

Superannuation Death Benefits Trusts – Options

Trusts with beneficiaries confined to one or more “death benefits” dependants qualify for excepted income concessions – note that

- If established after fund member’s death by Deed, they must be capital reserved or fixed
- If established by fund member’s Will, they can also be non-fixed (income and/or capital)

Superannuation Death Benefits Trusts (“SDB Trusts”)

An SDB trust (essentially an alternative to a child death benefits pension – see the ***Superannuation Death Benefits – Payment Choices Pocket Summary***) is a trust that is funded by death benefits paid by the trustee of a superannuation fund directly to either a deceased estate or to the trustee of the trust.

An SDB trust can be established either by the Will of the deceased or by a trust Deed that is executed prior to the trustee of the superannuation fund making the payment of the death benefits.

Beneficiaries

The beneficiaries of an SDB trust are confined to all or some of the dependants of the deceased under section 302-195 of the *Income Tax Assessment Act 1997*. These beneficiaries can include the deceased fund member’s:

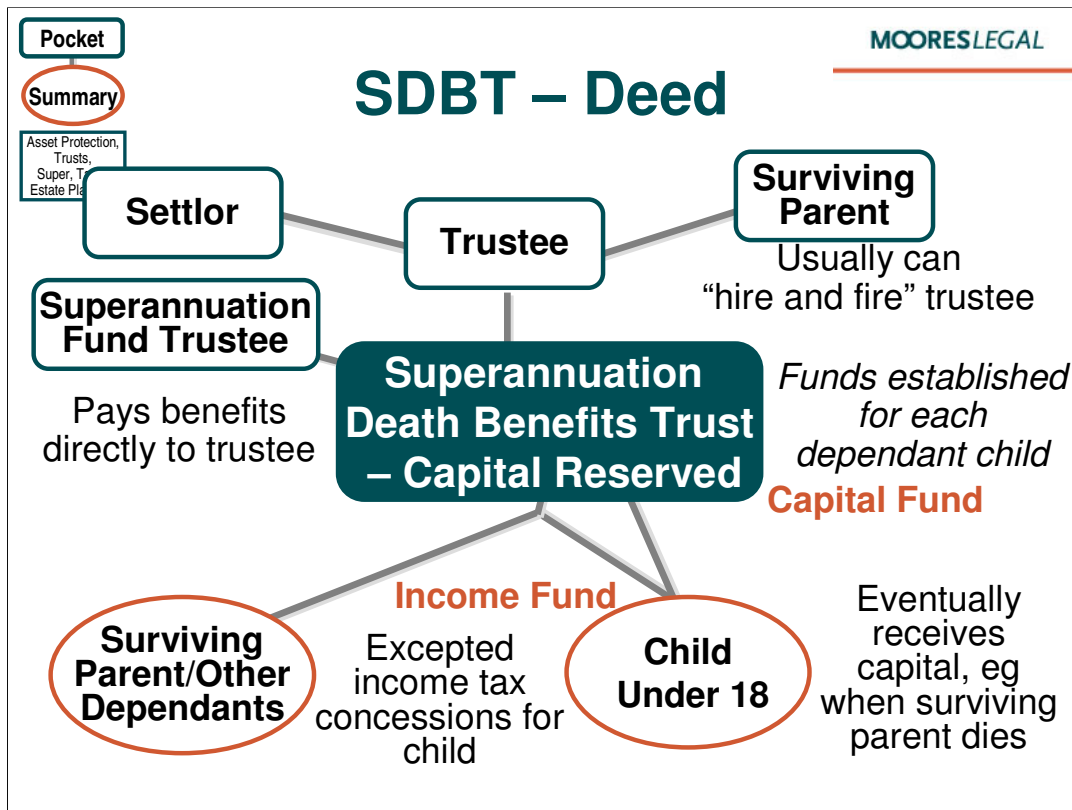
- Surviving heterosexual spouse or (possibly, but rarely) ex-spouse;
- Children less than 18 years or financially dependent and less than 25 years;
- Other financial dependants or interdependent persons, eg a financially supported parent or grandchild or a same gender spouse.

Excepted Income Tax Concessions

SDB trusts established by Will qualify for income tax concessions in relation to any income distributed to minor beneficiaries. If established by Deed, the concessions only apply if the minor beneficiaries also have fixed capital entitlements.

Means Tested Pension Eligibility

In many cases, Centrelink could be expected to view the establishment of the trust as a deprivation, particularly if the pensioner is seen to have instigated the trust.



Major Reasons for a Capital Reserved Superannuation Death Benefits Trust

To have income generated from death benefits taxed as excepted income in the hands of the child, rather than included in the surviving parent’s income and taxed at the parent’s marginal tax rate, eg 46.5%. # To thwart a challenge by a future partner of the surviving parent by setting aside a capital sum for ultimate payment to the child – payment usually occurs when the surviving parent dies, but can be advanced to the child at an earlier date. # To still have flexibility as to the distribution of income (as opposed to a fixed option). # Asset protection for “risk” beneficiaries, eg company directors/professionals.

Note: benefits must be paid directly to the trustee by the trustee of the superannuation fund. In practice, it can often quite difficult to get the agreement of an externally managed fund trustee and payment to the member’s estate and then to an estate proceeds trust (see the **Estate Proceeds Trust Pocket Summary**) might be an alternative.

Trustee and Appointor

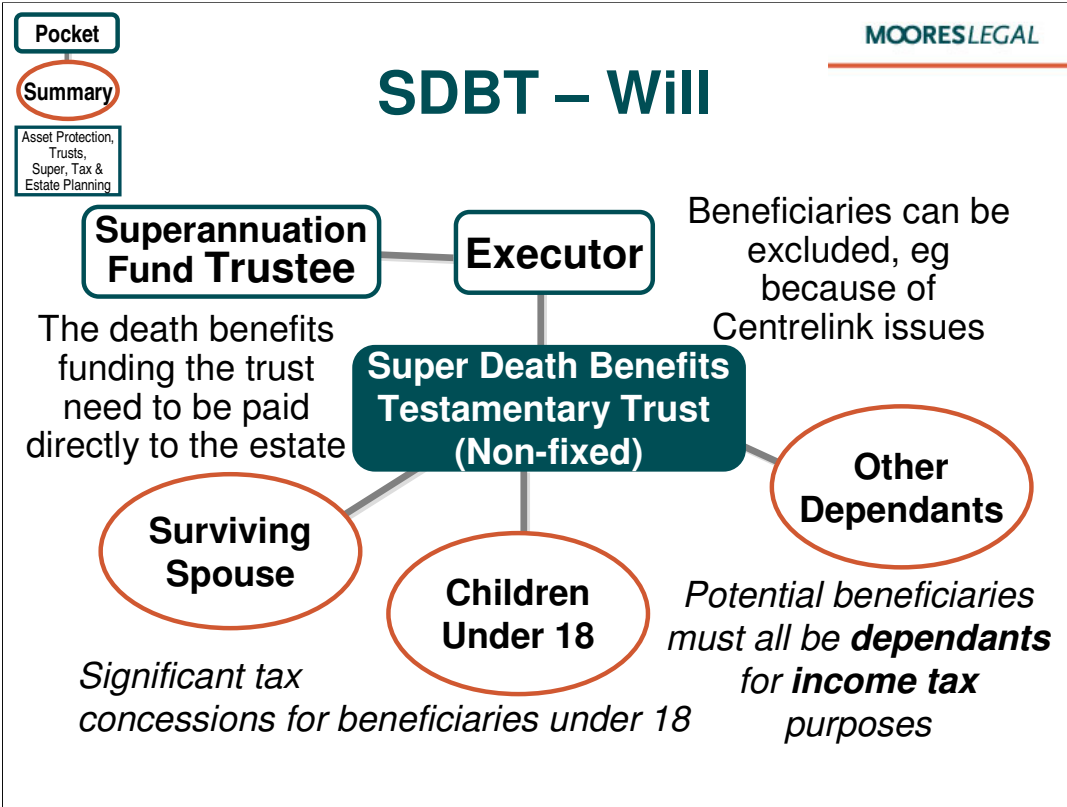
The trustee administers the trust – often the trustee is the surviving spouse or a company of which the surviving spouse is a director. A power of appointment of the trustee is usually held by the surviving spouse.

Income, Losses, Loans and Pension Benefits

Beneficiaries are taxed on all income spent on or allocated or paid to them, with credit for any tax already paid, eg dividend franking credits. Loans to the trust may need to be on arm’s length rate terms. Income and assets can be counted for Centrelink means tests purposes for both trustees and non-excluded beneficiaries of the trust.

Capital Profits

Taxed as a capital gain for the capital beneficiary (but with a 50% discount), both on disposal to 3rd parties (and possibly) on winding up of the trust.



Major Reasons for a Flexible Superannuation Death Benefits Testamentary Trust

- # To have income generated from death benefits taxed as excepted income in the hands of the child, rather than included in the surviving parent's income and taxed at the parent's marginal tax rate, eg 46.5%.
- # To thwart a challenge by a future partner of the surviving parent by setting aside a capital sum for ultimate payment to the child – payment usually occurs when the surviving parent dies, but can be advanced to the child at an earlier date.
- # To still have flexibility as to the distribution of income (as opposed to the fixed option).
- # Asset protection for "risk" beneficiaries, eg company directors/professionals.

Trustee
Usually administered by the executor of the estate and thus may also be the surviving spouse – crucial that the right executor is chosen.

Appointor
A power of appointment may be given to the surviving spouse or trusted relative.

Income, Losses, Loans and Pension Benefits
Beneficiaries are taxed on all income spent on or allocated or paid to them, with credit for any tax already paid, eg dividend franking credits. Loans to the trust may need to be on arm's length rate terms. Income and assets can be counted for Centrelink means tests purposes for both trustees and non-excluded beneficiaries of the trust.

Capital Profits
If assets that were owned by the Willmaker are distributed to beneficiaries, no taxable CGT event occurs until the beneficiaries dispose of them. Otherwise taxed as a capital gain for the selected capital beneficiary (but with a 50% discount), both on disposal to 3rd parties (and probably) on winding up of the trust.

Super Death Benefits Trust – Further Reading

Australian Master Estate Planning & Succession Guide – Chapter 40

The latest version of this Pocket Summary is at
www.mooreslegal.com.au/services/epss/pocket-summaries

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Further Reading

- The 1st edition of the **Australian Master Estate Planning and Succession Guide** by Allan Swan is scheduled to be published by **CCH** in 2011.
- The 1st edition of **You Can't Take It With You** by Andrew Simpson was published by **Wrightbooks** in 2009.
- The 5th edition of **Tax Issues in Family Law Property Settlements** – The Difference Between Hacking and Carving by Peter Szabo was published by **MOORESLEGAL** in 2008.

About the Author of the Pocket Summaries – Allan Swan

In addition to his main role as a principal of the **MOORESLEGAL** estate planning team (working in the areas of **Asset Protection, Trusts, Superannuation, Tax and Estate Planning**) Allan is also the principal of **APTSTEP**, a provider of training and materials. Allan's current presentation topics are:

- Asset Protection Planning
- Blended Families
- Business Structures Overview
- Estate Planning – Key Cases and Rulings
- Estate Planning – Practical Case Studies for 2010
- Estate Planning – Tax and Strategic Issues (includes pages 2-3 of this Pocket Summary)
- Funding Estate Planning
- Ruling from the Grave
- SMSFs – Planning Issues
- Superannuation Death Benefits (all)
- Superannuation Overview
- Testamentary Trusts (3)
- Trusts – Income and Capital Distributions
- Trusts – The A-Z.

Contact Allan 03 9843 2153 for further information regarding on the content of the topics, the fees charged and to schedule a presentation, workshop or seminar.