

FAMILY PROVISION CLAIMS: THE TAX TRAPS PRACTITIONERS CAN'T IGNORE CONTINUED...

Q: What superannuation issues commonly arise in family provision matters?

Superannuation death benefits introduce a separate set of tax rules. Benefits may be paid directly to dependants or to the LPR. If paid to an LPR the tax outcomes depend on who is expected to benefit, the form of the payment, and the taxable and tax free components.

Where benefits are paid to the estate, the timing of payment can be critical. If a family provision claim is unresolved at year end, it may be unclear who is expected to benefit, potentially resulting in adverse tax outcomes. Subsequent deeds cannot operate to retrospectively change the tax outcome for the year in which the death benefit was paid.

Practitioners should also pay particular attention to record keeping and the segregation of funds to ensure payments can be properly characterised.

Q: What additional risks arise where family trusts are involved?

Family provision settlements often seek to deal with assets that are not estate assets, including assets owned by family trusts.

Trustees may seek to distribute trust assets to the deceased's estate in the absence of any power to do so. That is, they wrongly assume that the estate comes within a widely-drawn beneficiary clause that refers to trust beneficiaries. While estates are treated like trusts for tax purposes, they are not trusts at general

law. Practitioners must first confirm whether the estate qualifies as an object of the trust.

Assuming that a trust distribution can be made to an estate, be aware that this can result in highly adverse tax consequences, including penal tax rates, denial of CGT discount, and loss of concessional treatment for minors.

Loans, unpaid beneficiary entitlements, and forgiveness arrangements also require careful consideration.

Q: How do life interest and remainder trusts complicate family provision outcomes?

Where a Will establishes life and remainder interests, variations made after the administration of the estate may trigger CGT events affecting multiple parties. If changes are contemplated, it is generally preferable that they be made during administration by way of a qualifying deed, rather than by later variation of trust terms.

Q: Who ultimately pays the tax?

The allocation of tax liabilities must be addressed expressly in settlement arrangements. Recent authority demonstrates the risks where parties proceed on different assumptions. Practitioners should ensure that agreements clearly identify whether entitlements are gross or net of tax.

Q: What issues are often overlooked in the context of determining who pays tax?

Recurring issues include:

- failing to understand how trusts are taxed
- assuming beneficiaries are presently entitled when they are not
- delaying advice until after key transactions have occurred
- overlooking the residency status of executors or beneficiaries.

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