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July 2007

Superannuation and Estate Planning...

will your family be happy?

Introduction

With the latest changes to superannuation legislation many individuals are expected to direct more of their personal assets into their superannuation fund. However with superannuation funds not automatically included in an estate, the consequences of this could be of concern to some clients.

In our experience most people want their children to receive an equal share of their assets however if the client has a mix of financial and non-financial dependants (as defined by the ITAA Act) there may be a discrepancy in the value of the inheritance received by each.

If the super fund trustee has discretion to determine who will receive the funds an income tax dependant may receive the funds with nothing directed to any non-income tax dependants even though they are siblings. Further to that, even if the amount distributed to each child is equal, will tax be payable by some and not others? Is the client aware of that and has it been provided for?

Case Study One - Robert is divorced with 2 children

Robert has a 17 year old son who is still at school and a 21 year old daughter who commenced full-time work 6 months ago. She is no longer financially dependent on her father. Robert suffers a heart attack and dies leaving a $500,000 house and $500,000 in superannuation.

Scenario One: No Binding Nomination and standard Will

Robert's standard Will directed that his estate be divided equally between his children. The executor of the Will therefore distributed $250,000 to his daughter and on the son's 21st birthday as directed by Robert, he will be entitled to the other $250,000.

As Robert did not have a binding nomination it is up to the superannuation trustees to decide to whom they should distribute the $500,000. If they decide it should be distributed to the son alone, it is probably fair to assume that Robert's daughter will be less than happy.

Scenario Two: Binding Nomination and Comprehensive Will

If Robert had a Comprehensive Will with an equalisation clause the executor would have to take into account the $500,000 received by

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the son and therefore direct the $500,000 in the estate to the daughter to ensure both children received an equal share.

However if the funds in the superannuation exceeded the amount in the estate, the son could have received more than the daughter if the superannuation trustees directed the funds to him.

In this situation, Robert may want certainty with his superannuation death benefits. The question then is should Robert bind the trustees to pay the super to the estate or direct to the dependants? This is a decision that needs to be reviewed as circumstances change. The son may be better off receiving a direct pension as the 15% income tax offset applies rather than a pension via the Super Death Benefits Trust in the Will.

If however the son was 19 and no longer qualified for the child pension when Robert died, Robert may be better off with a binding nomination that directed the superannuation be paid into his estate to ensure equal distribution amongst his children and to take advantage of the benefits of a Comprehensive Will eg it retains the tax advantages attached to super, asset protection, age of control etc.

Case Study Two - Mark is widowed with 2 children

Mark has a 17 year old son who is still at school and a 21 year old daughter who commenced full-time work 6 months ago. She is no longer financially dependent on her father. Mark suffers a heart attack and dies leaving a $1m house and $1 million in superannuation including $500,000 in life insurance.

Scenario One: Binding Nomination

Mark had a binding nomination directing his super to his dependants. As it's not possible to stream non-taxable and taxable components to particular dependants the executor must distribute the funds equally to both children. (need sec of Act?) Unfortunately this means the daughter will pay 16.5% on any taxable component of the $500,000 in funds and 31.5% on her share of the insurance proceeds. The son will not pay any tax.

Fortunately as Mark had a Comprehensive Will, the executor can take into account the amount of tax the daughter has to pay on the super death benefits proceeds and can distribute more from the house proceeds to her to ensure both children receive an equal amount.

Some scenarios to monitor

On the death of a spouse - who will receive the funds? Does your client need to update their Will? Or perhaps make a binding nomination to ensure their children receive an equal share? Or remove a binding nomination to optimise tax advantages?

Does your client now have a mix of dependant and non-dependent children? Does their Will cater for that?

Has your client invested significant assets into super? Is there enough in the estate for all preferred beneficiaries?

Has your client re-married or been in a de facto relationship for more than 2 years? A spouse may take priority as far as a Super Fund trustee is concerned. Will this affect prior children?

The recent legislative changes are a timely reminder of an on-going need to ensure clients have an estate plan in place that caters for their beneficiaries in the best possible way. With significant funds at stake it's important that all clients' circumstances are reviewed constantly to ensure they have the most appropriate solutions in place.

If you would like estate planning advice for your clients please call Irongroup on 03 8621 9000.