



TRUSTEE WEBINAR  
20<sup>TH</sup> JULY 2021

# Succession Planning - A Framework for Action

QUESTIONS & ANSWERS

Thank you for attending the webinar on 20<sup>th</sup> July 2021 'Succession Planning – A Framework for Action'.

Here are the answers to the questions asked during the webinar, plus a few more we couldn't get to in time;

Q/1.

**With the two-year option to move a Market Linked Pension/Lifetime pension to accumulation and start an account based pension. Can this \$ amount be added to an already existing allocated pension or must one start a new account-based pension?**

#### Comments

We are still a long way off seeing any of the draft legislation that was announced in this year's Federal Budget. However, based on the announcement legacy pensions that qualify under the proposal will be permitted to be commuted, including any amount held in reserves, to the member's accumulation account after any deduction for tax on the reserve transfer. The amount in the accumulation account can then be withdrawn from the fund or used to commence an account-based pension.

Here is a link to the government's fact sheet from the Budget which sets out the proposal for legacy pensions:

[Budget 2021-22 - Factsheet](#)

The current rules for commencing an account-based pension do not allow an amount to be transferred from accumulation to an existing pension. They require the existing pension to be commuted, added to the person's accumulation account and then an amount transferred to a new pension account in the fund.

Q/2.

**Myself and my wife (E&N) are both aged 70, still in accumulation mode. Children R&A (aged 37 and 35) have 3 children each themselves (aged 1, 3, 5 yrs).**

**All have maxed out the superannuation balance limit.**

- A. R&A have non-lapsing BDBN that the benefits must go to their 3 minor children equally (and not their spouse). Is it valid if R&A die (the Will does not contradict this)? That is, would the benefits go to their children, not their spouse?**

#### Comments

It is possible that if R&A die, either could have a BDBN which nominated their minor children to receive their death benefit. Under the superannuation rules the amounts retained in super for the children must be paid as death benefit pensions until the children are age 25. At that age the pensions must be converted to lump sums and paid to the children.

**B. If R/A die, how is it paid to the minor children? Who decides how it is paid and into what account etc, considering the beneficiaries are minors? The Will makes mention of this.**

**Comments**

It is possible that if R&A die, either could have a BDBN which nominated their minor children to receive their death benefit. Under the superannuation rules the amounts retained in super for the children must be paid as death benefit pensions until the children are age 25. At that age the pensions must be converted to lump sums and paid to the children. Usually, a surviving spouse or the children's guardian would look after the welfare of the children including the superannuation pensions until the children reach age 18.

**C. What happens if E&N both die at the same time, say in an accident? How to avoid extra taxes?**

**Comments**

If E&N die at the same time, any lump sum death benefits payable to minor children are tax free. However, if death benefit pensions are payable the children would be taxed at personal rates on the taxable component of the pension less a 15% tax offset until they reach age 25. When they reach 25 a lump sum is required to be paid to the children which is tax free.

**Q/3.**

**Could you please address the topic of pros and cons of death benefit nominations vs reversionary pensions for parties in their post retirement period?**

**To give you some context, currently my wife and I are in our mid 70s and both healthy. We have two adult children, married with young families who do not have any immediate financial needs. I imagine our circumstance may be similar to many others.**

**We presently have mutual wills in favour of each other which provide for the establishment of two testamentary trusts on our deaths, one in favour of each of our childrens' families.**

**Comments**

Here is a link to an article written by Phil La Greca on death benefit nominations that may be helpful: <https://superconcepts.com.au/insights-and-support/blog/detail/smsf-insider/2021/07/02/the-what-why-and-when-of-death-benefit-nominations>

The main benefit of a reversionary pension is that it becomes automatically payable to the reversionary beneficiary on the death of the original pensioner without having to go via the binding death benefit nomination or the provisions of the fund's trust deed.

The establishment of testamentary trusts as part of your estate is an estate planning issue and can be an effective way of providing benefits to your children and their families. This is a little bit outside our level of expertise and is really the role of an estate planning lawyer.

**Q/4.**

**We have an Estate Plan in place, which includes;**

- **Wills**

- BDBN
- EPoAs
- EGs, and
- testamentary trusts for both members of a two member SMSF

**When a member dies, can the SMSF account be maintained as part of the testamentary trust? Or do the normal rules apply, such as;**

- Existing pension reverts to surviving member.
- Surviving member commutes their pension to the accumulation account.
- Accumulation account for member who has died must be withdrawn (within a certain period, and hopefully before an imminent death as a lump sum).

**With regards lump sum withdrawals (pending imminent death), we have instructions in place to cover and expedite that withdrawal, per one of your previous seminars.**

#### **Comments**

Technically, a member's account in the SMSF forms part of the superannuation fund and does not form a sub-trust of a testamentary trust. In the circumstances, the 'normal rules' for payment of the death benefit from the fund would apply. That is, any reversionary pension would be paid to a surviving spouse who may not necessarily be a member of the SMSF. If the surviving spouse is a member of the fund it is possible for them to commute their pension in full or part to accumulation phase, depending on the position of their Transfer Balance Cap.

It is possible for the accumulation account of the member who has died to commence a death benefit pension. Whether a death benefit pension could commence would depend on the Transfer Balance Cap position of the beneficiary. However, the beneficiary may wish to withdraw a death benefit lump sum.

The withdrawal of a benefit as a lump sum prior to the member's death may have some advantages if the death benefit was to go to adult children in view of the taxable component of a death benefit lump sum paid from the super fund being taxed. However, if a surviving spouse was to receive the death benefit there may be few, if any tax advantages if they are 60 or older. In the end, it is a matter of personal judgement of the best course of action to take.

#### **Q/5.**

**My wife and I have four pensions in total, and all are reversionary to the surviving spouse. Each of us have more than \$1.6M in our pension accounts - more than the transfer balance cap at the time of establishing the pensions.**

- A. If I died and my pension reverted to my wife, it would put her pension even further above the transfer balance cap than it already is. Does this mean that the pension cannot revert?**

#### **Comments**

No, the pension can revert, and it is possible for your wife to receive the reversionary pension without change, up to the anniversary of your death. However, on the anniversary of your death she may have to take action to come within her Transfer Balance Cap.

The balance of the reversionary pension at the time of your death will be reported to the ATO, however, it will not be counted against your wife's Transfer Balance Cap (TBC) until the anniversary of your death. Prior to the anniversary of your death, your wife should get some advice as to any excess that may arise for TBC purposes. If there is an excess, there are several options that may be available to her:

- Commute the reversionary pension to the amount of the excess and withdraw it from the fund as a lump sum,
- Commute one of her pensions to the extent of the excess and transfer it to accumulation phase,
- Commute one of her pensions to the extent of the excess and withdraw it as a lump sum.

**B. If my pension can revert, does it mean that the assets supporting my pension income stream continue to enjoy tax free income?**

**Comments**

Yes, the income on assets supporting the reversionary pension plus the balance of your wife's pensions will continue to be tax free.

**Q/6.**

**Question relating to the Case;**

Assuming Sandy has a TBC of \$1.7m and \$1.7M in pension, can she still receive the \$500,000 pension or will that need to go into accumulation?

**Comments**

If Sandy had used up the whole of her Transfer Balance Cap and receives the reversionary pension, she could not transfer the value of the reversionary pension into her accumulation phase. However, she could commute part of any of her pensions, not the reversionary pension, and transfer one or more of them, to her accumulation phase. This may allow her to receive the reversionary pension and retain the whole balance of her superannuation (accumulation and pension phase amounts) in the fund.

**Q/7.**

**Is a Reversionary Pension in favour of a spouse, included in the Spouse's Total Super Balance?**

**Comments**

The balance of the reversionary pension received by the spouse is counted against their Total Super Balance as at 30 June in the previous financial year. This will determine whether the spouse is able to make non-concessional contributions to the fund and qualify for other contribution concessions.

For Transfer Balance Cap purposes, the balance of the reversionary pension at the time of the original pensioner's death is counted against the beneficiary's Transfer Balance Cap on the anniversary of the original pensioner's death.

**Q/8.**

**Is a reversionary pension possible if the beneficiary's TSB exceeds \$1.7M cap?**

### **Comments**

Yes, a reversionary pension may be payable to a surviving spouse if their Total Super Balance exceeds the \$1.7 million cap. A person's Total Super Balance is the total balance a person has in superannuation as at 30 June in the previous financial year. It controls the amount of non-concessional contributions made to super and other contribution concessions.

It is possible that you may be referring to the Transfer Balance Cap which has a maximum cap of \$1.7 million but may be lower if a person has commenced a pension that was in place as at 1 July 2017 or they commenced a new pension prior to 1 July 2021.

If the amount of the reversionary pension at the time of the original pensioner's death plus any pensions the beneficiary is receiving at that time is greater than the beneficiary's Transfer Balance Cap then an adjustment may be required so that the amount is reduced below that cap.

### **Q/9.**

#### **2 individual trustees, what to do if one trustee dies? How to keep fund operating?**

### **Comments**

One of the requirements to qualify as a self-managed superannuation fund is that each member is a trustee or director of the trustee company and each trustee is a member.

Where an SMSF has two members, each member is an individual trustee and one trustee/member dies there are several alternatives:

- If the remaining trustee is also the legal personal representative of the deceased, they can act as trustee in their personal capacity and as legal personal representative of the deceased. This will continue until the deceased member's benefits commence to be paid from the fund. When that occurs a second trustee (individual) will be required, however, there is no requirement for the second trustee to be a member of the fund.

As an alternative to the second trustee a company could be appointed as trustee:

- the remaining member could become a director of the company, or
  - consisting of the remaining member and another person as director who is not required to become a member of the fund.
- The remaining trustee could remain, and the deceased member's legal personal representative could be appointed until the deceased member's benefits commence to be paid from the fund. A second trustee could be appointed as trustee or a company could be appointed as the trustee as indicated in the last dot point.

### **Q/10.**

#### **But, Nick, don't the later versions of the Deed allow or not allow for LPR to stand in as trustee?**

### **Comments**

It just depends on the trust deed as our clients use many types of deeds which allow or require the LPR to stand in as trustee prior to making any decisions about the payment of death benefits.

**Q/11.****Can you pay BDN in-specie or does it have to be paid in cash?****Comments**

A binding death benefit nomination is a formal direction to the trustee of the fund to pay benefits to particular dependants on the member's death or the member's estate via their legal personal representative or both.

Whether the benefits are paid in cash or in specie or a combination will depend on the trustee, the beneficiary or the fund's trust deed. It would be unusual for a binding death benefit to stipulate that a member's death benefit is required to be paid in cash or as an in-specie transfer of assets to the beneficiary or legal personal representative.

The only restriction on the transfer of fund benefits in specie is that pensions are required to be paid in cash. However, lump sums including the conversion of a pension to a lump sum can be paid in cash or in specie or a combination.

**Q/12.****Does an Alternate Director of a corporate trustee assume the powers of a full director on death of the sole fund member/director?****Comments**

An alternate director is appointed under an enduring power of attorney granted by the director. The role of the alternate director is to take the place of the director when they are not available. As the enduring power of attorney ceases on the death of the grantor the alternate director would not automatically take the place of the deceased. However, the person who was the alternate director can be appointed as a director in their own right or as LPR (executor of the deceased person's estate) if they qualify.

This is covered in SMSF Ruling SMSFR 2010/2 which can be accessed at:  
[SMSFR 2010/2 | Legal database \(ato.gov.au\)](#)

**Q/13.****If a pension agreement does not include a binding beneficiary nomination can a pensioner create a binding beneficiary nomination by writing to the trustees?****Comments**

The pension agreement will not usually refer to a binding beneficiary nomination. It may allow the pensioner to provide a reversion of the pension to a surviving dependant such as a spouse. It is the fund's trust deed which will cover the provision of a binding death benefit nomination and whether it can be lapsing or non-lapsing.

**Q/14.****If the beneficiary of a reversionary pension is under 60 is it taxable, or tax free for them?****Comments**

The taxability of a reversionary pension depends on the age of the pensioner or the reversionary pensioner at the time of the pensioner's death. If the pensioner or the reversionary pensioner are at least age 60 at the time of the pensioner's death, then the reversionary pension will be tax free.

If both the pensioner and reversionary pensioner are under age 60 then the taxable component of the reversionary pension will be taxed at personal rates less a 15% tax offset. When the reversionary pensioner reaches age 60 the reversionary pension will be tax free.

#### **Q/15**

##### **A. If single director OK or do we need to executor appointed as well?**

#### **Comments**

A single director is acceptable under the Superannuation Industry (Supervision) Act as there is no mandatory requirement to have the executor appointed as a director. However, the trust deed of the fund may require the executor or LPR to be appointed as a director in place of the deceased.

##### **B. If you do not specifically mention super fund shares in will but all assets go to spouse is this OK?**

#### **Comments**

You may find that the company constitution of the trustee requires that the shares are redeemed and cancelled. However, where the remaining director inherits the shares in the trustee company the superannuation rules continue to be met.

#### **Q/16.**

##### **What about planning for incapacity? EPOA? Same process?**

**Would love to know more about incapacity as it didn't seem to be covered. Do you have material on this?**

#### **Comments**

Yes, the process involved in appointing a trustee where the member is incapacitated is similar to the appointment of a trustee or director of the corporate trustee in the event of their death. Removal and appointment of a person to replace the trustee is usually set out in the fund's trust deed and may require a trustee or member resolution.

#### **Q/17.**

**With a two trustee SMSF can the fund be liquidated to cash within the 6 months of death of one trustee instead of registering all assets into two new names?**

#### **Comments**

This is possible; however, the sale or transfer of the fund assets may depend on the requirements of the relevant financial institution or bank. It may be worthwhile for the trustee to contact the financial institution to see what they require if a trustee passes away. This may be an issue in the case of individual trustees, however, may be accepted in the case of a corporate trustee. The reason is that

the corporate trustee remains in place but where individual trustees are involved authorisation may require certain individual trustees to authorise the transaction.

**Q/18.**

**You suggest contacting you for reviewing succession planning but don't say how to make contact - via the Exec Assistant? Thanks**

**Comments**

The best way to contact the tech team members is via email. Our email addresses are below:

[nicholas.ali@superconcepts.com.au](mailto:nicholas.ali@superconcepts.com.au)

[graeme.colley@superconcepts.com.au](mailto:graeme.colley@superconcepts.com.au)

[philip.lagreca@superconcepts.com.au](mailto:philip.lagreca@superconcepts.com.au)

[anthony.cullen@superconcepts.com.au](mailto:anthony.cullen@superconcepts.com.au)

**Q/19.**

**Does an Alternate Director of a corporate trustee assume the powers of a full director on death of the sole fund member/director?**

**My Alternate Director was not appointed under a P of A but has been appointed by minute and registered with ASIC.**

**Comments**

An Alternate Director is appointed under an enduring power of attorney granted by the director. The role of the alternate director is to take the place of the director when they are not available. As the enduring power of attorney ceases on the death of the grantor the alternate director would not automatically take the place of the deceased. However, the person who was the alternate director can be appointed as a director in their own right or as LPR (executor of the deceased person's estate) if they qualify.

**Q/20.**

**The last Federal budget highlighted a "legacy" change for Market Linked (TAP) pensions which will hopefully be ratified beginning July 2022.**

**My question is, do you think this will also encompass a "Bring forward" of \$300k for such up to 75 years of age?**

**If yes, how do you envisage criteria and step process to enact/take advantage of this?**

**Comments**

The proposals announced in this year's Federal Budget included a number of changes to super most of which are intended to commence from 1 July 2022 depending on when the legislation is passed. You have mentioned two of those proposals which operate independently of each other – the change

that will allow legacy pensions to be commuted and transferred to your accumulation account and access to the bring-forward rule for non-concessional contributions being extended from age 67 to age 75.

From our understanding of the announcement it would appear that it is possible to access the bring forward rule for non-concessional contributions up to age 75 if your Total Super Balance is less than the relevant threshold amounts. That is, if you qualify under the current bring forward rules and your Total Super Balance on the previous 30 June is less than \$1.48 million you will be able to access two future year's non-concessional contributions over a fixed three year period (total of \$330,000 non-concessional contributions). If your Total Super Balance is between \$1.48 million and \$1.59 million you will be able to access one future year's non-concessional contributions over a fixed two-year period (total of \$220,000 non-concessional contributions). If you have a Total Super Balance of between \$1.59 million and \$1.7 million you can only access one year's standard non-concessional contribution of \$110,000. If you have a Total Super Balance of greater than \$1.7 million it is not possible to make non-concessional contributions to super without incurring a tax penalty.

Here is a link to the government's fact sheet on the budget proposals for superannuation from 1 July 2022:

[Budget 2021-22 - Factsheet](#)

**Q/21.**

**As we are a 2-member fund, we are considering changing The Fund to a Corporate Structure, so that on the death of one spouse The Fund can continue without making significant changes at this difficult time.**

**In changing The Funds structure does this involve changing the names of the assets in the Fund and does this bring about CGT issues?**

**Comments**

The superannuation legislation requires that the fund's investments are held in the names of the trustee. Where you are replacing individual trustees with a corporate trustee, the fund's investments will need to be held in the name of the corporate trustee. There is no CGT on the change of the trustee as there is no change in the beneficial ownership of the investments merely a change in the legal owner of the investments. A CGT event occurs where there is a change in the beneficial owner of an asset.

**Q/22.**

**In order to make these changes to the structure of The Fund and I assume a new Trust Deed, can it be done by Super Concepts or does a lawyer need to be involved?**

**Comments**

The transfer of the assets to a new trustee does not require a new trust deed to be established. You will usually find that the trust deed will indicate what is required to be done to remove a trustee and appoint a new trustee. This is usually done by trustee resolution or member resolution depending on what the trust deed states. The resolutions can be prepared by SuperConcepts and executed by the trustee or member as required by the fund's trust deed.

### **WHAT YOU NEED TO KNOW**

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