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Paying your super to the grandchildren

Clients regularly ask whether when they die, they can give their superannuation to their grandchildren. The short answer is “no”. Superannuation death benefits can only be paid directly from your fund to your estate, your spouse, your children, people with whom you are in an interdependent relationship, or your financial dependents.

Some clients choose to pay their superannuation into their estate, at which point their Will instructs their executor to distribute money to the grandchildren. But when the money moves into the estate, it becomes vulnerable to the deceased’s creditors, including the ATO. This is not, therefore, a solution that will necessarily suit those with existing debt or tax obligations.

Sometimes, however, it is possible for a client to leave their superannuation to their grandchildren if the grandchild is a financial dependant. Strictly speaking, the fact that the beneficiary is the grandchild of the client is irrelevant; it is their status as financial dependant that allows the super death benefit to be distributed to them.

The ATO has issued a number or private binding rulings (PBRs) that shed some light on how they test whether an individual is ‘wholly or substantially maintained financially by another person’. In short, the ATO asks: if the financial support received by a person were withdrawn, would the person be able to survive on a day-to-day basis? If the financial support merely supplements the person’s income and represents “quality of life” payments, then it is not considered ‘substantial’ support.

The ATO has made it clear that the only relevant expenditures are those that go towards the necessities of life (PBR 40376). These do not include expenses that maintain ‘a reasonable standard of living’ (PBR 18688). Nor do they include expenses that pay for social outings, medication, pocket money, chocolate, entertainment or hobbies (PBR 64085).

Some schooling costs have been held as relevant expenditures when considering financial dependence. Public school fees are relevant (PBR 52530), though it is uncertain whether private school fees enjoy the same status – probably not. For some reason, however, schoolbooks, lunches and uniforms do not matter (PBR 64085 again).

Moreover, the ATO has held that the financial support must make up a ‘substantial’ proportion of the total support for the child. There are examples where financial dependence was not made out because the bulk of the household income came from welfare benefits for parents. Additionally, contributions that are made towards the grandchild’s household (for example utilities) will be pro-rated by taking into account the other people living in the home (PBR 57857).

The ATO also requires the payments to have been made regularly and continuously in order for them to be considered maintenance. This is not always easy to document given that grandparents rarely invoice their grandchildren. Cash transfers into a bank account in the grandchild's name do not generally specify what the money is for and thus do not, without more, demonstrate reliance.

Given the strict criteria outlined above, grandchildren are usually financially dependent upon their grandparents when they live with, and are raised by, the grandparents. It is still possible, however, to demonstrate that a grandchild that does not live with their grandparent is nevertheless financially dependent – though it may require quite a lot of evidence over an extended period of time. Many people simply do not keep those kinds of records.

Our lawyers can draft death benefit nominations, and estate plans more generally, that take into account a client's desire to leave money to their grandchildren. They can also advise on the ideal way to ensure that the grandchildren are looked after without losing a chunk of cash to the taxman.

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About Townsend Lawyers

Townsend Lawyers was established in 1982 and is a leading independent law firm with a reputation for solid advice extending across a wide range of areas including: commercial and business law, corporate advisory, tax, estate planning, superannuation, insurance, trusts and SMSFs.

With a focus on client fundamentals of outstanding service and technical expertise, our thinking leads the market. Townsends is the legal adviser of choice for businesses, financial advisers and individual clients.

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