

Stepchildren can be included as dependants

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

As the incidence of blended families continues to rise, the issue of stepchildren and superannuation benefits is also likely to become a growing area of litigation.

However, Matthew Burgess, director of View Legal, said one case provides a useful explanation of the wider position at law about stepchildren from a superannuation perspective.

The Superannuation Complaints Tribunal (SCT) in D19-20\023 followed an updated view of the common law definition of “stepchild” to allow the stepchild relationship to continue, provided the relationship with the natural parent was not dissolved earlier other than by death.

Before this decision, the ATO stated in ATO ID 2011/77 that a child “ceases to be stepchild of a step-parent when the relationship between the child's natural parent and the step-parent ends, that is, on the death of the natural parent or the divorce of the natural parent from the step-parent”.

Burgess said in a more recent decision the tribunal gave some support for the position for general law purposes, and in particular family provision (or testator family maintenance applications) that someone does not cease to be a stepchild of a person when their natural parent pre-deceases the person.

“This is dependent on whether the marital relationship between their natural parent and the person was in place at the date of the natural parent’s death (see *Scott-Mackenzie v Bail* [2017] VSCA 108),” he said.

“That is, the relationship of step-parent and stepchild is one of affinity and does not cease merely because of the death of the natural parent. In other words, once a step-child of the deceased, always a step-child of the deceased, providing the relationship of the deceased with the natural parent was not earlier dissolved otherwise than by death.”

However, Burgess continued that there are also cases that conclude the relationship of “stepchild” ceases automatically on the death of the natural parent (see *Re Burt* (1988) 1 Qd R 23, *Re Moreton* (1996) 2 Qd R 174, *Basterfield v Gay* (1994) 3 Tas R 293, and *Connors v Tasmanian Trustee Limited* (1996) 6 Tas R 267).

“For superannuation purposes, historically the ATO is on record as holding that a child only remains a stepchild while the relevant parents are a couple,” he said.

“For example in ATO ID 2011/77, it was decided that a person ceases to be a stepchild for the purposes of being a dependant of the member under regulation 6.22 of the superannuation regulations, when the legal marriage of their natural parent to the member ends.”

He added there is, however, support for the broader concept of “stepchild” as a relationship of affinity between the step-parent and step-child that can continue beyond the death of the natural parent.

“In SCT D19-20\023 the tribunal was satisfied that the step-daughter and the deceased member continued to have a sufficiently close relationship after the earlier death of the spouse of the member who was the natural parent of the step-daughter.”

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“As a result, the natural daughter of the spouse of the member remained the step-child of the deceased member and in turn fell within the definition of ‘child’ at the date of the deceased member’s death. Therefore she was a ‘dependant’ for the purposes of both the trust deed of the fund and the superannuation legislation.”