WILLS AND ESTATES

Information about Superannuation Death Benefits

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THE DISTRIBUTION OF SUPERANNUATION FUNDS UPON DEATH

The distribution of superannuation benefits from your superannuation fund upon your death is not governed by your will. Rather, the trustee of your superannuation fund decides how your superannuation benefits are to be distributed, subject to the terms of the superannuation trust deed and relevant legislation. Only if the benefits are paid to your estate, or the legal personal representative of your estate, is your will relevant.

BINDING DEATH BENEFIT NOMINATIONS

The only exception to the superannuation trustee's power to decide upon distribution is where a valid binding death benefit nomination has been made. A binding death benefit nomination should not be confused with a beneficiary nomination that is not binding. A binding death benefit nomination must comply with certain formal requirements, must be in favour of a dependant (discussed later) or the member's legal personal representative (i.e. the trustee of their estate) and must have been made no more than three years prior to the date of death. A non-binding nomination is merely the expression of a wish made without formal requirements, and the trustee is not required to comply with it.

PAYMENT OF SUPERANNUATION DEATH BENEFITS

The form of payment of superannuation on the death of a member, and its tax treatment, will be dependent upon the individual to whom it is paid.

The *Superannuation Industry (Supervision) Act* defines persons to whom a trustee can pay benefits, that is "dependants", as a legal or de facto spouse (whether the same sex or a different sex), a child of any age or someone who is, amongst other things, financially dependent upon a member, and any person with whom the person had an interdependency relationship ("SIS dependants").

In contrast, the *Income Tax Assessment Act* defines dependants as being the legal or de facto current or former spouse (whether the same sex or a different sex), a child under 18 years, or someone who is financially

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dependent on the taxpayer, or has an interdependency relationship with the taxpayer ("tax dependants").

The law currently requires that on the death of a member, superannuation benefits be paid as follows:-

1. **By lump sum to**
   - SIS dependants, therefore bypassing the estate and being unaffected by the will; or
   - The member's legal personal representative where, if the member has a valid will, the benefits received will be governed by the will, which could include a transfer to a superannuation benefit trust (as discussed below); or

2. **By pension payments to SIS dependants**

   Under changes to the superannuation laws, from 1 July 2007 on the death of a member superannuation benefits must be paid as follows:-
   - To tax dependants by lump sum or pension (although a pension to a tax dependant child must be commuted to a lump sum once they turn 25); or
   - To the trustees of the member's estate or to a SIS dependant who is not tax dependant (i.e. children over 18 who are not dependant) by a lump sum.

The superannuation trustee's options are also determined by the superannuation fund trust deed. The trustee's options in the deed cannot go beyond the options set out in the law.

TAXATION AND SUPERANNUATION DEATH BENEFITS

From 1 July 2007, the taxation of benefits paid on the death of a member are:-

1. A lump sum paid to a tax dependant will be tax free.
2. A lump sum paid to a non-tax dependant is subject to 16.5% tax on the taxable component (i.e. taxable/concessional contributions and the fund's earnings) while the non-taxable component (undeducted/non-concessional contributions) will be tax free.
3. A lump sum paid to the trustee of the member's estate will be subject to the same taxation treatment as if the payment had been received by the recipient directly from the trustees of the superannuation fund. For example, if the surviving spouse and adult child are to receive 50% each of the deceased's estate pursuant to the deceased's will, the 50% attributable to the spouse is tax free as it is paid to a tax dependant, and the other 50% is taxable in accordance with the preceding paragraph.
4. Pensions paid to a tax dependant when either the deceased member or the tax dependant are aged 60 years or over are tax free. If both are under 60 the taxable component (see point 3 above) is taxed at the tax dependant's marginal tax rate less a 15% rebate until the tax dependant turns 60, when it is tax free.

A will maker must remember that the preferred distribution of superannuation death benefits may depend upon circumstances at the time. For example, it would be preferable to direct superannuation benefits to a tax dependant, and give non-superannuation assets to non-tax dependants. This would then require an adjustment clause to be drafted in the will aimed at beneficiaries from the estate and superannuation - and possibly also from a family trust - are equal, if that is the will maker's intention.

SUPERANNUATION BENEFITS TRUSTS

Superannuation benefits trusts are trusts established solely for the benefit of dependants of a fund member, and are funded by the member's superannuation benefits.

These trusts can be established either by a member's will (a superannuation benefits testamentary trust) or by a deed after the death of a member (a superannuation benefits deed trust). They provide tax concessions to beneficiaries.

QUESTIONS

If you have any questions in relation to superannuation death benefits Fleming Muntz Solicitors can provide specialist advice.

DISCLAIMER

This document is a guide only. It is not legal advice. You should consult Fleming Muntz Solicitors about the distribution of superannuation benefits upon death.