

irongroup lawyers



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Superannuation and Estate Planning...

Introduction

We are often asked to discuss the link between superannuation and estate planning.

A major misconception arises around the ownership and control of assets in a super fund. You do not control your super fund money, it is controlled by your super fund trustee and super fund assets do not automatically form part of your estate.

The super fund trustee is charged with the responsibility of distributing your super proceeds appropriately and in doing so will consider your Will.

However whilst this allows them to identify what the deceased's intentions were, they are also charged with the responsibility of maintaining the available tax advantages associated with superannuation. So whilst the trustee will consider your Will, they are not bound by it.

It therefore becomes important to avoid such a conflict by ensuring that a Will is drafted so that it allows the trustee to discharge their responsibilities appropriately, whilst optimising the outcome for the beneficiaries.

Death benefits proceeds trusts

Imagine, for example, if the deceased person's Will states that the estate is to be distributed to the children equally and yet only one of the children is financially dependant for taxation purposes. From the trustee's perspective, knowing that the deceased person wanted the children to receive an equal share from the estate puts them in a difficult position as a payment to the Will, if a standard Will, will mean unnecessary tax will be paid.

This is one reason why it's important to have properly executed Wills in place, with testamentary trusts designed to deal with superannuation proceeds ie death benefits proceeds trusts. These trusts maintain the special tax provisions which relate to superannuation payments, thus producing an optimal tax outcome for beneficiaries.

The following scenarios illustrate some key concerns.

Scenario 1: What can happen when a Will doesn't deal appropriately with super

Jeff is a divorcee with three children. Jeff has \$300,000 in his super fund and another \$150,000 in cash. He has a standard Will which does not contain a death benefits proceeds trust.

Jeff died aged 58 when his children were aged 16, 18 and 25 and his standard Will stated he wanted his three children to receive an equal share of his estate. The trustee of the superannuation fund



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must always distribute the benefits (here it's \$300,000), to one or more of the spouse, financial dependants or the deceased estate.

In this instance, as the 25 year old is no longer financially dependant on his father, the superannuation trustee will be inclined to pay the money to the two younger children because they are the financial dependants. If this happens the children will not receive an equal distribution of his total estate because the 25 year old will not receive a one-third share of the superannuation. However the superannuation trustee will be disinclined to pay the money into the estate because the standard Will does not enable the benefits to be paid tax free.

If Jeff had a Comprehensive Will with testamentary trust provisions, including a death benefits proceeds trust, the superannuation trustee could transfer the funds into the estate with no negative tax consequences.

Binding Death Nominations

Binding death nominations can be executed which require a trustee to pay the death benefit proceeds to the nominated beneficiary. As a general rule we advise against using these because it reduces the trustee's available choices as at the date of death. Even if an Irongroup Comprehensive Will is in place we say it is best to rely on the discretion of the trustee for the best outcome.

Whilst a Binding Death Nomination can create certainty, the problem is that circumstances change

over time and an existing Binding Death Nomination may not be appropriate in the future.

Scenario 2: Caution... Binding Death Nominations can cause problems

John has two children from a defacto relationship with Susie. His binding death nomination nominates his \$200,000 in superannuation is to be paid to Susie. However, John separated from Susie due mainly to her reckless financial habits and he died two years later. Whilst he remembered to change his Will, he did not remember to change his binding death nomination. Consequently it remains in force because the death occurred within three years of signing the nomination. John's parents are concerned because the \$200,000 will go to Susie and not to the children.

If there had been no Binding Death Nomination, the trustee would not have been required to pay Susie and they would have paid it to the estate from where the children would benefit.

These are just two more issues that need to be considered when preparing an estate plan. Irongroup provides a comprehensive estate planning service designed to help ensure people end up with the optimal solution for their circumstances.

If you have a client you believe needs estate planning advice please call on 03 8621 9000. We'd be pleased to help.