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August 2005

Private Client Interests Newsletter

Binding Nominations

Who has the right to decide what happens to your superannuation benefits?

You may think that you have already exercised the absolute right to determine to whom your superannuation (and any associated insurance benefit) is paid in the event of your death. However, this may not necessarily be so. In most cases, it is the Trustees of your superannuation scheme who actually determine to whom your superannuation benefits are paid. In the majority of cases, the Trustees of a superannuation scheme will request details of all of your dependants (anybody you were financially responsible for during your lifetime) and may invite all such dependants to indicate whether or not they wish to make a claim for your superannuation benefits. Your Trustees must then make a distribution in a way that they deem fair and reasonable based on the needs of the various claimants. Generally, it is only if there are no dependants that the Trustees will pay the benefit to your executors to be held upon the trusts in your Will.

But I've already lodged a nomination...

When joining a superannuation fund, members are usually asked to nominate their preferred beneficiary, such as a spouse or children. This type of election is a **Non-binding Death Benefit Nomination**. The Trustees of the fund must take your nomination into consideration and may give effect to your wishes, but if another eligible person applies for the payment of all or some of your superannuation benefit, the Trustees may decide in certain circumstances to make payments to these claimants and not to your preferred beneficiary. All elections made prior to December 1999 are non-binding elections.

How can I force my Trustees to act in accordance with my wishes?

Some superannuation schemes allow the member to make what is known as a [Binding Death Benefit Nomination](#). When a binding nomination is made, the Trustees must pay your superannuation benefits in accordance with your nomination. However, there are some limits and downsides to binding nominations:

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- Not all schemes allow binding nominations;
- Binding nominations are optional on the part of the member and are usually only valid for a fixed period of time (3 years);
- Binding nominations permanently oust any earlier non-binding nominations you may have made, so that in the event that a binding nomination lapses, your Trustees will pay your superannuation benefits to your dependants or to your estate, to be dealt with in accordance with the terms of your Will, if any;
- There can be tax implications in paying your superannuation benefits to someone other than your dependants;
- The person(s) named in a binding nomination must be dependant on you as at the date of your death, or the binding nomination must direct the superannuation benefits to be paid to your estate, for the binding nomination to be effective;
- There are doubts whether your attorney under power can make a new binding nomination if your existing nomination expires by effluxion of time after you have lost mental capacity;
- The nomination must be accepted by the Trustees of the superannuation fund and not merely received by it.

If you are uncertain as to what sort of nomination you have made, or whether your existing binding nomination remains current, you should contact your superannuation scheme.

If you wish to discuss which nomination best suits your circumstances or how your superannuation benefits can best be tied into an overall estate planning scheme, please contact Richard d'Apice on 9233 7788.

Recent Changes to Land Tax

There has been a lot of media coverage recently about the changes to Land Tax in New South Wales. How do these changes affect you?

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What is Land Tax?

Land Tax is a New South Wales tax levied for a particular year on land in New South Wales that you owned as at 31 December the previous year and which is not exempt from Land Tax. An owner can be an individual, a trust, an association or a number of other legal entities.

There are a range of exemptions available with respect to Land Tax, the most common being the exemption of the home in which you reside.

You should check that you are, in fact, covered by an appropriate exemption before you decide that you do not have to pay any Land Tax in relation to particular property.

What Land Tax am I liable for?

2004 Land Tax Year

For the 2004 Land Tax year (property owned as at 31 December 2003), the tax threshold was \$317,000.00. You may be liable for Land Tax in that year if the value of land you owned, other than any exempt property, had a total value of \$317,000.00 or more.

Premium Property Tax

The Premium Property Tax for 2004 only applied to a principal place of residence where the land value was \$1.97 million or more.

2005 Land Tax Year

For the 2005 Land Tax year (property owned as at 31 December 2004), the minimum threshold was removed. This means that many landowners who were not previously liable for Land Tax, became liable to pay Land Tax in the 2005 Land Tax year.

In the 2005 Land Tax year the Premium Property Tax was abolished.

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2006 Land Tax Year

For the 2006 Land Tax year (property that will be owned as at 31 December 2005), a threshold has been reintroduced. The new threshold will be \$330,000.00. **The re-introduction of a Land Tax threshold for 2006 does not affect any liability for the payment of Land Tax in 2005.**

The Premium Property Tax has not been re-introduced.

Extension of time for lodgement of 2005 Land Tax Returns

The extended lodgement period for Land Tax Returns for the 2005 Land Tax year was 31 July 2005.

It is important to remember that if you are liable to pay Land Tax, the obligation is on you to lodge a Land Tax Return with the Office of State Revenue. **Penalties and interest apply for late lodgement.**

Do not ignore it!

Unpaid Land Tax acts as a statutory charge upon your land. If the tax is not paid, it will accrue interest and (possibly) penalties and may cause difficulties if you subsequently try to sell or mortgage your land.

If you are uncertain as to whether you have an obligation to pay Land Tax, further information can be obtained from the Office of State Revenues website <http://www.osr.nsw.gov.au/>, including the Office's useful information booklet "*A General Guide to Land Tax*".

If you wish to discuss any aspect of this article please contact Richard d'Apice or Vera Visevic on 9233 7788.

Wills, Marriages and Divorce

The general rule in relation to wills in New South Wales is that a subsequent marriage will completely revoke an earlier will. There are, however, a number of ways in which this revocation can be avoided.

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Wills made in contemplation of Marriage

Traditionally, wills made in contemplation of marriage to a particular person would remain valid if the contemplated marriage did in fact occur. This applies to wills made after 1930 and before 1 November 1989.

This position was altered in 1989 by amendments to the *Wills Probate and Administration Act*, which now allows wills made:

- in contemplation of a particular marriage; or
- in contemplation of marriage generally;

to remain valid notwithstanding a subsequent marriage.

The requirements as to what needs to be set out in a will to give effect to such intentions differ depending upon the circumstances, and if you are contemplating making or amending a will, please contact Richard d'Apice or Vera Visevic to discuss your individual requirements.

Divorce

It is also important to realise that a divorce does not completely revoke an earlier will in which your former spouse was appointed as an executor or named as a beneficiary.

Generally, the effect of a divorce is that any beneficial gift to your former spouse is revoked, any appointment of the former spouse as executor is omitted and your former spouse is otherwise treated as if he or she had predeceased you, but your earlier will is still valid. This means that a former spouse will not be involved in the administration of your estate, nor take any benefit under your will. This may also leave you partially intestate.

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Therefore, if you have recently divorced, although your previous will may still be valid, the divorce may significantly alter the effect of your will and so we strongly recommend that you consider making a fresh will to take into account your altered circumstances.

Further points to consider

- You should consider revoking any existing powers of attorney, appointments of guardian or superannuation nominations that you may have made in favour of your former spouse.
- You should also consider the provisions of any trust or settlement under which your former spouse is an Appointor (capable of removing and appointing the Trustee) or may become an Appointor following your death.
- You should review any life insurance policies on which you or your former spouse were paying premiums. You should check who owns the policy and who is the beneficiary. Failure to do so could result in a windfall gain for your former spouse, or the cancellation of a policy for non-payment of premiums.

If you wish to discuss any aspect of this article please contact Richard d'Apice or Vera Visevic on 9233 7788.

Disclaimer

This newsletter is a non-comprehensive general outline of the law as at 1 August 2005. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

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