SMSFAdviser

Widening the class of death benefit recipients

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

Although it is usually only possible for death benefits to be paid to a member's dependants or legal personal representative, there is a wide class of potential recipients set out under the superannuation regulations, says a top legal expert.

Matthew Burgess, director of View Legal, said a wider class of potential recipients is possible as set out under Superannuation (Industry) Regulation 6.22(3). This states that the relevant conditions are satisfied if the trustee has not, after making reasonable enquiries, found either an LPR, or a dependant, of the member; and the person in whose favour benefits are cashed is an individual.

Mr Burgess said in the instance where there is no LPR or nominated dependents, the trustee must follow the general trust law provisions in relation to any exercise of discretion before deciding where the death benefits are allocated.

"For example, it has to in good faith and for proper purpose," he said.

"If the trustee has material concerns about how they should proceed then an application to court could be made."
It is ideal that the trustee does have a relationship with the deceased member for a claim to be initiated or considered, he said, although this will be driven by the factual matrix.

"It's important to note that this type of situation only arises where there is no legal personal representative and no-one who meets the definition under SIS as a dependant which happens in very limited, although not impossible, situations,' he said.

"Surviving parents, who are not otherwise dependants under SIS, would be the most common example."
In theory, Mr Burgess added there is a possibility that the trustee could claim the death benefits themselves, assuming the trust deed does not prevent this.

"If that was the intended path, a court application may be prudent if there were likely any parties that may be aggrieved by this decision," he said.

A well-drafted deed could mitigate this situation and should contemplate this style of situation to align with the SIS regulations.

"Despite it being a remote prospect for most well-managed SMSFs, particularly those that receive specialist advice about having an integrated and holistic estate plan that ensures at a minimum a validly appointed LPR under a valid will, it can arise," Mr Burgess said.

"Given the factual matrix required to see the provisions applicable, it is certainly an area that the risks of inappropriate conduct are heightened and is likely to be a deceased estate with few, if any, immediate family members involved and no valid will."

Mr Burgess said in the context of SMSFs and other forms of fixed trusts with a narrow range of known beneficiaries who can be proved via other evidence, a court application for adopting a new trust deed is generally seen as being unlikely to be necessary from a trust law perspective.

However, the federal court decision in Kafataris v DCT [2008] FCA 1454 highlights that even for trusts with an ostensibly narrow range of potential 'beneficiaries', care must be taken.

“In this case a husband and wife established separate SMSFs appointing themselves as sole members. They declared a property owned by them as property of their respective SMSFs,” he said.

“In considering who the ‘beneficiaries’ of each SMSF were, it was held that upon construction of the SMSF deeds, the class of beneficiaries was broader than each single member.

“This was because the trust deed allowed the trustee to pay benefits to the member’s dependants and even relatives if there were no dependants, as defined under the superannuation legislation, of the member.

“As such, the potential class of beneficiaries included 21 different people.

“Best practice, therefore, dictates that each person who can enforce the due administration of the trust should be a party to and sign a deed of variation that seeks to implement a replacement for a lost SMSF trust deed.”
Bryce Figot, special counsel for DBA Lawyers, said it is very rare situation where a member dies with no dependents or an LPR.

“You do get young people who die without dependents but what is profoundly rare is for people to die without dependents or an LPR,” Mr Figot said.

“It is common for people – especially younger people – to die without having made a will, but when that happens someone will put their hand up to be the administrator of the estate.”

Mr Figot said there is a legal framework and case law that is followed when the court appoints an administrator but it can sometimes also become a “bit sticky”.

“It’s important to have a will or deed in place even if you don’t personally own anything, if for no other reason than to appoint an executor, as there is still superannuation to consider,” he said.