo v Sweeney [2009] NSWSC 719, cited
Guazzini v Pateson (1918) 18 SR (NSW) 275, cited
In re Danish Bacon Co [1971] 1 WLR 248, cited
In the Goods of Loveday [1900] P 154, cited
Mordecai v Mordecai (1988) 12 NSWLR 58, cited
Rankine v Rankine [1998] QSC 48, cited
Re Hayes' Will Trusts [1971] 1 WLR 758, cited
Sargeant v National Westminster Bank PLC (1991) 61 P & CR 518, cited
Williams v Federal Commissioner of Taxation (1950) 81 CLR 359, cited

COUNSEL: D B Fraser QC with R T Whiteford for the applicant
D J Morgan for the respondent

SOLICITORS: Hillhouse Borough McKeown for the applicant
Gleeson Lawyers for the respondent

[1] This decision deals with an area of the law which has growing practical importance in view of the growth of personal superannuation: how should the legal personal representative of a deceased person deal with the entitlement to payment of the deceased person's superannuation upon death. As can be seen from this case, the amount invested in superannuation and receivable by way of death benefit may be well in excess of the amount of funds in the estate.

[2] This proceeding commenced by way of originating application on 12 September 2013 when the applicant, Elizabeth McIntosh, applied for an order pursuant to r 610(1)(d) and r 625(1) of the *Uniform Civil Procedure Rules* 1999 (UCPR) that, subject to the formal requirements of the Registrar, Letters of Administration on intestacy of the estate of James Joseph McIntosh *(sometimes referred to as Jamie) be granted to her. James McIntosh, who was the son of the applicant, Elizabeth McIntosh, and the respondent, John McIntosh, died intestate on 14 July 2013.

[3] The applicant filed two affidavits in support of her application for Letters of Administration. In her affidavit filed on 12 September 2013 Ms McIntosh set out her relationship with her deceased son, that he died intestate without a spouse, and the assets and liabilities of his estate. In the affidavit she also deposed to a high

level of conflict between herself and her former husband, the respondent, and said as a result she did not believe that a joint grant to them of Letters of Administration was workable. She deposed that she understood that, if she were appointed Administrator of the estate, she was required to collect her son's assets and pay his liabilities as soon as possible and distribute his residuary estate by dividing it equally between herself and the respondent. She said "I propose faithfully to do this."

[4] There were some brief references to the superannuation held by the deceased. In a letter dated 19 August 2013 from the applicant's solicitors to the respondent's solicitors exhibited to the affidavit it was said:

> "Our client is aware of the obligations that will apply to her as the Personal Representative to administer Jamie's estate in accordance with the rules of intestacy such that the estate is distributed between Jamie's two parents in equal shares.
>
> As previously discussed in our letter of 13 August 2013, any superannuation held by Jamie at the time of his death will be dealt with by the trustees of the relevant funds having regard to any binding nominations, any non-binding nominations, lapsed nominations, the relationship between the deceased and his parents and the intestacy rules."

[5] The letter of 13 August 2013 was not annexed to that affidavit.

[6] In her affidavit filed on 20 September 2013 the applicant said that she had initially spoken to her solicitors on 23 July 2013 regarding "Jamie's estate and superannuation".

[7] On 24 September 2013 an order that Elizabeth McIntosh be granted Letters of Administration was made by the Chief Justice in the following terms:

> "Subject to the formal requirements of the Registrar, Letters of Administration on intestacy in the estate of James Joseph McIntosh, deceased be granted to the Applicant."

[8] On 14 November 2013 the Registrar informed the applicant's solicitors that they were required to file a supporting affidavit exhibiting the original death certificate. That was done by affidavit on 19 November 2013. A formal application for Letters of Administration was also filed by the applicant on that date.

[9] In the affidavit filed on 19 November 2013 supporting the formal application for Letters of Administration the applicant deposed "I am aware of the intestacy provisions that will apply to the deceased's estate and the beneficial interest that the deceased's father has in his estate. If this Honourable Court grants me Letters of Administration on Intestacy I will comply with my duties as personal representative in administering the estate of the deceased in accordance with the intestacy provisions."

[10] The grant of Letters of Administration to the applicant "as ordered by the Court by Order dated 24 September 2013", was made on 26 November 2013.

[11] On 26 March 2014 the applicant filed an application within the originating application for advice or directions pursuant to s 6 of the *Succession Act* 1981 (Qld)

and s 96 of the *Trusts Act* 1973 (Qld) as to whether she was required to account to the estate of James Joseph McIntosh for certain superannuation benefits. Those superannuation benefits were payments from three superannuation funds to the applicant personally being in the amount of $234,282.35 from Hostplus; $184,190.94 from Hesta; and $35,275.40 from Intrust Super.

[12] In support of her application for "advice or direction" the applicant relied upon affidavits by herself and her solicitors. The respondent also filed an affidavit. The applicant sought an order that she was not required to account to the estate for the superannuation benefits received by her.

[13] This application was made in a background of family conflict. The applicant and the respondent were married on 19 October 1968. There were three children of the marriage including James, the deceased, who was born on 8 August 1972. His parents separated on 9 October 1977 and were divorced on 23 February 1979. The parents have had and continue to have an acrimonious relationship. From the applicant's affidavit, it appears that in spite of regular contact with his father until he turned 17, James was closer to his mother and lived with her at the time of his death. The respondent's affidavit paints a rather different picture, deposing to a warm continuing relationship with James, but accepted that James lived with the applicant at the time of his death.

[14] James died intestate on 14 July 2013. He was not married. The net assets of his estate appear to amount to about $80,000. The majority of that was from the proceeds of a life insurance policy. That amount is in contrast to the payment of $453,748.69 in superannuation benefits received by the applicant personally.

[15] In essence, the applicant argues that she should be entitled to retain the benefit of all of the superannuation paid to her while the respondent submits that the applicant should be required to account to the estate for those monies, which would then be divided under the intestacy rules equally between the applicant and the respondent.

[16] The acrimonious relationship between the applicant and respondent is reflected in the correspondence between their legal representatives. I shall refer to that correspondence in so far as it relates to the superannuation benefits.

[17] On 5 August 2013, Logan Legal Centre (LLC) on behalf of the respondent wrote to Hillhouse Burrough McKeown (HBM), the applicant's solicitors, about her application for Letters of Administration. Ian Hillhouse from HBM deposed that in reply to that letter he contacted Janelle Rollo from LLC by telephone on 5 March 2014. That date must be in error as it appears from the context that the telephone call was made on 5 August 2013 on receipt of the letter from LLC sent by facsimile transmission on that day. Mr Hillhouse says that in response to a query by Ms Rollo as to superannuation, he informed her that superannuation did not form part of the estate and the intestacy rules did not apply to the superannuation proceeds.

[18] On 12 August 2013, LLC wrote to HBM referring to that telephone conversation saying, *inter alia*:

> "We confirm that [the respondent] is satisfied with your proposal that the parties reach a deed of agreement regarding the disposal of any assets and the distribution of any superannuation fund entitlements to [the applicant and the respondent] in equal shares."

[19] The applicant deposed that she did not give her solicitors any instructions to make any proposal regarding superannuation being available to the estate in any way. Her view was (and is) that the superannuation does not form part of the estate. Mr Hillhouse denies that he indicated to Ms Rollo that he had instructions to agree to the superannuation forming part of the estate and being divided between the parties.

[20] The applicant says she instructed her solicitors to write to LLC on 13 August 2013 in the following terms:

> "1. Our client, Elizabeth McIntosh, will investigate the position regarding distribution of any superannuation funds. Elizabeth McIntosh is entitled to have all superannuation funds distributed to her when she is named as the beneficiary.
>
> 2. Your client will be informed of the position regarding superannuation as information is received.
>
> I did not make a proposal that the parties enter a deed of agreement in regard to the disposal of assets and the distribution of any superannuation fund entitlements to your client and Elizabeth McIntosh in equal shares. Elizabeth McIntosh does not agree to that and has not instructed us to make such a proposal. What I said was that under an intestacy the estate would be divided between the parents. I did not intend any inference to be drawn from this that the rules relating to intestacy were to be applied to superannuation proceeds. The position there is that the trustees will be bound by any binding nominations and will also consider any non-binding nominations, lapsed nominations, the relationship between the deceased and his parents and the intestacy rules."

[21] On 19 August 2013 HBM wrote to LLC saying that the applicant was aware of the obligations that would apply to her as personal representative to administer the estate in accordance with the rules of intestacy such that the estate was to be distributed between the parties in equal shares.

[22] The respondent consented to the applicant being appointed as the sole personal representative of the estate and, as previously mentioned, an order was made appointing the applicant as administrator on 24 September 2013.

[23] On 26 September 2013, LLC wrote to HBM with a number of questions. With regard to superannuation that letter contained the following:

> "**Superannuation**
>
> 13. What efforts have been made to establish all superannuation entitlements that the deceased would have accrued in his working life?
>
> 14. How does the administrator intend to satisfy the beneficiary that she has called in all relevant superannuation entitlements of the deceased?
>
> 15. Can you confirm whether or not the death beneficiaries under these super funds are true valid binding nominations or indeed out of date nominations?

> 16. If it has been established that these are valid binding death nominations please advise of the last date that these nominations were updated?"

[24] On 14 November 2013 Paul Gleeson from Gleeson Lawyers wrote to HBM informing them that he now acted on behalf of the respondent saying *inter alia*:

> "As administrator, I note that your client will make her best endeavours to maximise the size of the estate. Bearing this in mind, please advise whether your client intends to seek any or all of the deceased's superannuation entitlements to be paid entirely to her in her personal capacity.
>
> In this regard, I request that you forward to me copies of any correspondence you or your client has received from any of the deceased's superannuation companies and also, forward to my office any correspondence from your client to the respective superannuation companies, and claim forms, whereby she has requested all superannuation proceeds to be paid to the estate."

[25] On 20 November 2013 Gleeson Lawyers wrote to HBM asking for details of the deceased's superannuation accounts so they could make their own enquiries. Mr Gleeson followed that up by emails on 27 November 2013 and 23 January and 31 January 2014.

[26] On 4 February 2013 HBM wrote to Mr Gleeson saying with regard to the superannuation:

> "With respect to your client's requests in relation to the superannuation, as previously indicated to your client while he was represented by Logan Legal, we do not hold any instructions in relation to the superannuation as it does not form part of the estate. Our instructions are limited to calling in and administering the estate in accordance with the intestacy provisions. It is our understanding that there is no obligation upon our client as the personal representative to make an application to have the superannuation interests held by Jamie paid to the estate. If you are able to direct us to the law that requires our client as personal representative to make such an application to the super funds then we will take instructions in this regard."

[27] On 10 February 2014 Mr Gleeson responded by email:

> "In relation to superannuation, as personal representative, your client has a fiduciary obligation to maximise the return for the estate. Clearly your client is in breach of her obligation if she has actively sought payment to herself direct in lieu of the estate."

[28] On 27 February 2014 HBM replied to Mr Gleeson's letter of 26 September 2013. With regard to the superannuation the letter said:

> "Superannuation
>
> 13. The deceased's superannuation entitlements are not assets of his estate and s 52(1)(a) of the Succession Act 1981 does not apply to them."

[29] Mr Gleeson responded by email on 5 March 2014 saying with regard to that paragraph:

> "As to the deceased's superannuation entitlements, would you please explain on what basis those entitlements are not, or may not become, assets of the estate. If the deceased had made binding death benefit nominations in favour of the estate, then his entitlements would fall into the estate. Alternatively, if the relevant superannuation trustees have a discretion as to the payment of the deceased entitlements, their discretion is usually exercisable, inter alia, in favour of the estate. Is there any reason to think that the relevant superannuation trustees would not exercise their discretion in favour of the estate? In particular, has your client sought the payment to her of any of the deceased's superannuation benefits, and if so, on what basis? Alternatively, had the deceased made any binding death benefit nominations in favour of your client?"

[30] The applicant's response was to file this application. In an affidavit filed 26 March 2014 a solicitor from HBM, Amy Sanders-Robbins, disagreed with the proposition in Mr Gleeson's email that discretion by superannuation trustees is usually exercisable in favour of the estate. She deposed:

> "I disagree with that proposition. It does not accord with my experience. My experience is that in the usual course of events, the trustees will make enquiry as to those persons who are eligible to receive benefit under the terms of the relevant legislation and trust deed, and will place particular emphasis on exercising their discretion to the position of those who were dependent upon the contributor and any nominated beneficiaries under non-binding nominations. In my experience, such trustees make their own enquiries in that respect including soliciting submissions where they deem appropriate."

[31] The applicant's affidavit filed in support of her application exhibited copies of the most recent superannuation statement for each of the three funds that she could locate in James' personal papers at the time of his death. She swears that she was the nominated beneficiary of each of the superannuation funds and that it was a non-binding nomination in each case. She deposed that in about September 2013 she applied to each of the superannuation funds to have the balance including the death benefit paid to her as the nominated beneficiary. She says that she provided each fund with information regarding the deceased's relationship with her and with the respondent. She says she did not have the respondent's direct contact details but that when requested she provided contact details for the respondent's solicitors, LLC. The respondent in his affidavit contradicts her claim that she did not have his personal contact details.

[32] The applicant swears that the trustee of each fund determined to pay the balance held by James to her on the basis that the deceased and the applicant lived in an interdependency relationship at the time of his death and the balance of his funds were paid to her on that basis which meant she did not to pay tax on the interest each trustee paid to her.

[33] She then refers to the receipt of $453,748.69 in superannuation benefits which she holds in a bank account controlled by her. She swears that if the court determines

that the funds she has received are or should form part of the estate then she would transfer the funds to the estate.

[34] On 14 April 2014 Mr Gleeson asked for copies of the documents referred to in the applicant's affidavit with regard to her application to the superannuation funds for the balance to be paid to her and the payment by the trustee of each fund to her.

[35] On 16 April 2014 HBM wrote to Mr Gleeson saying with regard to the superannuation:

> "10. Please find enclosed the following
>
> (a) Host Plus Application for Death Benefit Form dated 30 September 2013;
>
> (b) Intrust Super Death Benefit Claim Form dated 30 September 2013;
>
> (c) Hesta Death Benefit Claim Form dated 30 September 2013; and
>
> (d) Handwritten letter by Elizabeth McIntosh to Intrust Super advising of the legal dispute and enclosing supporting documentation dated 3 December 2013.
>
> 11. We are instructed that the letter and enclosed documents sent to Intrust super was also sent to Host Plus and Hesta. We do not hold a copy of these letters and have not been able to obtain a copy from the respective funds.
>
> 12. We do not hold any other correspondence from the superannuation funds."

[36] In response, Mr Gleeson asked to inspect the initial letters sent from each superannuation fund to the applicant enclosing the death benefit claim forms.

[37] On 17 April 2014, HBM sent to Gleeson Lawyers a letter enclosing a letter from Hesta to the applicant dated 12 February 2014; a letter from Host Plus to the applicant dated 19 December 2013; letters from Intrust Super to the applicant dated 29 August 2013, 21 October 2013 and 22 January 2014; and what was described as a handwritten letter sent by the applicant to Intrust Super and Hesta when she was requested to provide the respondent's contact details.

[38] The documents disclosed reveal the following with regard to the applicant's claim against each superannuation fund.

Intrust Super

[39] On 29 August 2013, Intrust Super wrote to the applicant referring to her enquiry about James' superannuation. It set out the documents required for a claim. It informed her:

> "Please be aware the time frame for processing death claims may be lengthy, because *every* dependant of the deceased *and* potential claimant must be contacted, and their intentions recorded.
>
> In accordance with the Fund Trust Deed (fund rules) and Government regulations the Trustee will make the final decision as to how benefits are divided and to whom any benefits are paid. Initially dependants and/or legal personal representatives of the deceased are considered for payment. Where there are no

> dependants or legal personal representatives; benefits may be distributed to other claimants."

[40] The application dated 30 September 2013 to Intrust Super by the applicant required certified copies of any documents relevant to Letters of Administration being sought because the fund member died intestate. The application provided for a number of headings under which a claim might be made. Section 10 deals with claiming on behalf of the deceased member's estate. Beside that the applicant wrote:

> "These papers are still with Courts. Gain them 25th September. My solicitor: Hillhouse, City care of Amy Sanders-Robbins 07-32286100."

[41] The applicant's claim for payment of James' superannuation to her was made under sections 11 and 12 of the application form. Section 11 dealt with claiming under financial dependency. The applicant ticked the boxes for joint sharing of household expenses (electricity, phone, gas) and financial interdependence (money loaned on the understanding it was to be repaid). Under section 12, claiming an interdependency relationship, she ticked an affirmative answer to whether they had a close personal relationship, if they lived together, if one or each of them provided the other with financial support, if one or each of them provided the other with domestic support and personal care and if one of them provided the other with support and care of a type and quality normally provided in a close personal relationship rather than by a mere friend or flatmate.

[42] In answer to the question as to the degree of mutual commitment to their shared life she wrote:

> "James was my son. We lived together for more than 30 years of his 40 years of life. He lived in Melbourne from 2001 to 2005. We shared household bills & he depended on me as he was Bi Polar since the age of 22 years."

[43] She said the degree of emotional support was "James had Bi Polar also a hip disease which left James a leg shorter than his right leg." She described the relationship as "mother and son".

[44] The documents provided by HBM to Gleeson Lawyers included a number of documents provided by the applicant to Intrust Super. They included a statutory declaration dated 3 September 2013 by Nathan Phipps, a friend of James, who expressed the view, based on his experience of James' relationship with each of his parents, that the applicant should be the sole beneficiary of the distribution from any superannuation fund. They also included a statutory declaration dated 30 September 2013 from the applicant setting out her relationship of interdependency with James and his poor relationship with the respondent.

[45] Another statutory declaration by the applicant dated 30 September 2013 referred to the circumstances that the deceased paid board, his share of the food, electricity, gardener, rates and water rates during the years he lived with her while she was a single parent.

[46] On 21 October 2013, Intrust Super acknowledged receipt of the documentation from the applicant but told her:

> "We are unable to proceed with this claim until we receive the following:

- The whereabouts of the late James Joseph McIntosh's father John McIntosh (please provide contact details)"

[47] The applicant has provided a handwritten letter on which the annotation "Draft of letter sent back to Intrust & Hesta" appears:

> "In reply to your letter on 21st October 2013
>
> The whereabouts of John McIntosh is unknown to me or his Daughter Stacey Leanne Straford (James Sister) as from December 2012
>
> my only contact with him is through his solicitor Logan Legal Centre PO Box 335 Waterford QLD 4133"

[48] On 3 December 2013, the applicant sent a further letter to Intrust Super in the following terms:

> "My name is Elizabeth Jan McIntosh, my son James Joseph McIntosh was tragically killed 14th July 2013. He was a member of your super fund.
>
> I have filled all claim forms and submitted them to you.
>
> The court has awarded me The Letters of Administration and Probate my Solicitor or myself will forward copies to you.
>
> I have enclosed 2 copies of the Affidavit I have signed, via Court Hearings am retaining a Barrister to say James Estate will be shared between his Family. As Executor I hope I can state it to be the shared or divided between Father, Brother, Sister and myself.
>
> I am also aware this privilage [sic] can be revoked if I don't do what is required.
>
> My Solicitor has said on several occasions James Super is a separate identy [sic]. This information has also been sent in writing to John McIntosh, James estranged father, on more than 3 occasions. This is why I have … corresponded with James Super Funds with no Solicitor.
>
> I have been told it up to the discretion of the Superfund Board.
>
> James died Intestate, as most single sons do. Five months after his tragic death I find myself struggling to keep James wishes as I hope he wanted.
>
> With the history of his fathers help financially: eg want to put him into Bankruptcy after major surgery.
>
> I know James wishes would be for me to attend his affairs, and have no involvement from his father. This was proven when James bought his new car a month before his death. John had no knowledge until his passing. A dream he took many months to forfill [sic].

> My son and I were close, and I know he would want me to disperse his hard earnt [sic] earnings to his siblings, Nathan, Stacey and their children, over the length of my life, and also set up a diary, to be found, after my death.
>
> As a mother, I should not have buried my beloved son, as that is the case, I hope you can help me bring his wishes to the fore, and I can keep his memory alive through his family."

[49] On 22 January 2014, Intrust Super sent the entire proceeds of the superannuation fund in the sum of $35,316.40 to the applicant.

Host Plus

[50] The documentation regarding Host Plus shows that the applicant applied for the death benefit on 30 September 2013 the basis that she was "in an interdependent relationship with the deceased". She said that probate and Letters of Administration had been granted to her on 24 September 2013 and gave the name and phone number of her solicitor. In the application she said that she was both financially dependent upon the deceased at the time of his death and in an interdependent relationship with him at the time of his death. In support of that she wrote the following:

> "My son James were living together, at same address. We also work for the same company. James paid board $100.00 per week, he also helped financial to household accounts, rates, electricity, food and gardener as he was unable to do this himself. James had major hip surgery in 2006 which left his left leg shorter by 5-6 cms that gave him a limp also my son was Bi-Polar & I needed to look after & supervise his life-long medication, cut his toenails, put his shoes & sox [sic] on & pick up things he couldn't do."

[51] On 16 December 2013, Host Plus paid a death benefit to the applicant as James' dependant in the sum of $234,282.36.

Hesta

[52] The applicant's application to Hesta was also made on 30 September 2013. She said that she was financially dependent on, and in an interdependent relationship with, the deceased at the time of his death. She said:

> "James was Bi-Polar depended on medication all his life, We lived together for over 30 years, he was my financial support also he made himself trustee of our family without asking also he had a bone disease, one leg shorter, I had to put his shoes & sox [sic] on, and also cut his toe nails as he couldn't bend to do it."

[53] She said she had applied for but not yet received probate and letters of administration.

[54] In support of support of her claim of being financially dependent on the deceased at the time of his death and in an interdependency relationship with him, she said:

> "Financial support, household bills, board, gardener, work at same place, car pooled also emotional support with driving to family &

> friends outings and I supported with medication & dressing, personal things".

[55] She apparently sent to Hesta a letter of which she has provided a handwritten version saying she did not know of the respondent's whereabouts but providing the address of LLC.

[56] On 12 February 2014, Hesta sent a letter to the applicant enclosing a cheque for $184,190.94 as her "entitlement from the fund**."**

The applicant's submissions

[57] The applicant concedes that, once appointed as Administrator, she was in a fiduciary relationship with the beneficiaries of the estate. However, she argued that given the content of the fiduciary duty in the circumstances of this case she did not breach any such duty.

[58] The content of the duty expressed in s52(1)(a) of the *Succession Act* 1981 to collect and get in the real and personal estate of the deceased ("the deceased's assets") did not include the inchoate right to compel the trustee of the superannuation fund to exercise its discretion according to the superannuation deed. Neither the superannuation benefits nor the inchoate right were assets of the estate to which the duty in s 52 of the *Succession Act* would attach.

[59] The applicant also submitted that as the potential conflict between her duty as Administrator and her interest in receiving the superannuation benefits personally was known before she was appointed Administrator, an application for payment of the superannuation benefits to the estate did not form part of the Administrator's duties.

The respondent's submissions

[60] The respondent submitted that the applicant, as personal representative, had a positive duty under s 52 of the *Succession Act* to get in the assets of the estate. She also had a fiduciary duty not to allow a conflict of personal interest and duty to occur. Seeking a payment of the superannuation death benefit to herself personally, without also doing so on behalf of the estate or, otherwise, not informing the respondent so that he could do so, breached both those duties.

[61] The remedy for breaching that duty is an account of profits. Consequently the applicant should be directed that she is obliged to account to the estate for the death benefits received by her.

Consideration

[62] The first question to be considered is - what are the duties of an administrator which are relevant to this case? The office of personal representative may be filled by an executor appointed under a will to administer the estate or an administrator appointed by the court. The method of their appointment is an important distinction between them as the appointment of an executor is the act of the testator exercising a testamentary choice. The testator may appoint someone whom the testator knows is a creditor or debtor of the testator or whom the testator has designated as the sole named beneficiary under a non-binding nomination of the testator's superannuation fund. These are examples of circumstances where the testator has nominated a legal

personal representative who has a known conflict and must be taken to have accepted that conflict. This is an exception to the general rule that no one who has fiduciary duties is allowed to enter into engagements in which the fiduciary has or may have a personal interest conflicting with the interests of those whom the fiduciary is bound to protect.

[63] The exception is described more precisely by Hope JA in *Mordecai v Mordecai*:[1]

> "That exception is where a testator or settlor, with knowledge of the facts, imposes on a trustee a duty which is inconsistent with a pre-existing interest or duty which he has in another capacity. In that situation the trustee is not thereby debarred from accepting the trust or from performing the duties which are imposed under it."[2]

[64] The exception does not however extend to allowing a trustee, by the trustee's own act, voluntarily to put himself or herself into a new position of conflict.[3]

[65] The appointment of an administrator is made by the court for the due and proper administration of the estate and the interests of the parties beneficially entitled thereto.[4] This is usually done where a person has died intestate. The exception referred to in *Mordecai v Mordecai* does not therefore apply. The court can only act on the information before it. Usually the administrator appointed will be the person who has the greatest interest as beneficiary of the estate but that person may be passed over where the court apprehends from the material before it that that person may not act in the best interests of the estate.[5]

[66] The priority for the grant of Letters of Administration is set out in r 610(1) of the UCPR. Where, as here, the person died without a surviving spouse, children or other issue, the deceased's parents are entitled to a grant. It is not usual to make a joint grant. The court has a general power found in r 610(3) to grant Letters of Administration to any person, in priority to any person mentioned in r 610(1).

[67] In this case Letters of Administration were issued to the applicant after the respondent withdrew his opposition. The only information the court had about the superannuation was the reference made to it in the letter of 19 August 2013 annexed to the applicant's affidavit. The applicant did not disclose that she intended to apply to the superannuation funds for the funds to be paid to her personally. There was certainly not sufficient disclosure by her for the court to infer that she would be placed in a position of conflict nor for the respondent to give his informed consent to that position of conflict.

[68] In this case, the applicant did not make an application to any of the superannuation funds until 30 September 2013 which was after the order was made on 24 September 2013 that Letters of Administration be granted to her. After that order she acquired the fiduciary duties which are reposed in the office of Administrator. Section 50 of the *Succession Act* provides that an administrator has the same rights

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1 (1988) 12 NSWLR 58 at 66-67.

2 See also *Sargeant v National Westminister Bank PLC* (1991) 61 P & CR 518 per Nourse LJ.

3 *Guazzini v Pateson* (1918) 18 SR (NSW) 275 at 277.

4 *In the Goods of Loveday* [1900] P 154 at 156 per Jeune P followed in *Bath v British & Malayan Trustees Ltd* [1969] 2 NSWR 114 at 118.

5 See for example *Butler v Meriga* [1904] St R Qd 248 at 252 per Chubb J; *Succession Act* 1981 (Qld) s 6.

and liabilities and is accountable in like manner as if the administrator were the executor of the deceased.

[69] It is essential to fiduciary duties that they include the core or irreducible minimum duties necessary for the legal personal representatives to perform their obligations "honestly and in good faith for the benefit of the beneficiaries."[6] This is the encapsulation of the fiduciary's duty of loyalty and fidelity.[7] As Millett LJ held in *Bristol and West Building Society v Mothew*:[8]

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

[70] In this case there was a clear conflict of duty and interest contrary to her fiduciary duties as administrator.[9] When the applicant made application to each of the superannuation funds for the moneys to be paid to her personally rather than to the estate, she was preferring her own interests to her duty as legal personal representative to make an application for the funds to be paid to her as legal personal representative. She was in a situation of conflict which she resolved in favour of her own interests. As such she acted not only in breach of her fiduciary duty as administrator of the estate but also in breach of the duty which is given statutory expression s 52(1)(a) of the *Succession Act* 1981.

[71] An administrator of an intestate estate has a duty to apply for payment of superannuation funds to the estate. The administrator has no proprietary right to the funds[10] but has standing to compel the trustees of the fund to exercise their discretion to pay out the funds. The superannuation fund's duty on the death of a member is found in reg 6.22 of the *Superannuation Industry (Supervision) Regulations* 1994 (SIS Regs) which relevantly provides:

> "**Limitation on cashing of benefits in regulated superannuation funds in favour of persons other than members or their legal personal representatives**
>
> (1) … a member's benefits in a regulated superannuation fund must not be cashed in favour of a person other than the member or the member's legal personal representative:
>
> (a) unless:

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6 *Armitage v Nurse* [1998] Ch 241 at 253-254; cited by de Jersey CJ in *Rankine v Rankine* [1998] QSC 48 at p 16.

7 Queensland Law Reform Commission Interim Report "A Review of the *Trusts Act* 1973 (Qld)" WP No 71 at [6.9]-[6.10], [6.42]-[6.43].

8 [1998] Ch 1 at 18.

9 *Calvo v Sweeney* [2009] NSWSC 719 at [228] per White J.

10 *In re Danish Bacon Co* [1971] 1 WLR 248 at 256; *Williams v Federal Commissioner of Taxation* (1950) 81 CLR 359.

(i) the member has died; and
(ii) the conditions of subregulation (2) or (3) are satisfied; or

…

(2) The conditions of this subregulation are satisfied if the benefits are cashed in favour of either or both of the following:
(a) the member's legal personal representative;
(b) one or more of the member's dependants.

(3) The conditions of this subregulation are satisfied if:
(a) the trustee has not, after making reasonable enquiries, found either a legal personal representative, or a dependant, of the member; and
(b) the person in whose favour benefits are cashed is an individual."

[72] A "dependant" of a person is defined in s 10 of the *Superannuation Industry (Supervision) Act* 1993 (SIS Act) to include the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship. Section 10A(1) of the SIS Act provides that two persons have an interdependency relationship if:

"(a) they have a close personal relationship; and
(b) they live together; and
(c) one or each of them provides the other with financial support; and
(d) one or each of them provides the other with domestic support and personal care."

[73] It is axiomatic that the legal personal representative would, if he or she did not have a conflict, make an application for the payment of the superannuation to the deceased member's legal personal representative. That application would be made as part of the administrator's duty to get in the estate. Unless the application is made and is successful the funds do not become part of the estate.

[74] The trustee of the superannuation fund may make the payment to either or both of the legal personal representative or the member's dependants. This discretion resides in the trustee but is one which the deceased member's personal representative must be under a duty to call on the trustee to exercise.

[75] The exercise of discretion is different to the duties falling upon a trustee of the superannuation fund when a binding nomination is made. If a member of a superannuation fund makes a binding nomination and the governing rules of the fund enable the member to do so, then the trustee is required, under reg 6.17A(4) of the SIS Regs to pay the benefits to the legal personal representative or a dependant so nominated by the member. A binding nomination must be by a notice. Such notice:

(1) must be in effect;[11]
(2) must be in writing;

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[11] The time limits on notices are set out in reg 6.17A(7).

(3) must be signed, and dated, by the member in the presence of two witnesses each of whom has turned 18 and neither of whom is a person mentioned in the notice;
(4) must contain a declaration signed, and dated, by the witnesses stating that the notice was signed by the member in their presence;
(5) must nominate persons who are the legal personal representative or dependant of the member; and
(6) must set out in such a way that is certain or readily ascertainable from the notice, the proportion of the benefit that will be paid to that person, or to each of those persons.

[76] Section 55A of the SIS Act provides that the governing rules of a regulated superannuation fund must not permit a fund member's benefits to be cashed after the member's death otherwise than in accordance with the standards prescribed for the purposes of s 31. Section 31(1) provides that the regulations may prescribe standards applicable to the operation of regulated superannuation funds.

[77] There was no binding nomination in this case so the trustees of the superannuation funds were obliged to comply with reg 6.22 of the SIS Regs and pay the benefits to the legal personal representative or to the member's dependant or dependants.

[78] The failure of the applicant to apply for payment to herself as legal personal representative was in breach of her fiduciary duty to act in the best interests of the estate, for which she may be held liable by the court.[12]

[79] It remains to determine what remedy is appropriate. The usual remedy in such a situation is the taking of an account. As Gummow J held in *Breen v Williams*:[13]

> "The fiduciary will be brought to account for any benefit or gain which … has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between the fiduciary duty and personal interest in the pursuit or possible receipt of the benefit or gain … ."[14]

[80] In this case, the applicant was a fiduciary who had a conflict between her fiduciary duty to the estate for the pursuit or possible receipt of benefit or gain for the estate and her personal interest in the pursuit or possible receipt of benefit or gain for herself. She must therefore account to the estate for the benefit which she gained for herself in breach of that duty. In this case that means transferring the payments received from the three superannuation funds from herself to the estate of James McIntosh.

Orders

[81] The applicant is required to account to the estate of James Joseph McIntosh deceased for the superannuation benefits referred to in paragraph 40 of the affidavit of Elizabeth Joy McIntosh filed on 26 March 2014.

[82] I shall hear submissions as to the precise form of the order and as to costs.

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12 *Re Hayes' Will Trusts* [1971] 1WLR 758 at 764 per Ungoed-Thomas J.
13 (1996) 186 CLR 71 at 135.
14 See also the discussion in Dal Pont and Mackie "Law of Succession" Lexis Nexis, 2013 at [12.43].