

Let's chat

Superannuation and planning for the unexpected – March 2021

With:

Darius Hii – Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal

Information provided is general in nature; precise application depends on specific circumstances

Overview

- Sudden death and non-sudden death
- The beneficiaries
- Planning for incapacity

Sudden and non-sudden death

- Death is a compulsory cashing event
- SIS Reg 6.2 requires superannuation death benefits to be paid out 'as soon as practicable' after the death of the member
- Reversionary pension automatically meets such cashing out
- Lump sum can be troublesome if difficult to sell
- No definition to the phrase, however, practically 6 months appears to be practical

Sudden and non-sudden death

- Superannuation death benefits treatment
- Consider BDBNs and reversionary pension
- Consider terms of superannuation fund deed (particularly with SMSFs) to break any uncertainty
- Consider if documents are validly executed:
 - Valid recipients
 - Correct execution
 - Not yet lapsed (3-year v non-lapsing)

Sudden and non-sudden death

- Cashing out prior to death?
 - Retirement phase (over 65 and retired)
- Compliance costs exceed benefits?
- Consider age, health status, life expectancy and family mix → where financial planners come in
- Known life expectancy → pull out superannuation now and gift value to adult beneficiaries
 - Case study → mother with cancer and millions in shares held in superannuation (and intended for such shares to be gifted to her two sons as opposed to her surviving husband)
 - Case study → mother pulling money out to make pre-Will gifts to three children

The family mix

- Eligible recipients of superannuation death benefits include legal personal representative or member's dependents:
 - Spouse of the deceased member
 - A child of the deceased member (of any age)
 - A person who had an independency relationship with the deceased member for the purposes of section 10A SIS Act
- Note the difference in definition for tax treatment purposes

The family mix

- Spouse:
 - Married person
 - Includes those in a relationship that is registered under a law of a State or Territory
 - Also includes those who lives with the person on a genuine domestic basis in a relationship as a couple (i.e. de factos)
 - No strict time limit under SIS Act, although the Family Law flags a 2 year period
 - Consider the factual circumstances
 - Important for younger couples
 - *Howard v Batistich* [2019] FCA 525 – Firefighter passed away young and girlfriend (dating for a few months) successfully proved defacto relationship via texts suggesting they were planning the rest of their lives together and news reports identifying the Ms Batistich as the partner of Mr Howard
 - Consider terms of SMSF

The family mix

- Child:
 - Adopted, step or an ex-nuptial child are included
 - Child of a person's spouse
 - Child under the meaning of the Family Law
- Stepchild ends on ending of marriage:
 - Solution – specific gift under Will and BDBN in favour of LPR accordingly (whether 100% or a lower %)

The family mix

- Interdependent
 - Close personal relationship; and
 - They live together; and
 - One or each of them provides the other with financial support; and
 - One or each of them provides the other with domestic support and personal care.
- An option if not considered a spouse?
- Definition could cause unwanted people claiming so:
 - Get a BDBN
 - Review a SMSF deed defined terms

Planning for incapacity - SMSF

- Section 17A SIS Act
 - SMSF has more than one member – each member is either a trustee or a director of a company trustee
 - SMSF has one member then:
 - Member is sole director of company trustee, or one of two directors of the company trustee alongside another individual who is either a relative or a person who is not an employee of the member
 - Member is a trustee along with another individual who is either a relative or a person who is not an employee of the member
- What happens if member is incapacitated?
 - Tax consequences if SMSF ceased to be a complying superannuation fund
- Section 17A(3) SIS Act
 - 'legal personal representative' of the member of the fund is a trustee of the fund or a director of a body corporate that is the trustee of the fund in place of the member during any period when the member is under a legal disability **or** the legal personal representative has an enduring power of attorney in respect of the member of the fund.
- Section 17A(4) SIS Act – 6 months to comply

Planning for incapacity - SMSF

- Enduring power of attorney documents and SMSFs?
 - Multiple attorneys under EPA? → Any one or more can be appointed onto SMSF subject to terms of the trust deed
 - Same attorneys for multiple members → Same persons can act for all members (however, a wise choice?)
 - Appointing attorney as individual trustee of SMSF → Read the deed (*Dawson v Dawson* 2019) NSWSC 826 where step-mother and accountant did not properly change the trustee according to the terms of the trust deed
 - Changing directors of a company trustee
 - BDBN powers in EPAs → *Re Narumon Pty Ltd* [2018] QSC 185
 - Power for attorney to execute BDBN on behalf of member?
 - Extension v new BDBN?
 - Terms of SMSF in relation to attorney power
 - Terms of EPA allows attorney to make nominations?
 - Conflict provisions in EPA?

Planning for incapacity - SMSF

- No EPA?
 - Go through Tribunals (no guarantee of appointment)
 - Rollover incapacitated member's interest into a multimember superannuation fund

Contact details

Darius Hii

Tax and estate planning lawyer; Chartered Tax Advisor; and Director at
Chat Legal

darius@chatlegal.com.au

0403923374