Superannuation proceeds trusts: Tricks and traps

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A superannuation proceeds trust (**SPT**) is a trust established solely to receive superannuation proceeds on the death of a fund member. A SPT can be established by a will or by deed after the death of an individual, although establishing the structure post death can be problematic and is outside the scope of this article.

The ITAA 1997 provides that a superannuation death benefit, paid to a death benefit dependant as a lump sum, is not assessable income. A death benefit dependant (defined under s 302-195 of the ITAA 1997) is a:

- spouse or former spouse of the deceased;
- child, aged below 18, of the deceased;
- person with whom the deceased had an "interdependency relationship", as defined by s 302-200 of the ITAA 1997; or
- person financially dependent on the deceased just before they died.

1.1 Payments to the estate

Where there are death benefit dependants under a deceased estate who are potential recipients of superannuation benefits, it is often an appropriate estate planning strategy to allow for a separate SPT under the will in addition to any testamentary trust (**TT**), so that a tax-free distribution of the superannuation proceeds can be achieved via a protected structure. Other estate assets can be distributed to a TT that has beneficiaries who are not death benefit dependants.

When the superannuation proceeds are paid to a SPT, the legal personal representative (**LPR**) is taxed in accordance with how the person or persons intended to benefit from the estate would be taxed were they to have received the payments directly. That is, ATO will generally adopt a "look through" approach as if the death benefit had been paid directly to the recipient.

To ensure that any receipt of superannuation proceeds is tax-free, the LPR should ensure that, at least at the time of receipt of the superannuation proceeds by the SPT, the only capital beneficiaries of the SPT are those who meet the definition of "death benefit dependant" under s 302-195 of the ITAA 1997.

In practical terms, this means that where there is more than one death benefit dependant, the terms of the SPT should provide that they receive the trust capital in specified shares on vesting.

In particular, ATO Interpretative Decision 2001/751 (which has since been withdrawn on the basis that its view has been subsumed into s 302-10 of the ITAA 1997) confirms that it appears to be the clear intention of

the legislation that the fact that a payment is made to a trustee, rather than directly to the dependant, should not obscure the fact that the payment is ultimately for the benefit of the dependant.

In the facts considered in ATO ID 2001/751, the death benefit dependant was the sole beneficiary of the trust and, therefore, absolutely entitled to the income and capital of the trust.

1.2 Income beneficiaries of a SPT

The requirement that death benefit dependants receive the capital on the ending of the trust is also driven by the requirements of s 102AG(2) of the ITAA 1936, which sets out the basis on which trust property must be regulated when the trust ends, in order to access the excepted trust income provisions. The excepted trust income provisions effectively allow infant beneficiaries of income distributions to be taxed as adults.

There is limited guidance about whether the ATO will require all the income beneficiaries of a SPT to be death benefit dependants.

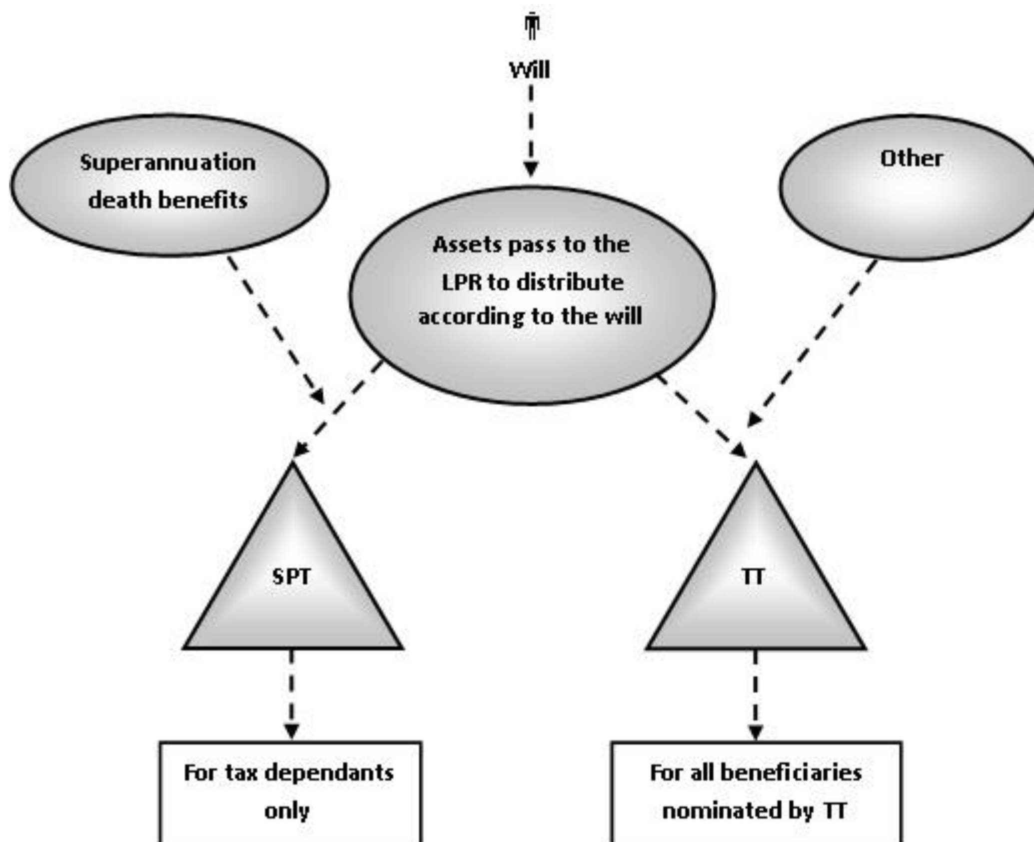
The conservative position would be to limit the income beneficiaries of the SPT to death benefit dependants only. In particular, the guidance available in relation to whether tax will be payable on receipt of the superannuation proceeds under s 302-10 of the ITAA 1997 indicates that the income and capital beneficiaries should be limited to death benefit dependants.

It is arguable however, based on the ATO's comments in Taxation Ruling TR 98/4, that a SPT can include a broad range of discretionary income beneficiaries. While TR 98/4 sets out the ATO's view in relation to child maintenance trusts (see 2015 WTB 11 [287]), it can by analogy be argued that the comments apply to other similar types of trusts (including SPTs).

Furthermore, in practical terms, it appears that the ATO only tests the range of potential beneficiaries of the SPT at the date at which the superannuation proceeds are received by the SPT (for example, see private ruling authorisation number 1011741138466).

Therefore, even if a trustee takes the conservative approach, that is, to limit the range of potential income beneficiaries to death benefit dependants, following receipt of the proceeds, it may be possible for the range of beneficiaries to be expanded to include non-death benefit dependants.

Below is a diagram giving an example of making distributions under a will to a TT and a SPT.



1.3 Provisions of a will

For completeness, as superannuation proceeds do not automatically form part of the estate of the deceased member, it may be necessary to ensure that appropriate nominations are made by the member to direct that the superannuation death benefits are paid to the LPR for distribution under the will, and if appropriate, to any SPT established.

Assuming proceeds are paid under a will, the LPR should have the power to ensure that the range of potential beneficiaries can be limited to persons:

- within the provisions of s 295-485(1)(a) of the ITAA 1997; and
- who satisfy the definition of "death benefits dependant" under s 302-195 of the ITAA 1997.

The main reason both these provisions should be mentioned is due to the requirement under s 295-485(4) that regard needs to be had to the extent to which a death benefit dependant can reasonably be expected to benefit from the estate.

In particular, s 295-485 of the ITAA 1997 gives superannuation funds the ability to claim a tax deduction based on an increased amount of superannuation lump sum death benefit paid under the "anti-detriment" rules, with reference to the tax paid on contributions.

1.4 Conclusion

In many respects, the ability to utilise a SPT under a will incorporating a TT is a simple, yet powerful, strategy that practically is useful in a large range of circumstances.

There are however some fundamental threshold issues that need to be addressed to ensure the expected income tax concessions can be validly accessed. Furthermore, given the significant number of estate planning related issues aside from tax that are potentially relevant, it is critical that a methodical approach is adopted.