COOPER GRACE WARD
LAWYERS

Superannuation

Death Benefits and Binding Nominations

Superannuation is rapidly becoming a major asset for most Australians. This is often the case for retirees or younger people saving for retirement, particularly if they hold life insurance in their superannuation fund.

Therefore it is essential that superannuation is dealt with properly as part of an estate planning strategy. If they are not consistent, a great superannuation strategy and an equally great estate plan can lead to some unintended and often undesirable consequences.

Who can the trustee pay to?

1. On the death of a member, the trustee is required to pay a death benefit. The *Superannuation Industry (Supervision) Act 1993* (SIS Act) gives the trustee of a fund a number of choices

2. Death benefits can be paid:

   (a) as a lump sum or a pension;

   (b) to the member's legal personal representative or their dependants.

3. If the benefit is paid to the legal personal representative, it will be distributed in accordance with the Will.

4. A member's dependants include their:

   (a) spouse (includes de facto spouse and same sex couples);

   (b) children of any age (not as straight forward as it seems);

   (c) any person with whom the person has an interdependency relationship; and

   (d) financial dependents.

5. It is essential to check the trust deed for the superannuation fund as it could limit the range of people the trustee can pay to or exclude the legal personal representative.

6. Death benefit pensions can be paid to dependants, and to a member's child if the child is:

   (a) under 18;

   (b) under 25 and financially dependant; or

   (c) disabled.

   A pension paid to a child must commute at age 25 (except for disabled children).

What are the tax consequences?

7. Whether there is any tax payable on a death benefit depends on who receives the benefit.

8. A lump sum death benefit:

   (a) if paid to a tax law dependent will be tax free;

   (b) if made to a non-tax law dependant, will be taxed based on the different components in the fund (generally at 15% plus Medicare levy on the taxable component).

9. If the death benefit is paid to the legal personal representative, the benefit will be tax free to the extent that a tax law dependant receives the amount under the Will.

10. Tax law dependents include:

    (a) spouses or former spouses;

    (b) children under the age of 18;

    (c) a person who was in an interdependency relationship or financially dependent on them just before they died.

11. If a death benefit is paid as a pension, it will be tax free if the deceased or the recipient are over 60. Otherwise it will be taxed as a normal pension.

12. If there is life insurance in the fund, the rate of tax if it goes to a non tax-law dependant is generally 30% plus Medicare levy (with an allowance for future service).

Binding Nominations

13. For most superannuation funds, it is possible for you to sign a binding nomination that specifies how any superannuation benefit will be paid on your death. This takes away the trustee's discretion.

14. With self managed superannuation funds, it is important to check the terms of the trust deed to ensure they allow a binding nomination, and then to follow the rules precisely.

15. Binding nominations need to be considered as part of an estate plan and should not be done as a matter of course. The trustee cannot ignore a valid binding nomination.

16. As this is one of the only decisions that can be made with the benefit of hindsight, it is usually better to maintain as much flexibility as possible. This can allow the trustee to pay the superannuation in the most tax effective way at the time.

17. For self managed superannuation funds, this means it is vital to ensure that the right person is making the decision, so it is important to consider who becomes the trustee after your death.

18. Binding nominations can be very effective:

    (a) if there is a risk of a dispute over the superannuation;

    (b) where there is a risk that the person who might be making the payment decision will not follow the deceased's wishes (as in the *Katz v Grossman* case); or

    (c) to keep the superannuation outside of the estate if there is a concern about a Will challenge.

19. Binding nominations can be dangerous, including where they force the benefit to be paid to:

    (a) individuals rather than testamentary trusts set up in the Will;

    (b) the estate where a challenge is likely to the Will or the estate is insolvent; or

    (c) someone involved in bankruptcy proceedings.