

Fatal attraction

The distribution of death benefits through inheritance is the largest source of grievance before the Superannuation Complaints Tribunal and such angst is on the rise, PETER BOBBIN writes.

SUPERANNUATION IS undergoing a deathly struggle, but it remains deeply buried in misinformation and misplaced security. Benjamin Franklin said, “In this world nothing is certain but death and taxes”. But in Australia there is a third certainty; superannuation – and it calls upon another Franklin quote: “A countryman between two lawyers is like a fish between two cats.”

Superannuation death benefit litigation is experiencing substantial growth that will soon accelerate. The breadth of superannuation in Australia has almost guaranteed that on death there will be a fund of value that must be allocated. But to whom, how much, when and in what form are the questions that pique the interest of spouses, mistresses, children, executors and the array of “hangers-on” that cry a dependency sufficient to demand consideration.

The death benefit remains the single largest category of complaint to the Superannuation Complaints Tribunal. In its 2006 Annual Report, the SCT lamented that this was because of a failure by the public to distinguish between assets to be distributed via inheritance versus through a superannuation benefit distribution. The resolve of the states and territories of Australia to embrace the notional estate principles used in the NSW Family Provision Act, 1982 will accelerate superannuation death benefit litigation. This nationwide reform will drag into each estate challenge the deceased’s superannuation that was otherwise felt secure from a claim due to its existence outside of the estate.

The principle within the draft legislation, which is already operative in NSW, is that property once owned or controlled by the deceased may be clawed-back into the estate if the deceased superannuant did, directly or indirectly, or omitted to perform, within three years of death, any act resulting in property becoming held by another person where full valuable consideration was not given by the person obtaining the benefit of the property. There is no expression of intent in these words. There is just a question of fact.

The first superannuation that will clearly fall into any challenge will be the contributions. Any amount paid into superannuation within three years of death will be easily capable of being clawed-back. The multi-

billions that recently flowed into superannuation will remain exposed to an estate claim until 2010. Salary sacrificed income into superannuation within three years of death is also property of the deceased that has been indirectly applied by them. It too will form part of notional estate and is capable of clawback into an estate challenge. What about the capital value of the superannuation interest – is that exposed?

One of the earliest determinations rendering superannuation of a deceased person as notional estate was in *Pope & Ors v Christie; Re The Estate Of Glendon Frederick Dobrich*. The actions of the member is not what triggered the result. It was the mere fact of the trustee decision – this alone was enough to then deem, in the context of the legislation, that the superannuation member had immediately before his death entered into a prescribed transaction. This was sufficient to bring the value of the superannuation into the notional estate of the deceased. Such an approach has been adopted many times over since 1998.

The uncertainty of a superannuation death benefit is what prompted the creation of the binding nomination concept. Can this provide the certainty that some seek?

We know that for a Superannuation Industry (Supervision) Act, 1993 (SIS Act) compliant binding nomination, it must have been entered into within three years of the death of the deceased for it to have been effective. Frustratingly, the clawback period for a Family Provision Act claim is also three years. Whoever designed the original binding nomination process in effect guaranteed that superannuation can be challenged. Thus, the purpose of the SIS compliant three-year binding nomination to secure certainty is made uncertain by the potential for a Family Provision Act claim.

It is not the three years that triggers the clawback. It is the potential for the deceased to deal or omit to deal with their superannuation that is relevant. Many superannuation funds have designed non-lapsing binding nominations that do not suffer from the need to be updated every three years.

But it is the absence of altering a nomination already in place that will be identified as the relevant property transaction. Perpetual binding nominations will also be

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of little practical effect in resisting an estate clawback upon the superannuation.

Can there be any certainty in a superannuation death benefit payment? The willingness of the courts to find a causal link between the actions or inaction of any person to the application of a super death benefit suggests that superannuation will be hopelessly part of notional estate in any Family Provision Act claim.

What does this mean for managing and administering a death claim? The SCT issued a report in December 2004 calling on superannuation trustees to adopt a formal claim staking approach to dealing with the death benefit. This is necessary so as to deal with the disappointed beneficiary who is later successful in a claim; a court may make the trustee liable for the legal costs of the challenge if the court believes the trustee acted unreasonably.

In view of the NSW court decisions, should a trustee search out not only persons who are dependants in the terms of the trust deed that they administer but also those who may be eligible persons under the Family Provision Act? It is clearly accepted that all trustees owe a duty of good faith under the trust to their beneficiaries that they must act in their best interests. And when doing so, the trustee cannot favour one beneficiary over another unless the trust deed explicitly directs this.

A claim staking procedure is an appropriate strategy for all superannuation trustees, both large and self-managed superannuation fund, to apply to their (dependant defined) potential beneficiaries. And the claim-staking procedure needs to be consistent among the potential claimants identified in the trust deed.

But what of the person who does not fit the description of dependant for the trust deed, but is an eligible person under the Family Provision Act?

A different claim staking procedure is needed.

The trustee needs to be cautious of such a person but must not assist them. Otherwise the trustees are in breach of their duty to the dependants identified in their trust deed. The trustee must not search out such persons or warn them of an impending distribution, but if on notice of a threatened claim, the trustee should “claim-stake” the person to bring their claim on in a formal legal manner.

Our superannuation system has been built over the past 100-plus years on a sorry foundation of the taxation powers of the commonwealth, state trustee legislation, the industrial powers of both – as well as a hodgepodge of contract and equity principles that emerged over 400 years of British law. The jurisprudential innovation of the early 1990s saw a clever circumnavigation of the recognised limitations within the constitution with the introduction of the first attempt at a comprehensive law in the SIS Act. The problem is that this law has merely focused on building a framework for the taxation principles to be applied. It has not and probably cannot meet the community standards and expectations that are required for dealing with a person’s superannuation.

Superannuation is expected to become the major financial asset for the majority of Australians, so a continuous focus is needed to maintain an orderly and systematic method for dealing with the myriad issues that arise in superannuation death benefits. But with the final adoption by the states and territories of Australia of the uniform Family Provision Act into the apparent superannuation death benefit, order will come into the chaos of court-induced claims of notional estate and relevant property transactions.

No matter which way one looks at the issue of super death benefits, the lawyers will be busy. 🌟

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