

# Financial dependants

## *Donal Griffin LEGACY LAW*

On 18 July 2014, the Commissioner released ATO ID 2014/22 confirming that where a child moved in and cared for an elderly parent, the child could be a “death benefit dependant” as defined in s 302-195(1) of the Income Tax Assessment Act 1997 (1997 Tax Act):

- A *death benefits dependant*, of a person who has died, is:
- (a) the deceased person’s spouse or former spouse;
  - (b) the deceased person’s child, aged less than 18;
  - (c) any other person with whom the deceased person had an interdependency relationship under s 302-200 just before he or she died; or
  - (d) any other person who was a dependant of the deceased person just before he or she died.

Interestingly in the same ATO ID, the Commissioner confirmed that the parent and child also satisfied the inter-dependency definition now set out in s 302-195 and further described in s 302-200(1)(a), (b), (c) and (d) of the 1997 Tax Act:

- (1) Two persons (whether or not related by family) have an *interdependency relationship* under this section if:
  - (a) they have a close personal relationship;
  - (b) they live together;
  - (c) one or each of them provides the other with financial support; and
  - (d) one or each of them provides the other with domestic support and personal care.
- (2) In addition, two persons (whether or not related by family) also have an *interdependency relationship* under this section if:
  - (a) they have a close personal relationship;
  - (b) they do not satisfy one or more of the requirements of an interdependency relationship mentioned in paras (1)(b), (c) and (d); and
  - (c) the reason they do not satisfy those requirements is that either or both of them suffer from a physical, intellectual or psychiatric disability.

It seems that the mutual nature of the definition was supported in the circumstances of this ruling as the carer “received no financial support from anyone, other than the parent, during that time”. This is important to remember for clients in the position of carer for a parent.

In the Explanatory Memorandum<sup>1</sup> to the instrument which introduced the superannuation regulations which specify the matters that are, or are not, to be taken into account in determining whether two people have an interdependency relationship, it explained that;

“Generally speaking, it is not expected that children will be in an interdependency relationship with their parents” and gave an example:

Daniel died at age 23, leaving behind a superannuation benefit of \$30,000. Daniel was not married, nor did he have any children, and lived with his parents and younger brother in his parent’s home.

Given that Daniel was 23, he and his parents had of course known each other for some time (subparagraph (1)(a)(i)). While both parties may have intended to remain an important part of each other’s lives, it is reasonable to assume that the relationship would have changed significantly over time. That is neither Daniel, nor his parents, would have expected to be providing each other the same level of domestic support and personal care that they did prior to Daniel’s death, for the next forty years, had he not died.

In February 2014, the ATO showed that certain adult children could be dependants. In ATO ID 2014/6, the Commissioner found that “The Youth Allowance payments the taxpayer received were calculated at a lower ‘at home’ rate as opposed to the higher ‘independent’ rate. This indicates that the taxpayer was substantially financially dependent. A comparison of the level of financial support provided by the taxpayer’s parent with that provided by the Youth Allowance payments also indicates that the taxpayer was financially dependent.”

The writer suggests that it is a sign of the times. Ten years ago, people were keen to show that grandparents’ support for their children by paying school fees meant that the grandchildren were financially dependent with the result that superannuation could be paid to them tax free. The ATO have issued rulings to discourage attempts to contrive dependency for the purposes of establishing compliance with this favourable tax status.

More frequently, the sick person will spend time not living with their “death benefit dependant” in hospitals or aged care facilities before dying. The ATO have considered that people were ordinarily living together: “In view of the period of a number of years over which a close familial and personal relationship existed between the deceased and the beneficiary, the period of the deceased’s residency at the nursing home was a period in which the deceased and the beneficiary were temporarily living apart, within the context of the example of subreg 8A(3) of the ITR 1936”.

# Retirement & Estate Planning

## Bulletin

Fast forward and we have all aged. Unfortunately, more of us need to support our parents, financially and emotionally.

In ATO ID 2005/143, the son who died lived with his mother for six years, provided emotional support when his brother was badly injured, provided financial support in the way of contributing to household expenses to the extent that a bank factored in his contributions when agreeing to underwrite a loan.

The latest ruling is consistent with previous releases. However, where ATO ID 2005/143 found that a son who died was in a close relationship with his mother, this ruling confirms that a parent who died was in a close relationship with a son who moved home to care for his mother.

Private Binding Ruling 67744 dealt with a situation where the parent died. The Commissioner found that all of the requirements of inter-dependency were met.

Previously, it was made clear that support and care must be significant and a link to being unwell or suffering emotionally. This was to be beyond the support one would hope to get from a friend who prepares an occasional meal.<sup>2</sup>

The AAT in Malek's case<sup>3</sup> considered whether the support was necessary. In a more recent ruling,<sup>4</sup> the above authorities were considered and the net question was whether the person would be able to meet their daily basic necessities (shelter, food, clothing etc) without the additional financial support.

Where a parent needs support, most people would consider it part of the usual familial relationship to support them. However, the facts need to demonstrate

that what might be termed a normal familial relationship has changed so that there is a demonstrable mutual commitment to a shared life.

It seems that moving in with a parent and supporting them with a commitment to continue to look after them for the rest of their life is sufficient to establish interdependency. Our role is to assist clients.

In fairness, we were told almost ten years ago<sup>5</sup> that "the existence of a statutory declaration signed by the person claiming to be in, or claiming to have been in, an interdependency relationship may also be taken into consideration when determining the presence of an interdependency relationship."

The writer would like to acknowledge the assistance of Jayne Nah in the preparation of this article but any opinions are those of the writer alone.



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## Footnotes

1. Explanatory Memorandum to Select Legislative Instrument 2005 No. 262.
2. Above, n 1.
3. *Malek v Federal Commissioner of Taxation* (1999) 99 ATC 2294; 42 ATR 1203; [1999] AATA 678.
4. Private Binding Ruling 91657.
5. Above, n 1.