

## Stepchildren and death benefits still an area of confusion: legal specialists

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

A stepchild can receive a super death benefit from a step-parent but only if an interdependency relationship still exists, a leading legal specialist has said.

When an SMSF member dies, their super death benefit can be paid to a spouse, a child, or anyone financially dependent on them, Scott-Hay Bartlem, partner at Cooper Grace Ward Lawyers, says.

“That includes somebody in an interdependency relationship with them, or to the member’s estate where it’s dealt with under their will,” he said.

“However, in the case of stepchildren, there are some challenges.”

Legally, ‘child’ is defined to include a stepchild or a child of a spouse, Hay-Bartlem said.

“Now, that means that if you are in a relationship, a continuing relationship with someone, your superannuation when you die can be paid to that person’s child.”

“So, for example, my partner’s superannuation can be paid to my son, if something happens to my partner. But that’s only while we are in a continuing relationship.”

If the member dies first, the relationship with the spouse ends, according to the Tax Office, for super purposes.

“[In my case] my son ceases to be my partner’s stepchild when I die and that means that the whole stepchild thing will come to an end, and my partner’s superannuation cannot be paid directly to my son,” he said.

“We can still pay my partner’s superannuation to my son if I’ve died first. If my son remains actually financially dependent upon my partner, or [they] remain living together in an interdependency relationship, or my partner’s superannuation could be paid into their estate, and then the clause in the will leaves it to my son.”

Hay-Bartlem added that there are ways to ensure a stepchild could be included as a beneficiary.

“You just need to be careful that you put together the right method, often with an estate and a will,” he said.

Matthew Burgess, director of View Legal, said that as the number of blended families continues to rise, the issue of whether stepchildren could receive death benefits from super is also becoming an issue.

His previous article provides a useful explanation of the wider legal position about stepchildren from a super perspective, he said.

“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 another decision the tribunal last year 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 predeceases 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).”

“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 stepchild of the deceased, always a stepchild of the deceased, providing the relationship of the deceased with the natural parent was not earlier dissolved otherwise than by death.”

However, Burgess added 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.