

Death and super

The only certainty used to be death and taxes, but new tax-free rules will change that – and create fresh material for reality TV producers. PETER BOBBIN explores the possibilities.

IF YOU are aged 55 or older, think nothing but super. Give up the cigarettes and whisky and put the savings into super. The new July 2007 tax-free rules are just too attractive to miss. If you are able, you should salary sacrifice as much as you can for a smooth transition to retirement.

If you are aged 45 to 55, you should panic. You should also think super but you need to give up the cigarettes, alcohol and kids education to superannuate yourself now, because your ability to do it later has been capped.

If you're aged 25 to 45, don't panic, but be afraid. The National Centre for Social and Economic Modelling said in 2004 that relying solely on compulsory super will mean a 69 per cent cut in your standard of living when you retire. Now that it will be tax-free, the cut in your standard of living will be only 63 per cent, unless you do something about it now.

If you are aged under 25, ignore your super future. But you should embrace the super future of everyone else by studying law. Why bother about your super future when you can have a piece of everyone else's.

In an earlier article I said that Peter Costello's 2007 tax-free super gift to baby boomers was remarkable. He brought retirement to the front of everyone's thinking.

A current transitional rule allows a one-off payment of up to \$1 million in the remaining few months before June 30. Predictions have suggested that inflows into super will be more than double the usual multi-billions. Anecdotal evidence suggests that up to one in five current residential sales are from rental investors cashing up to put the proceeds into super.

Superannuation will soon surpass the family home as the most important asset for Australians. This is why the under-25s should study law. Australia has more than \$1 trillion in superannuation and managed funds, and a 40 per cent divorce rate. What is the connection? Divorces create blended families, and Costello's tax changes guarantee a pot of money for them to fight over.

This would not be a problem if the federal government had designed the superannuation system to meet community standards and expectations, but it has been designed only for tax purposes.

Let's look at Bill. He has super saved for his retirement and has a new wife, Betty, to share it with. On his



death he wants Betty to have an income for life, and the remainder to benefit his (spendthrift) son. Public super funds are not designed to achieve Bill's wishes – they could be but they chose not to. Self-managed super funds can amend trust deeds to allow this but who will control the super pot of money after Bill is dead? Section 17A of the Superannuation Industry (Supervision) Act (SIS Act) in effect says that Betty will.

Bill wants the super left from his second wife's reversionary super pension for his spendthrift child's super future. But after Betty's death he doesn't want the son to get a cash payout. Instead he wants his hard-earned savings put into super for his son's future. He can't. The new rules say it must be paid out.

Don't worry. Our 25-year-old super-trained lawyer will be able to suggest a range of legal contortions and litigation strategies that can involve everyone. At least that lawyer's simpler super is secure.

I can't set up a Bobbin Family Superannuation Fund. Why? I have more than two children.

Only four of us are allowed to be member-trustees. Who do I exclude? Will the ones that I include do the right thing by the others? The superannuation trustee standard in section 17A of the SIS Act is an anachronism. It has no practical reflection of community standards, needs or wants. And neither do the new compulsory cashing rules.

Binding death benefit nominations simply do not meet the need. (In a future article I will dispel the false faith that these provide.) The legal contortions that are required to come close to giving a person some measure of belief that their objectives will be achieved is, to say the least, financially rewarding (oops, I meant to say frustrating).

Death and super will become the reality television of the future.

For some, the response is that the trustees can sort it all out and if they cannot, aggrieved persons can look to the Superannuation Complaints Tribunal for an answer (or to their Supreme Court if it is a self-managed super fund). That is no answer – it is my super savings, why can't I decide where, to whom and how it is to be paid?

If trustees are to make the decisions for others because of some government policy which says that tax savings into super means that people lose the right

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to decide where the money goes, they should make that statement. At least everyone will know the rules and make decisions knowing the future results. Let's also not blame the lawyers when the multi-million dollar lawsuits scramble over Australians future superannuation savings. We lawyers are only doing the job for the Australians who are doing the scrambling.

The NSW 2005 Supreme Court decision in *Katz v Grossman* is the simpler super tip of the litigation iceberg. The facts foretell of a super litigation future.

The parents were the trustees. After the death of his wife, the father appointed his daughter as a co-trustee. (The section 17A trustee requirement obviously reared its ugly head.) The father died in September 2003 and under his will he named both his son and daughter as executors. By a deed of appointment dated December 5, 2003, the sister appointed her husband as a co-trustee with herself. Consequently, the sister and her husband became responsible for paying the \$1 million-plus death benefit (her father had only left a non-binding death benefit nomination). The son/brother challenged the trustee appointment of his sister and his brother-in-law.

The Court held that the sister had been validly appointed and also upheld the sister's appointment of her husband as a new trustee.

In raising this court case among like-minded professionals, some have said to me: "What if dad wanted his super to go his daughter and this was his way of doing it?" I reply: "Maybe you are right. I guess he also wanted to see his children in a court battle and for both his son and daughter's solicitors and barristers to benefit from his superannuation."

The forward-thinking under-25-year-old law student need only study four subjects; trust law, superannuation law, tax law and litigation. They will have no super future to worry about; their simpler super will come from the simpler super of the older generations.

Let's understand the problem: the government has created a system that encourages maximum input into simpler super (up to \$1 million this year), which is neither simple nor super for achieving the super member's longer term personal wishes.

Now that simpler super is tax efficient, let's demand that it reflect community standards, needs and wants.

To do this, we may have to tax-complicate some parts of simpler super; this is a small price to pay to get something that will give us what we really want.

Financial planners and superannuation specialists should worry about the avalanche of super negligence litigation. The only way to avoid this is to ensure that in any current advice to clients the warning is given; super is now really tax efficient for you, but it robs you of the certainty of achieving your estate-planning goals. Don't embrace it if this is a problem for you. Any professional who does not give this warning will face the Van Erp risk. This 1997 *Hill v Van Erp* High Court decision makes clear that if a person other than the client is affected by the actions or omitted advice of the professional, that other person can sue and recover any loss they suffer.

What loss you ask? The super loss of the wife/husband/child's superannuation that you knew the deceased wanted to be paid to them but was not because the surviving spouse or sibling took control of the super and took the money as well. All of them are possible litigants in a super strategy that does not warn of the failure to achieve confident estate planning wishes.

But why rely on the High Court's view in its Van Erp decision, section 55 of the SIS Act specifically opens the door to those who have suffered from a contravention of a SIS covenant such as the one to ensure that the trustee's duties and powers are performed and exercised in the best interests of the beneficiaries.

Financial services compliance professionals watch out. Your template statements of advice need to heed this warning.

The exposure to a financial planner and superannuation specialist for self-managed superannuation fund advice is high. The scenario that I have presented for Bill is quite common, and each such scenario will have its own nuance. I do not know how Bill can, under the current laws, perform and exercise his duties and powers in the best interests of the beneficiaries, for both Betty and his spendthrift son. But I do know that Bill's financial planner or superannuation specialist really must disclaim responsibility.

Simpler super may be tax efficient, but it does not allow for an individual's standards, needs and wants – unless, of course, you are studying to be a lawyer. ★