LawTalk Blog

When are you a dependant? Differences under the tax and superannuation laws

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These days, many working people accumulate superannuation throughout their working lives. Upon their death, a deceased person's superannuation death benefits (if any) will be left to one or more beneficiaries, who are typically 'dependants' of the person. Please note however that different superannuation funds have separate rules as to the distribution of proceeds to beneficiaries of a deceased member's estate.

Nevertheless, the two most common ways in which superannuation proceeds of a deceased member are distributed are:

1) Directly to a beneficiary by the trustee of the superannuation fund either:

a) Pursuant to a Binding Death Benefit Nomination (**BDBN**) made by the deceased member prior to their death; or

b) Where there is no BDBN made or where it has lapsed, the trustee decides to pay the superannuation proceeds to certain beneficiaries (usually dependants of the deceased);

2) Payment directly into the estate of the deceased member to follow the provisions of his or her Will or, where there is no Will, for distribution under the intestacy laws.

In either case, a person who receives a payment from a deceased member's superannuation fund may be able to claim a tax exemption or discount if the person is deemed a 'tax dependant' under the tax law.

A 'tax dependant' includes the following persons:

- A spouse or defacto spouse
- A former spouse or defacto spouse
- A child of the deceased under 18 years of age
- Any person who relied on the deceased for financial maintenance at the time of their death
- Any person who lived with the deceased in a close personal relationship where one or both of them provided financial and domestic support and personal care to the other.

This is to be contrasted to a 'superannuation dependant' who is any of the persons listed above but may also include an adult child.

It follows that where superannuation proceeds are left to a dependant adult child who does not fit any of the descriptions listed above, that child will not be recognised as a 'tax dependant' under the tax law and will not be entitled to the tax concessions and exemptions that would otherwise apply.

In view of the above, it is important to consider when making either a BDBN or a Will which expresses wishes as to how superannuation proceeds are dealt with to channel those proceeds, wherever possible, to financial dependants who would otherwise qualify as 'tax dependants' under the tax law.

Of course, this is not always possible where there are adult children beneficiaries (which is quite often the case). In those circumstances, tax may be unavoidable but alternative measures can be taken to minimise the effects of tax. For example, a testamentary trust could be set up in the Will which allows a trustee to control the flow of income and/or capital to the beneficiary or class of beneficiaries concerned. Care should be taken as testamentary trusts are not always the best solution in every case and are often only used for minor beneficiaries or those in need of financial protection.

Care should also be taken when dealing with superannuation death benefits to check the terms of the particular trust deed as different rules may apply as to the distribution of those benefits to beneficiaries. In some cases, for example, the trust deed of the fund may restrict the distribution to a particular group of people.

If the superannuation fund enables a BDBN to be made, it is important that this is properly signed and a signed copy provided to the trustee of the fund. The superannuation law requires certain formalities to be followed when signing a BDBN.Ffor example, it will need to be witnessed by two adult witnesses neither of whom can be the beneficiaries named. It is also important to note that unless a BDBN is updated every 3 years then it ceases to be binding on the superannuation trustee. In those circumstances, the trustee will generally have a discretion (subject to the particular terms of the trust deed) as to who should receive the superannuation benefits and in what proportions.

In summary:

- Where superannuation proceeds pass to a 'tax dependant' then taxation may not be payable by that dependant on the proceeds received.

- Where superannuation proceeds are received by a person who is treated as a dependant under the terms of the superannuation trust deed but who is not a 'tax dependant' then tax may be payable depending on the income of the dependant.
- When making a Will or BDBN, particularly where there are minor beneficiaries, consideration should be given to tax savings that can be achieved by channelling the superannuation proceeds to 'tax dependants'. Note: in order for a minor beneficiary to receive concessional tax treatment the Will must provide for the beneficiary via a testamentary trust.

The taxation of superannuation beneficiaries is a relatively complex area but it need not be, particularly if you have an experienced solicitor assist you.

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