SUPERCENTRAL

Benefitting a non-dependant from your super

A withdrawal and recontribution strategy could over time permit a member to transfer a material part of their superannuation to a non-dependant who would not ordinarily be entitled to receive the member's super following the death of that member.

Regulation 6.22(2) of the *Superannuation Industry (Supervision) Regulations* ("SIS Regulations") provides that a member's death benefits must not be cashed in favour of a person other than one or more of the deceased member's dependants or the member's legal personal representative (i.e. meaning to their estate to be distributed in line with their Will or pursuant to the intestacy laws if there is no Will).

Section 10 of the SIS Act defines "dependant" for the purposes of regulation 6.22 to include the deceased member's spouse or child, or a person who was dependent on the deceased member or who was in an "interdependency relationship" with the deceased member immediately prior to the death.

Given these limitations how would you go about effectively transferring the member's superannuation death benefits to a person who is not one of those listed types of persons and therefore not a dependant?

You could simply give the benefit to the 'legal personal representative' (i.e. the deceased member's estate) and pay it to the beneficiary in accordance with the deceased's Will. But that involves taking the money out of the superannuation regime.

What if you wanted to leave the money in super for the tax concessions or to protect your chosen beneficiary from themselves (by locking up the super and forcing them to save) or because the fund holds a particular asset that you wish to retain in the super fund either because you do not want to trigger CGT or because it is just not the right time to realise profits.

A withdrawal and re-contribution strategy could be the answer. The chosen beneficiary joins the self-managed superannuation fund. The main member then withdraws an appropriate amount that they gift to the chosen beneficiary who then uses that money to make a non-concessional contribution to the fund.

What that means is that over time the main member's balance is going to progressively fall and the chosen beneficiary's balance is going to rise.

If you can do that for long enough and the payments of course are under the non-dependant's non-concessional contributions cap, then the member's balance is gradually transferred to the non-dependant without the need to worry about regulation 6.22 because it is irrelevant.

Having to pay out a smaller death benefit on the passing of the main member will result in less strain being placed on the liquidity of the SMSF at that time. This in turn will mean any large illiquid assets that would otherwise have had to have been sold to pay out a larger death benefit could be retained within the superannuation environment, netting the non-dependant (i.e. the remaining member) a more favourable financial position.

There are pitfalls including the time that the strategy is likely to take to play out and the fact that it is dependent on the chosen beneficiary's transfer balance cap and therefore their non-concessional contributions cap.

It is also worth noting that the strategy should be fully and carefully documented, particularly the deed of gift of the withdrawn super benefit from the main member to their chosen non-dependant. Given that the dominant purpose of the strategy is to increase the non-dependant's superannuation and not to avoid tax, any small tax saving which results would likely not form the basis of a challenge under Part IVA.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.