SUPERANNUATION NEWSLETTER – SEPTEMBER 2014

Nomination of beneficiary an important consideration

In the recent case heard in the Supreme Court of Queensland, it was considered how payment of death benefits would be treated if the deceased person's legal personal representative was also the beneficiary.

The facts of this case were that the deceased person had died intestate (i.e., without a valid Will), and without a surviving spouse or children.

The deceased's mother successfully applied to be the administrator of the estate. She also successfully applied to the deceased's super funds to have the super death benefits paid to her personally.

However, the father's lawyers advised that the mother had a "fiduciary obligation" to pay the deceased's superannuation benefits to the estate, rather than to herself directly.

The mother applied to the court for direction as to whether she was required to pay the superannuation benefits to the estate.

The court held that the father's lawyers were correct, and that the mother had to hand over the superannuation benefits to the deceased's estate (resulting in a significant portion being paid to the father).

This outcome is perhaps surprising, especially as:

- There appear to have been nominations for each of the superannuation funds (though they were non-binding); and
- These nominations were in favour of the mother.

The outcome may well have been different (i.e., the mother may not have been required to pay the benefits to the estate) if there had been **Binding** Death Benefit Nominations (BDBNs) in favour of the mother.

Failing this, if the deceased had made a Will naming the mother as the executrix and beneficiary of the estate, the benefits would have been paid in what appeared to be the manner intended for the funds.

While the court's decision applied to superannuation funds that were not SMSFs, there are still implications for SMSFs, highlighting in particular:

- The strict fiduciary duties that apply (e.g., to legal personal representatives and trustees of super funds);
- The importance of having a Will (even if the personal estate is not large);
- The importance of having a BDBN (in the appropriate circumstances); and
- The importance of the right people controlling the SMSF upon death.

Getting these things right is important for those left behind. Experience shows that even a simple estate that has no direction can be brought into dispute and create ill-feeling amongst relatives.

A simple discussion with your adviser can see a plan of action designed to ensure your final wishes are respected and funds distributed as you intend.

Nomination of beneficiary an important consideration

A recent case ruled on by the Administrative Appeals Tribunal (AAT) reminds us that trustees are ultimately responsible for their actions, and that not being aware of the rules is no defence.

In this case, the taxpayer in question and her husband were advised that the husband should withdraw all of his superannuation, and re-contribute it into a new superannuation account in the name of the taxpayer.

The taxpayer's husband accordingly (in February 2009) withdrew the sum of $293,895.75 from his superannuation fund. A few days later, $293,858.00 was paid as a non-concessional contribution to the taxpayer's superannuation fund.

With this contribution being over $150,000, the taxpayer (being aged under 65) triggered the three-year "bring-forward" rule. This gave her a total cap of $450,000 over three years (i.e., three times $150,000).

On 30 August 2010, the taxpayer withdrew $240,933.39 from her superannuation fund and re-contributed $200,000 to the same fund.

This $200,000 contribution saw the taxpayer's total

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non-concessional contributions in the three financial years ending 30 June 2011 total in excess of her $450,000 contribution cap. Having exceeded the cap by financial year by $43,858, she became liable for excess contributions tax on this amount, which is charged at a rate of 46.5%.

The taxpayer argued that she was unaware of the contributions cap and that the contribution she made in 2010 was a mistake. She also argued that the reason she took this measure was to minimise tax payable by her children on her superannuation benefits after she died. It followed that because of this she did not receive any direct financial benefit from the transaction, and that the withdrawal and further contribution essentially involved the same money.

However, the AAT maintained that the lump sum contribution was a new non-concessional contribution and was intended to gain a tax advantage for the taxpayer's children when she died.

The AAT held that "special circumstances" generally do not include ignorance of the law, mistake and financial hardship, erroneous or deficient professional advice or reliance on media reports.

While the AAT accepted that there was no significant and direct financial gain from the taxpayer's actions, in this case it was not able to find "special circumstances" under the relevant legislation. Because of this, the penalty in excess of $20,000 stood to be paid.

This is a timely reminder to ensure that our clients understand that SMSFs are governed by a range of complex rules, the breaching of which can have significant consequences.

Before taking any action with relation to contributions or other aspects of your SMSF please make time to speak to your adviser to make sure you cover off on any possible ramifications.

What happens when a member of an SMSF loses capacity?

With members of an SMSF generally required to be a trustee (or director of the corporate trustee), they are required to have mental capacity to fulfil that role. If they do not, they are considered at law to be under a legal disability.

If a trustee loses "mental capacity", the SIS Act allows such a trustee to be represented by "a person who holds an enduring power of attorney granted by a person".

It is important to note that a member would need to grant an enduring power of attorney while they still have mental capacity (i.e., before they lose that capacity). It is therefore prudent to consider such a situation when setting up the SMSF.

But even with the enduring power of attorney in place, it may be appropriate for the benefits of the member who has lost mental capacity to be rolled over to another non-SMSF superannuation fund.

The benefits of having the rollover occur in this situation include:

- Removing the responsibility for trustee duties from the member and the member's "attorney";
- Allowing other members (trustees) of the SMSF the ability to actively manage the fund; and
- The ability of the "attorney" to implement an investment strategy for the member in isolation (i.e., not having to consider other members or any non-segregated assets).

With many SMSFs operated within a family environment, it follows that a family member holds the power of attorney. Consideration should be given as to whether this creates a potential conflict of interest. As such, this issue should be included on a check list of points to consider when establishing an SMSF.

Appropriate legal and superannuation advice should be sought in relation to the points raised above.

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