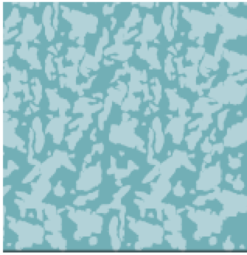

BROWNE·Linkenbagh
LEGAL SERVICES

WILLPOWER PLUS

Maximising Superannuation Death Benefits

Darryl I Browne LLB
Acc. Spec. Wills and Estates
(Notary Public, Principal)

You're in good hands.
There are over 30,000 solicitors in
New South Wales.
There are only 66 Accredited Specialists in
Wills and Estates.
Darryl Browne is one of them.

11/11, 2016 edn

Leura "Ballygowan"
Tel 02 4784 2177 Fax 02 4784 2145
21 Grose Street Leura 2780
Email info@browne-link.com.au

Liability limited by a scheme approved under Professional Standards Legislation

Maximising Superannuation Death Benefits

Background

A member's superannuation entitlement is often paid out following the member's death. In this situation, there are restrictions on the persons able to receive the member's death benefit. If the benefit is paid as a pension, the only persons eligible to receive it are the surviving spouse, a child who is a minor (i.e. under 18 years of age) and an adult child who is dependent (but only until the child's 25th birthday unless the child has a disability).

Eligible beneficiaries

More commonly, except where paid to the spouse, the death benefit is paid as a lump sum. In that situation the only eligible beneficiaries are:

- a spouse
- a child (of any age)
- a person in an inter-dependency relationship with the deceased at death
- a person who is dependant on the deceased at death, and
- the deceased's legal personal representative (i.e. the executor of the deceased's estate).

The taxing of some beneficiaries

There may be tax payable on the lump sum payment, depending on who receives the payment from the fund. This is because the following are the only persons who can receive the superannuation benefit tax free:

- a spouse
- a former spouse
- a child who is a minor
- a person in an inter-dependency relationship with the deceased at death
- a person who is dependent on the deceased at death
- the deceased's estate (if the benefit passes to a person who comes within one of the five other categories named above).

These are tax exempt recipients. If any other

eligible beneficiary receives the death benefit (such as an non-dependent adult child), the taxable component (such as payments made by a salary sacrifice or deductible contributions but not after tax personal contributions) of the death benefit is taxed at 17% or 32% (depending on the source of the taxable component).

Lessening or eliminating the tax burden

The possibility of the superannuation benefit being taxed can be lessened, and possibly eliminated, with careful estate planning. There are two options. The first is potentially available to all members of superannuation funds. The other option is available to some members of superannuation funds. Both options require carefully drawn supporting documents.

1. Becoming a tax exempt recipient

The first option is to ensure that, at the member's death, one or more, and most usefully all, the intended recipients of the member's superannuation payment are eligible beneficiaries and tax exempt recipients. This option is commonly considered where a member is no longer partnered or the member (sensibly) wishes to cover the possibility that their spouse dies before them.

If the member's intended recipient is dependent on the member at the member's death; the intended recipient receives the death benefit tax free.

Dependency

A number of court decisions have considered the concept of dependency in the context of an eligible beneficiary. These decisions establish two features of dependency. Firstly, there is no specific level of support needed to show dependency. In other words, *the dependency can be minimal.*

For instance, in *Faull's* case, a member paid $30 per week board to her daughter. In a 2004 decision the payment by a niece to an aunt of $80.00 per week as rent made the aunt a dependent. In *Noel –v- Cook* the dependency was the sharing of rent, costs and rates on a jointly occupied property. The total weekly payment was $90.00.

The second feature is that the recipient's need for the support is largely irrelevant to the issue of dependency. For instance, a High Court judge has held that there need be no legal obligation to be supported, there need be no physical requirement for support, there can be no need for support at all. But there must be a "dependence or reliance".

Accordingly, *the receipt of the support is crucial, reliance on support is essential but the need for support can be non-existent.* In *Faull's* case the daughter had an income of $39,400.00 per annum. The amount of board provided minimum assistance to the daughter.
Nevertheless, the daughter was found to be dependent on her mother.

Common examples of dependency

As a result

- providing rent free accommodation
- providing subsidized accommodation
- paying loan repayments (or part)
- paying rent (including part)
- paying utilities, such as rates, etc.

may make the recipient a dependant, and therefore a tax exempt recipient of the parent's superannuation payment (provided that position exists at the member's death). In some circumstances the provision of child care may create a dependency .

Not tax avoidance

It is important that the arrangement not be artificial, a sham or a mere contrivance; ie it can't be just a device to avoid paying tax.

Unintended consequences

There is a possibility of unintended consequences without careful planning. If a member supports a person at his or her death, that person will be a dependant and may be able to claim part or all of the member's death benefit. In *Noel –v- Cook* a friend who served with the deceased as a soldier in Vietnam, and who, years later, shared a house with the deceased was found to be dependent on the deceased. Binding death nominations are often needed to avoid unintended consequences.

Supporting documents

To comprehensively deal with the issues that may unexpectedly arise with an inheritance plan, a member will often need to prepare three supporting documents:

- a binding death nomination. There are different types of nominations. For instance, it may be lapsing and non-lapsing. Either will suffice, but it must be a binding death nomination. The binding death nomination

should cater for contingencies. *For further information see 'Binding Death Nominations' InfoSheet.*

- an enduring power of attorney. There are two reasons. Firstly, if a member becomes incapacitated, it is important that someone on behalf of the member (ie the attorney) can continue to make the payments or provide the facility (such as accommodation) which will establish dependency. Secondly, if the law allows – and the position is still debated – it may be appropriate to authorise the attorney to remake a binding death nomination if it lapses, or amend it if the circumstances change. *For further information see 'Powers of Attorney' InfoSheet*

- a will. There are a number of reasons. One is that the will may need a carefully considered hotchpot provision. A hotchpot provision prevents or adjusts for 'double dipping'. Another is to include a superannuation proceeds trust to cater for payment of superannuation to the estate. *For further information see 'Wills' InfoSheet*

2. Early withdrawal

There is another way for a member to eliminate the tax payable on a superannuation death benefit: the member may withdraw the proceeds of the member's superannuation fund before death. Subject to some conditions, if a member withdraws the proceeds of the fund after reaching 60 years of age, the proceeds are received tax free.

However superannuation funds receive significant tax concessions. Consequently, if a member prematurely withdrew his or her superannuation entitlement the member could end up paying more tax because the preferential tax treatment in the superannuation fund wouldn't be available to the member.

Therefore it is not usually advisable for a member to redeem his or her interest in the fund, but the position is different if the member's death is imminent, especially if the member is over 60 years of age. In that circumstance, if the superannuation payment would be taxed and there is a net benefit to beneficiaries but the money can be obtained during the member's life without being taxed, the member would be advised to redeem the superannuation entitlement before death.

Catch 22

The catch 22 is that, if the member's medical condition will soon lead to his or her death, the member may not be capable of making the necessary withdrawal from the superannuation fund. For this reason an important supporting document to assist a member with an early withdrawal is an enduring power of attorney which gives authority to the attorney to withdraw the member's superannuation entitlement if that is financially advisable. *For further information see 'Powers of Attorney' InfoSheet.*

The second appropriate supporting document for this purpose is a will which ensures that the same beneficiaries receive the superannuation proceeds whether they are withdrawn before death (as contemplated above) or paid after death. *For further information see 'Wills' InfoSheet.*
For the problems that can arise if these arrangements are not made properly, see 'The best laid plans for mice and men' newsletter vol18 no.2

You're in good hands.
There are over 30,000 solicitors in New South Wales.
There are only 66 Accredited Specialists in Wills and Estates.
Darryl Browne is one of them.