Unbundling superannuation dependency

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For the purposes of the Superannuation (Industry) Supervision Act (**SISA**), a dependant in relation to a person *includes* the spouse of the person, any child or the person and, from 1 July 2004, any person with whom the person has an interdependency relationship (s(10(1)).

It should be noted that the inclusive nature of the definition in SISA for a dependant means that common law concepts of 'dependant' need to also be considered for the scope of the definition. Therefore, as an example, a person can also be a dependant of another if financial dependence can be proven.

2 persons are in an interdependency relationship under SISA if:

- they both have a close personal relationship; and
- they live together; and
- one or each of them provides the other with financial support; and
- one or each of them provides the other with domestic support and personal care (s10A(1) SISA).

Section 10A(2) provides that 2 persons are in an interdependency relationship if:

- 2 persons (whether or not related by family) satisfy the requirement of paragraph (1)(a); and
- they do not satisfy the other requirements of an interdependency relationship under subsection (1); and
- the reason they do not satisfy the other requirements is that either or both of them suffer from a physical, intellectual or psychiatric disability.

Section 10A(3) provides that certain factors in Reg 1.04AAAA(1) may or may not be taken into account when determining whether an interdependency relationship exists under s10A(1) and s10A(2). An example of some of the factors are:

- the duration of the relationship;
- whether or not a sexual relationship exists;
- the ownership, use and acquisition of property;
- degree of mutual commitment to a shared life;
- care and support for children;

- the reputation and public aspects of the relationship;
- the degree of emotional support;
- the extend to which the relationship is one of mere convenience; and
- any evidence suggesting that the parties intend the relationship to be permanent.

Generally, it is not expected that children will be in an interdependency relationship with their parents. A conclusion confirmed in Tax Office Private Binding Ruling Authorisation Number 1051971162905 (which also cited the Explanatory Statement to the Income Tax Amendment Regulations 2005 (No.7) as further confirming the point).

The Tax Office also confirms in the ruling that while a child is not absolutely precluded from being in an interdependency relationship with a parent, interdependency will only exist where the relationship goes beyond the usual connection between an adult child and a parent. That is, unusual and exceptional circumstances would need to exist.

However, Reg 1.04AAAA(2) is an accurate example of a working interdependency relationship between children and parents:

1. they meet the requirements of s10A(1)(a)-(c) (they have a close personal relationship, they live together and one or each of them provides the other with financial support); and
2. one or each of them provides the other with support and care of a type and quality normally provided in a close personal relationship, rather than by a friend or flatmate.

So, for the purposes of SISA, a parent can be a 'dependant' if they:

- satisfy the requirements of s10A(1), using the model in reg 1.04AAAA(2) as an example; or
- if common law concepts of a dependant (e.g. financial dependant) can be proven on the circumstances.

For more information, the explanatory notes for the regulations on the topic are helpful.

The Tax Office in Private Ruling Authorisation Number 64085 provides some insight to its view of the level of financial support required in the context of the above SISA requirements.

In deciding that a surviving sibling was not financially dependent on their deceased sibling the Tax Office confirmed as follows:

1. a 'financial dependant' is considered to be a person to whom another person contributes all or a major amount of necessary financial support. If the level of financial support is insignificant or minor, then the person cannot be regarded as a dependant.
2. if the person who is alleged to be a 'dependant' relies on another as the source wholly or in part of their existence, then dependence is established.
3. thus if the facts show that the beneficiary is a person to whom the deceased contributed all or a major amount of necessary financial support and the beneficiary 'depended or relied on' the earnings of the deceased for day-to-day sustenance then the person will be a financial dependant.
4. in other words, the test to be applied under the definition of 'dependant' is: if the financial support received by a person were withdrawn would the person concerned be able to survive on a day-to-day basis.
5. in contrast then, if the financial support provided merely supplements the person's income and represents 'quality of life' payments, then it would not be considered a substantial support.
6. relatively minor financial support should be regarded as part of normal domestic and/or familial arrangements and not a dependency relationship, particularly given the Tax Act does not acknowledge partial dependency.

Thus, in Private Binding Ruling 1052187560814, the Tax Office held that the following factual matrix was insufficient to establish financial dependency:

(a) adult child of deceased, living with former spouse of deceased;

(b) deceased had a binding child support agreement with the former spouse, which had expired when the beneficiary turned 18;

(c) after expiry of the child support agreement, the deceased continued to pay a monthly amount and costs such as extracurricular school activities and out of pocket medical expenses and intended to pay for the beneficiary's university fees;

(d) the beneficiary had low levels of taxable income.

The Tax Office confirm that in order to meet the Tax Act definition (see section 302-195(1)(d)) there must be more than the mere giving of money - rather, there must be a relationship where one party relies on the other for what is required for their ordinary living.

The Tax Office further confirmed that the definition of dependency was set out in the case of *Kauri Timber Co (Tasmania) Pty Ltd v. Reeman* (1973) 47 ALIR 184, where it was held that the key principle is that it is the actual fact of dependence or reliance on the earnings of another for support that is the test.

Therefore, as one example providing gifts does not create financially dependency (see *Edwards v Postsuper Pty Ltd* [2007] FCAFC 83).

Ultimately, as confirmed in *Re Malek v Federal Commissioner of Taxation* (1999) 42 ATR, dependency requires financial support to a level that maintains the person's normal standard of living, such that there is reliance on the regular continuous contribution of the other person to maintain that standard.