



SPRING 2009

## Superannuation Proceeds Trusts

▶ Michael Norbury | Partner

In the context of estate planning a "superannuation proceeds trust" has one of two meanings.

### Superannuation Proceeds Trust in a Will

Where the death benefit in a superannuation fund is paid into the estate of the deceased member, if the deceased's will contains no special provisions, the superannuation monies will be mixed with the other monies in the estate and used for general estate purposes.

For instance, the superannuation monies could be used to pay estate creditors, or legacies. Once the superannuation and other estate monies are mixed, it is not possible for the executors of the estate to dissect the monies according to source. Accordingly, superannuation monies will be paid to estate creditors and to legatees. To the extent that those recipients are not tax dependants for superannuation purposes, very high rates of taxation are payable in respect of those payments.

Inclusion of a superannuation proceeds trust in a will is designed to avoid this outcome by establishing a special separate trust in the will into which the superannuation death benefit is paid. This trust provides for payment of the superannuation death benefits to the deceased's tax death benefit dependants only. These people are generally spouse, children under 18 and any person with whom the deceased had an "interdependency relationship". Because the Commissioner adopts a look through approach, he taxes the superannuation death benefit as if it had been paid direct to the tax death benefit dependant. The other funds available to the estate would be used to pay estate creditors and other beneficiaries who were not tax death benefit dependants. The will might include a clause which attempts to equalize the amount received by, for instance two children, one of whom is a tax death benefit dependant and one who isn't.



### Superannuation Proceeds Trust: Payment to a Minor

This term is used where a superannuation death benefit is payable to someone under the age of 18. The trustee of the superannuation fund pays the death benefit into a trust established specifically for the minor because a minor cannot give a valid receipt to the trustee of the superannuation fund for receipt of the death benefit. The trust is usually established by the trustee of the superannuation fund. The trustee may be the trustee of the superannuation fund, or it may be someone else chosen by the trustee of the superannuation fund to act specifically as trustee of the superannuation proceeds trust.

The trust should be conducted solely for the general advancement of the minor beneficiary.

If by the terms of the trust the trust capital will pass to the beneficiary when the trust ends, income from the superannuation proceeds trust will be treated as exempt trust income, in other words a beneficiary under 18 will be able to take income at adult marginal tax rates. ■

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# Partition of Jointly Held Land

▶ Matthew Baker-Johnson | Lawyer

*Often land will be held by two or more people either as joint tenants or tenants in common. Sometimes the co-owners may want to terminate the co-ownership and partition the land between them. This could be part of an estate planning process or perhaps there is a dispute between the co-owners.*

The term "partition" refers to:

- the division of land and the transfer of the divided parts between the co-owners so that each co-owner is sole proprietor of a portion of the land which was formerly owned by the co-owners; or
- if land is already divided and held by the co-owners, the transfer of the already divided parts among the co-owners so that each co-owner becomes sole proprietor of a pre-existing lot.

From a property law perspective if a subdivision is needed, partition might involve some complexity. Otherwise, from a property law perspective partition is not a difficult process.

However, the process of partition may have tax implications.

## (a) Capital Gains Tax

TD 92/148 deals with the subdivision of co-owned land into two smaller pieces of land and each owner then becoming sole proprietor of one of the smaller pieces of land. Up to the completion of the subdivision, there is no change in beneficial ownership, so no capital gains tax arises as the result of the subdivision. However, as a result of the transaction which gives each co-owner the whole interest in one piece of land, each co-owner is

taken to have disposed of a half interest in the piece of land now owned by the other.

## (b) GST

GST will be payable where the usual GST threshold issues (such as whether there is an enterprise) are satisfied, by giving effect to a partition. Each transfer or conveyance will constitute a taxable supply. However, a co-owner does not make a supply of its own interest in the land.

The Commissioner for Taxation considers that the mere subdivision of land by co-owners does not constitute a supply for the purposes of GST.

## (c) Stamp Duty

In relation to property held in Victoria, the transfer or a conveyance of dutiable property is subject to ad valorem duty under the Duties Act (Vic). However, by section 27 of that Act, where a dutiable transaction effects a partition or division of an interest in land, duty is payable on the value less any beneficial interest held by the transferee prior to the transaction.

The position in relation to Queensland property is to broadly similar. By section 31 of the Duties Act (Qld) the value on which duty is payable is the amount by which the value of the property transferred exceeds the value of interest of the transferee in that property.

Exemptions or concessions may operate to reduce the tax implications of a partition.

However, when considering a partition, it will be necessary to understand the tax implications of the proposed partition before a decision is made to proceed. ■



# Updating the Paperwork – a Case Study

▶ John Currie | Consultant | MacDonnells Law

A distressed mother came to see me recently following the tragic death of her 26 year old daughter (Julia) in a particularly horrific car crash.

Julia had made a will some years ago, but never updated it.

Julia subsequently entered into a short and turbulent marriage to a drunken and abusive husband (Max). During the course of the marriage Julia nominated Max as her preferred beneficiary when filling out the superannuation forms on taking up a part time job.

The marriage ended badly. Julia and Max separated acrimoniously.

Eleven months after the separation, Julia called at Max's home to retrieve a copy of their marriage certificate so she could file the paperwork for a divorce as soon as the twelve month separation period expired.

Julia was killed on the way home from this visit.

The only asset is a significant death benefit entitlement from the superannuation fund.

As Julia had not yet qualified to secure a divorce, Max remained as her legal spouse despite the estrangement.

As Julia had not nominated a replacement preferred beneficiary with the superannuation fund, there is a strong likelihood that the trustee will pay the death benefit to Max.

Julia's original will was deemed revoked by her marriage. As no new will was prepared, Julia in effect died intestate. In this case Max is the sole beneficiary of the

intestate estate under Queensland law. Should the death benefit be paid to Julia's estate by the superannuation fund trustee these funds would flow directly to Max – notwithstanding the fact that the parties were acrimoniously separated.

The result of Julia neglecting her paperwork is that Max is likely to receive a windfall benefit from Julia's death notwithstanding the history of abuse and that he was the last person that Julia really wanted to benefit in fact.

This appalling outcome could have been avoided by Julia taking a couple of simple steps – making a new will as soon as the marriage broke down and nominating a new preferred beneficiary with the superannuation fund.

At law there is simply "married or not married," with the "married" category now expanded to include de facto and same sex relationships. There is no "separated" category.

Accordingly if you are separated, but not yet divorced it is important to review your will, powers of attorney, superannuation death benefit nomination and other arrangements to ensure that you do not trigger a perverse outcome of the sort outlined here.

If you need assistance in doing this please contact your Meritas lawyer. ■

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# Acting as Executor

▶ [Charlotta van Otterdyk | Special Counsel](#)

An Executor's role is to carry out the Willmaker's intentions as expressed in the Will. This can prove more difficult than it sounds.

## Process in a Nutshell

The Executor

- ▶ deals with the immediate issues arising after death
- ▶ applies for a Grant of Probate
- ▶ administers the estate in accordance with the Will

## Immediate issues after death

The Executor should obtain a copy of the last valid Will as soon as possible.

Sometimes a Will contains wishes about funeral arrangements. Generally, the funeral arrangements are handled by immediate family members, but the funeral is ultimately the Executor's responsibility.

## Information Gathering

The Executor should read the Will carefully and note details about:

- ▶ Executors
- ▶ the deceased
- ▶ Beneficiaries - the entitlement of each beneficiary under the Will and any conditions attaching to bequests
- ▶ Assets and liabilities of the deceased

## Assets

The Executor must identify all the deceased's assets. The Executor may have knowledge of the assets because of the relationship with the deceased or because the deceased's own records are good. It may be necessary for the Executor to make enquiries and obtain details.

## Liabilities

The Executor must also identify the deceased's liabilities. The Executor may need to contact creditors to arrange time to pay. Liabilities should be paid as soon as possible after death.

## Obtaining Grant of Probate

A Grant of Probate is made by the Probate Office in the jurisdiction of residence of the deceased. If assets are held in two or more Australian States or elsewhere in the world, it may be necessary to "re-seal" the grant or apply for a fresh grant of Probate (or equivalent) in the other places.

## After Probate

Once the Probate has been obtained, the Executor administers the estate in accordance with the Will. The Grant of Probate gives the Executor the right to deal with the deceased's assets.

## Taxation

The Executor must complete the deceased's final tax return up to the date of death, and thereafter a trust tax return until the estate is fully distributed.

## Distribution

It may be that the whole estate cannot be distributed immediately. If this is the case, the Executor must continue to act and hold assets for the benefit of the beneficiaries until distribution is possible. The Executor can be held personally liable for errors in administration.

Where the Executor is uncertain in relation to aspects of estate administration, the Executor should seek advice from appropriately qualified persons as to the proper course of action. The costs of that advice are borne by the Estate. ■

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