

Superannuation and Estate Planning: A Pitfall

By Sharon Winn, Special Counsel

For many of you, your superannuation benefits form the largest part of your resources on death. Recent changes to the taxation and superannuation laws allowing for the tax effective passing of wealth between generations through a self managed superannuation fund (a SMSF) means that estate planning in a SMSF has become more crucial.

You may be surprised to know that superannuation death benefits do not automatically form part of your estate to be passed on by the terms of your will. Many people wrongly assume that because they have made provision for the passing of death benefits in their will, this will in fact happen.

Unless the trustee of a superannuation fund exercises its discretion to pay the death benefit to the estate or you have in place a valid binding death benefit nomination which compels the payment of the death benefit to the estate, a death benefit may not be paid to the estate to be then dealt with by the terms of a will, but may be paid directly to one or more superannuation dependents to the exclusion of others. This may be contrary to the wishes of the deceased member or not result in the most tax effective payment of benefits.

Dramatic consequences such as these are illustrated in the case of *Katz v Grossman* [2005] NSWSC 934.

In this case the father, a member of a SMSF, died leaving two children. The daughter was a member of the SMSF and a trustee of the fund. The son was not a member of the SMSF.

The father left a superannuation benefit of approximately \$1m. He had included in his will a direction that his superannuation benefits were to be split between his two children equally. The father did not sign a binding death benefit nomination binding the trustee to pay the death benefits to the estate.

On the father's death the surviving trustee, his daughter, became the sole controller of the trust and custodian of the trustee's discretions. She paid all of the deceased father's death benefits to herself to the exclusion of her brother. The brother challenged these actions in the New South Wales Supreme Court and Court of Appeal, without success. The Court held that she was entitled to take the action that she did under the terms of the trust deed governing the superannuation fund. The directions left by the father in the will regarding superannuation were of no effect.

No doubt the father never thought this would have happened! The outcome in *Katz v Grossman* may have been avoided if the father had considered as part of his estate planning the use of a binding death benefit nomination to remove the control of the payment of the death benefit from his daughter or by using a corporate trustee. The case is also a reminder that care must be taken regarding who becomes members of your SMSF.

If you would like to know more about your options to look after dependents or others from a SMSF or any other aspects of estate planning, please contact Sharon Winn on 07 3233 1247 or sharon.winn@flowerandhart.com.au