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Article Information

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Superannuation death benefits and bankruptcy

The Federal Court recently considered a summary judgement application by the trustee in bankruptcy regarding whether superannuation death benefits comprising part of the residuary estate of his late mother

Cunningham (Trustee) v Gapes (Bankrupt) [2017] FCA 787

The Federal Court recently considered a summary judgement application by the trustee in bankruptcy regarding whether superannuation death benefits comprising part of the residuary estate of his late mother, to which he was entitled, was property divisible among his creditors. In this article we discuss the decision of the Federal Court.

The bankrupt's mother died in 2013. Her superannuation death benefits were paid to her estate and pursuant to the terms of her will formed part of her residuary estate to be distributed equally to her beneficiaries, including her bankrupt son. As the bankrupt did not have a bank account in his own name, the distribution from the estate was paid into his wife's bank account.

The trustee in bankruptcy claimed that the distribution from the estate was property divisible among creditors of the bankrupt and therefore should vest in the trustee in bankruptcy.

Pursuant to section 116 of the *Bankruptcy Act 1966*, certain superannuation interests are exempt from being divisible among creditors. The trustee in bankruptcy argued that in these circumstances the exemption for superannuation interests did not apply as the bankrupt did not have an interest in the superannuation policy personally but rather only received the funds as a beneficiary of his mother's estate.

The trustee in bankruptcy argued that the exemption should not apply in this case, as if accepted, the scope of the exemption would be too wide and not in accordance with the purpose of the legislation. If the exemption was broadened to include payments from third party superannuation funds, it could create a potential for bankrupt individuals to avoid paying funds to creditors.

The Court distinguished this case from the decision in *Morris v Morris* [2016] FCA 846, in which the bankrupt widow of the deceased received superannuation death benefits directly from her late husband's superannuation fund as a result of the exercise of the appropriate determination by the superannuation trustee. In that case, the Court held that the exemption did apply as the bankrupt widow could establish that she had a direct personal interest in the superannuation fund and not an indirect payment from a third party.

As the bankrupt in this case did not receive the superannuation death benefits directly from the deceased's superannuation fund but rather indirectly through his mother's residuary estate under her will, he could not satisfy that he had an interest in the superannuation fund and therefore the exemption could not apply.

The Court held that accordingly the distribution from the estate should vest in the trustee in bankruptcy.

This is an important case to bear in mind if you have a beneficiary, such as a spouse or child, who is a bankrupt or a potential bankrupt. Careful and strategic estate planning and consideration of the superannuation policy is required to assist in protecting your assets from vesting in the trustee in bankruptcy.

Depending on the terms of the particular superannuation policy, had the mother in this case sought appropriate estate planning advice, she may have been able to prepare a binding death benefit nomination, directing the superannuation

trustee to pay her superannuation proceeds directly to her children (including her bankrupt son) rather than to her estate. The bankrupt son may have then been in a position to rely on the exemption and state that he had an interest in the superannuation as it was received directly from the fund.