

Death and Advice

Key Super, Tax and Age Pension Considerations

Presented By

Stuart Sheary

Senior Technical Services Specialist

30 July 2025

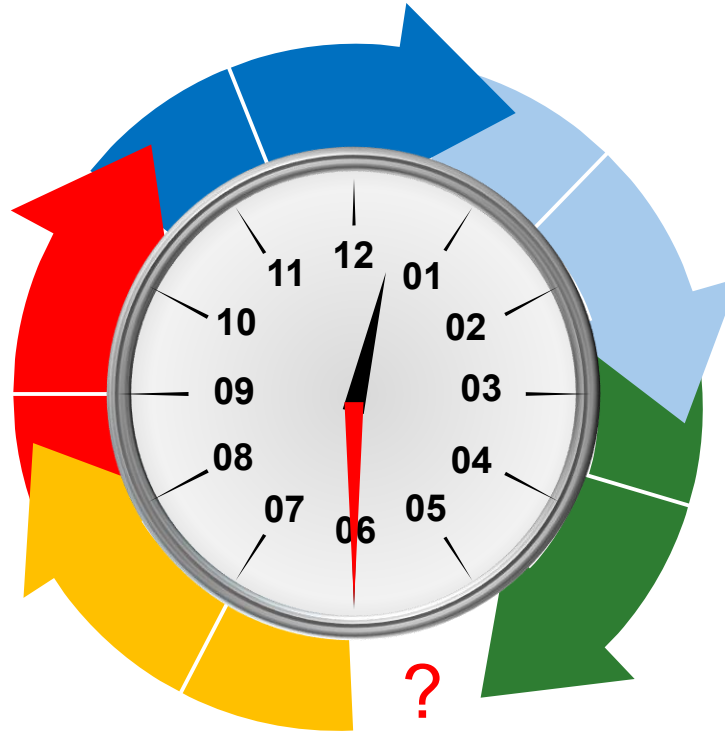


Agenda

The case for non-binding nominations

SMSF trustee discretion and relevant court cases

Taxation of super death benefits



Questions

Poll questions

Death and age pension considerations

Questions?

Please ask questions through the Q & A pod not on the chat pod.

Not Answered Questions will be emailed to you along with the **webinar recording**

**Binding or non-binding
nominations?**

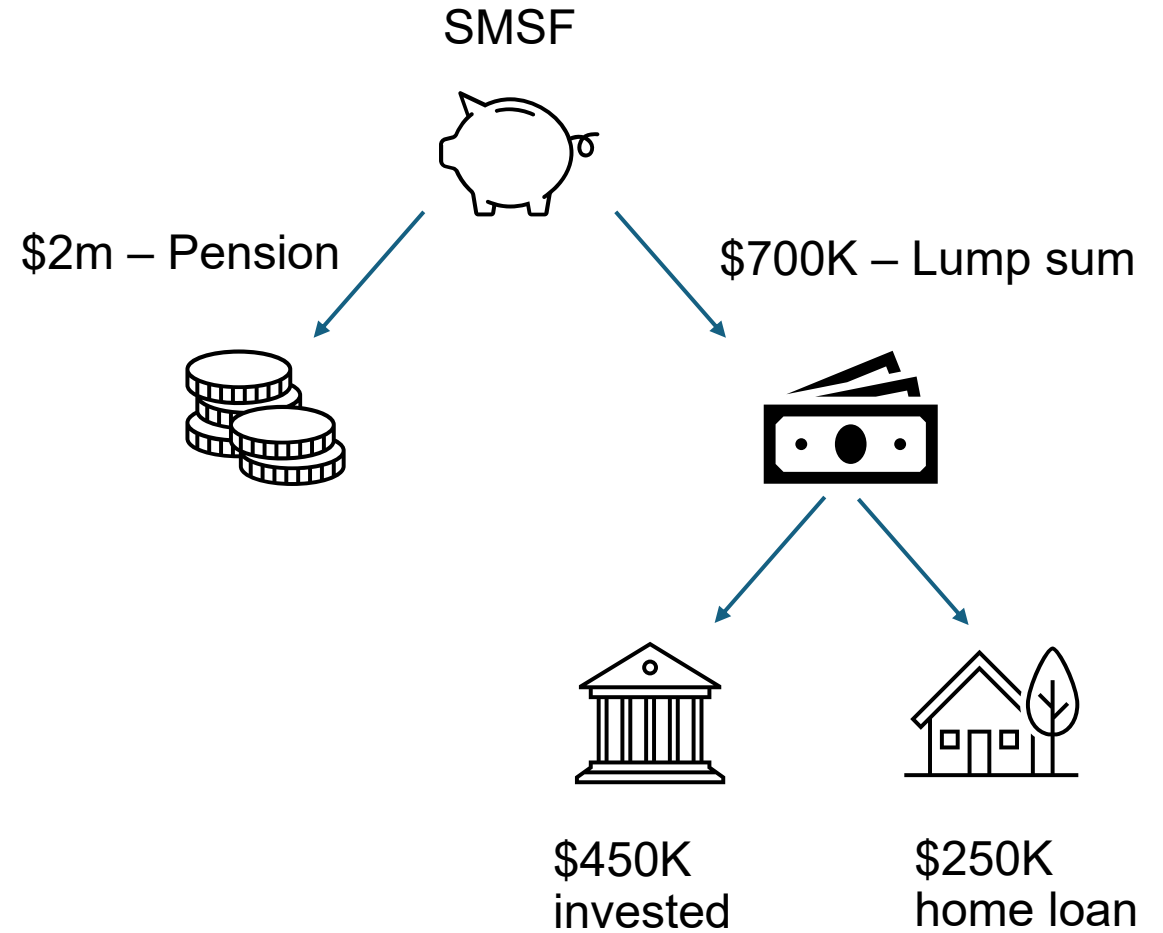
The case for non-binding nominations

- Dove and Gilbert (both age 50) have three children Seamus (19), Anikka (15) and Teddy (8)
- Dove and Gilbert have an SMSF with a corporate trustee
- They each have \$700K in super (all taxable) and \$2m in life cover
- They have binding super death nominations to each other



Super death benefit payment

- Gilbert unexpectedly dies in a motorcycle accident leaving a death benefit to Dove of \$2.7m (including insurance)
- She commences a death benefit pension for \$2m and takes \$700K as a lump sum
- \$250K is used to repay home mortgage and the remaining \$450K is invested



Outcome for Dove

Dove	Amount
Salary	\$150,000
Investment income [^]	\$27,000
ABP (all taxable)	\$80,000
Taxable income	\$257,000
Gross tax*	\$86,928
15% rebate	\$12,000
Tax	\$74,928

*Including Medicare levy

[^]Investment income – 6% income on \$450K

- Dove spends a lot of money on education. Her younger children attend private schools and she is paying her eldest child's university tuition
- After other living expenses she has little remaining cashflow
- Can a better outcome be achieved?

Alternative death benefit distribution

What if Gilbert had a non-binding nomination instead?

- Gilbert leaves a non-binding nomination and instructions in his will creating Testamentary Trusts for his children in the event there are 'residual' estate benefits
- Dove exercises her discretion and decides to pay Gilbert's death benefit as follows:

	ABP	Lump sum
Dove	\$2,000,000	\$250,000
Teddy – TT		\$150,000
Annika – TT		\$150,000
Seamus – TT		\$150,000
Total		\$2,700,000

Outcome for Dove

Dove	Option 1	Option 2
	<i>Binding</i>	<i>Non-binding</i>
Salary	\$150,000	\$150,000
Investment income	\$27,000	-
ABP (all taxable)	\$80,000	\$80,000
Taxable income	\$257,000	\$230,000
Gross tax*	\$86,928	\$74,238
Rebate	\$12,000	\$12,000
Tax	\$74,928	\$62,238
Tax saving	\$12,690	

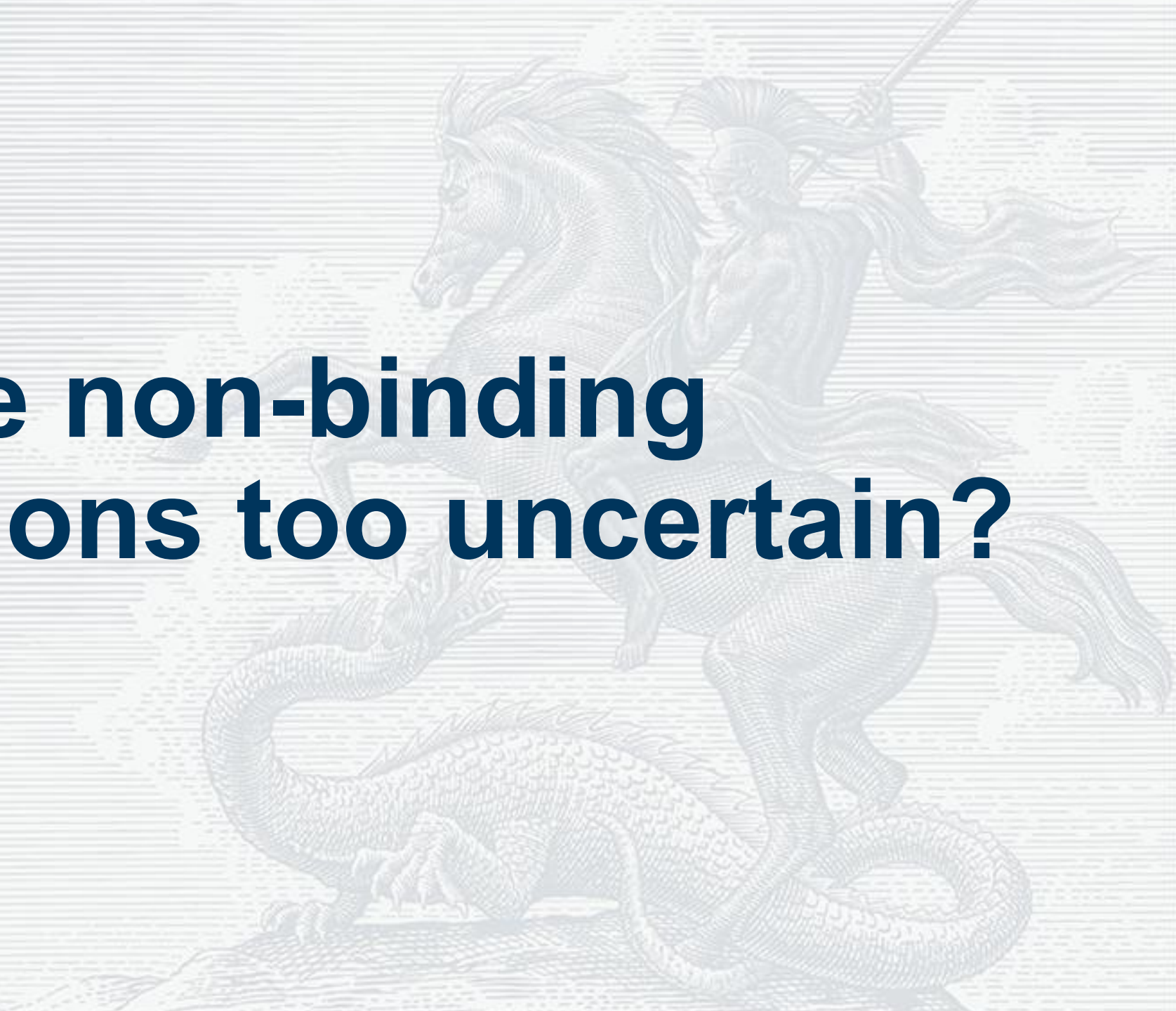
Testamentary Trust	Investment income	Tax
Seamus	\$9,000	-
Annika	\$9,000	-
Teddy	\$9,000	-

Division 296 – other structures may become more attractive

*Includes Medicare levy

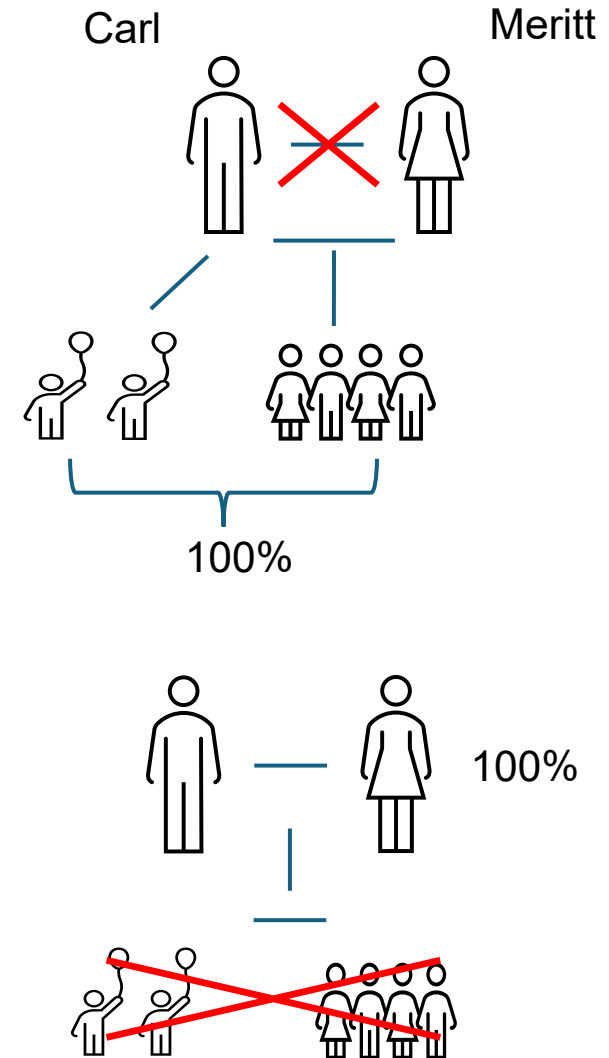
^Investment income – 6% income on \$450K

**Are non-binding
nominations too uncertain?**



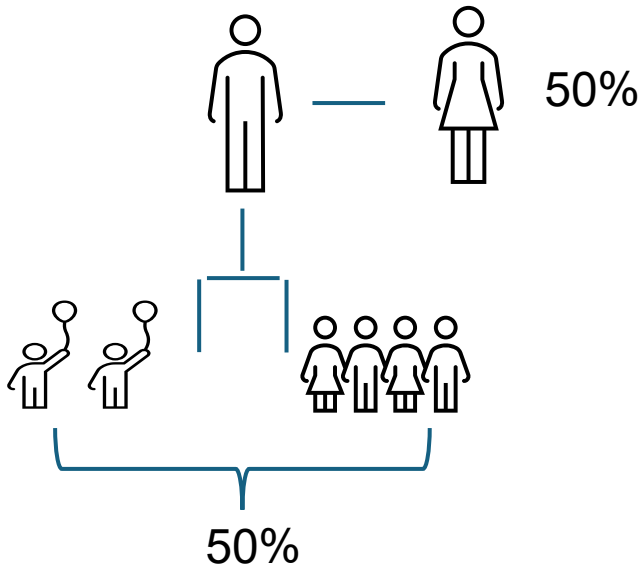
Large funds & Non-binding nominations

- Carl breaks up with his wife Merritt (does not divorce). Carl wants to leave super to children so executes a non-binding super death nomination in favour of his four daughters and two stepsons
- His fund, AustralianSuper, has a Trust Deed allowing trustee discretion when a member with a non-binding nomination dies
- AustralianSuper pays 100% to Merritt
- Carl's children are not happy and complain to AFCA



Case note - Lynn case

- AFCA decided that AustralianSuper's decision to allocate to Merritt was not fair and not reasonable and should be set aside



- AFCA decided 50% of the super death benefits should be paid to Merritt and remaining 50% to be shared between six children
- Merritt takes AFCA decision to court
- Court accepts AFCA decision (AustralianSuper's decision was unfair and not reasonable)

Trustee discretion – APRA Fund v SMSF

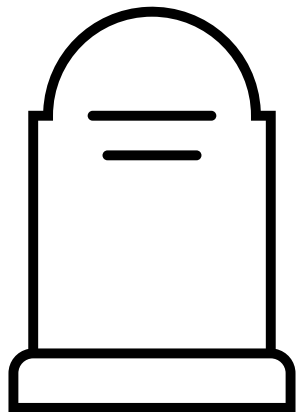
- Non-binding nominations particularly uncertain in large funds
- Member cannot always be confident in trustees' use of discretion
- Decisions made from trustee discretion can be set aside by AFCA if that decision is unfair or not reasonable
- Are non-binding nominations likely to deliver on an SMSF members' intentions?
- Can a member have confidence in the trustee?
- Can courts undermine the trustee discretion?

SMSF cases



Ioppolo v Conti

- Francesca & Augusto are married, SMSF trustees/members
- Francesca had children (from prior marriage) who were Augusto's stepchildren
- Francesca died without a BDBN (BDBN to Augusto had lapsed)
- Will favoured children, excluded Augusto



- SMSF deed said death benefits at trustee's discretion without BDBN
- Augusto, sole trustee, appointed his company as trustee
- Augusto pays death benefits to himself, not children

Ioppolo v Conti

- Francesca's children (estate executors) disputed distribution and argued that:
 - LPR should replace Francesca as trustee
 - Augusto acted in bad faith, ignoring the will
 - Will should dictate SMSF distribution



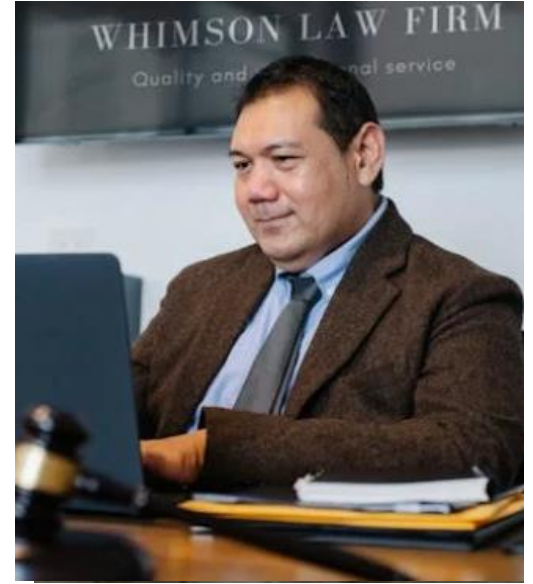
Outcome:

- Court accepted trustee decision to pay Augusto
- Deed determines trustee succession
- Bad faith hard to prove
- Wills don't bind super only BDBN



Re Gainer Associates Pty Ltd

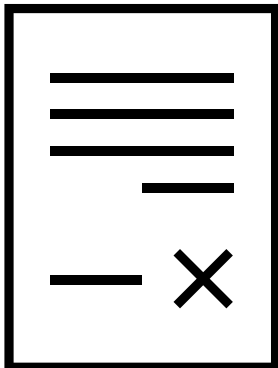
- Gail and Werner are married and establish an SMSF with corporate trustee
- Werner dies and Gail remains as sole member (the couple have no children)
- Gail goes on a cruise between November 2014 and February 2015 and meets Steven (an American)



- Steven is a successful attorney specialising in estates, trusts and family wealth planning
- After the cruise they each return to their respective countries but continue to spend time with each other

Re Gainer Associates Pty Ltd

- Gail dies - New South Wales Trustee and Guardian appoint accountant as sole director/trustee
- Binding super death benefit nomination directs benefit to LPR
- Will gifts \$1M plus art collection to her 'partner' Steven
- Will also directs gifts to brother, niece, friends and charity



- Binding nomination invalid - not properly witnessed
- SMSF deed gives trustee power to exercise discretion

Re Gainer Associates Pty Ltd



- Accountant/trustee proposes paying one third of super death benefit to Steven and two thirds to estate
- Steven demands 100% of death benefit as 'sole dependant', also argues tax outcome should influence distribution (Steven considers himself a tax dependent)
- Accountant/trustee seeks Judicial advice under s 63(1) of the Trustee Act 1925 (NSW):
 - *trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument*

Outcome - Re Gainer Associates Pty Ltd

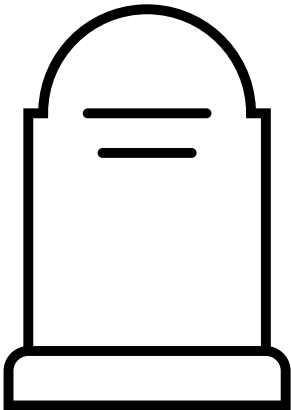
- Tax outcome not a reason to pay 100% to Steven
- Trustee had given “*real and genuine consideration*” to the decision (obtained legal advice, contacted beneficiaries etc)



- Distributing death benefit (one third to Steven, two third's estate) justified
- Courts respect trustee discretion absent bad faith

Re Marsella [2019]

- Helen Swanston is a member of the Swanston Super Fund
- Helen and her daughter Caroline (from previous marriage) are trustees
- Helen made BDBN to grandchildren in 2003 but nomination had lapsed
- Old trustee minutes give Caroline discretion under the deed to pay herself a lump sum death payment



- Helen dies and Caroline appoints husband as trustee
- Caroline distributes the entire benefit to herself
- Helen's husband Riccardo (married for 32 years) gets nothing

Re Marsella [2019]

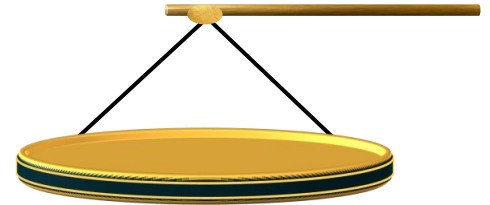
- Riccardo disputes distribution and argued that:
 - Distributed funds should be repaid to the fund
 - Trustees should be removed and new trustee appointed
 - Trustees did not exercise discretion in *good faith* and *genuine consideration* to the matter



- Caroline argues that the deed, gave the trustee absolute and unfettered discretion
- She says it was 'abundantly clear' the deceased did not want to confer a benefit on the husband – otherwise she would have made him co-trustee

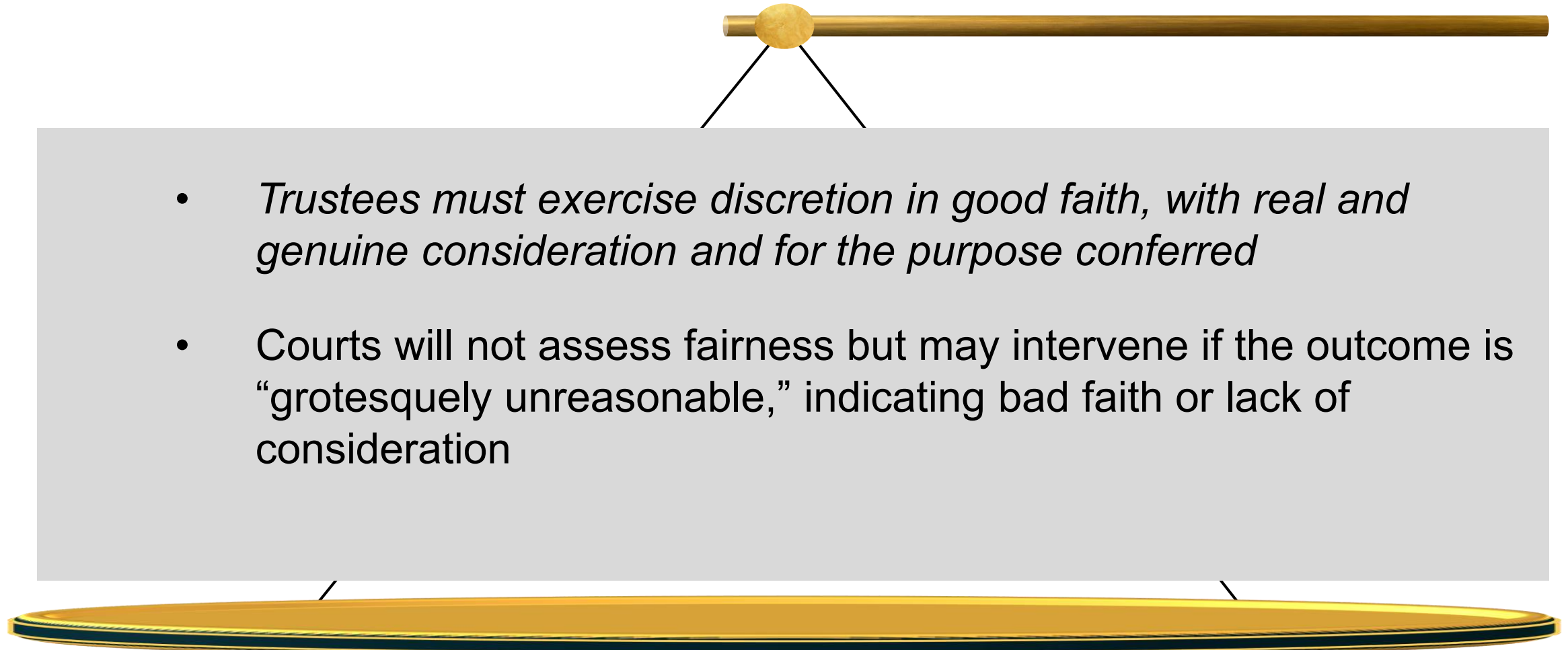
Outcome Re Marsella [2019]

- Trustees failed to consider Ricardo's 32-year marriage and financial circumstances. Conduct exceeded mere carelessness
- Caroline acted in bad faith



- Distribution set aside for lack of *real and genuine consideration*
- Trustees removed due to improper exercise of discretion and conflict of interest

Outcome - Re Marsella [2019]

- 
- *Trustees must exercise discretion in good faith, with real and genuine consideration and for the purpose conferred*
 - Courts will not assess fairness but may intervene if the outcome is “grotesquely unreasonable,” indicating bad faith or lack of consideration

Taxation of death benefits



Case study: Jonas



Jonas
(father)

Jonas has minimal
potential estate assets

He has \$100,000 in
super (all taxable
component)

He wants to leave his
super to his adult son
Tadej who works full
time



Tadej
(son)

Poll question 1

Will Tadej receive more in net proceeds if he receives a death benefit directly from super or the death benefit via the estate?

The same

Super

Estate

Background

Direct from Super

Tax = \$100,000 x 17% (including Medicare levy)

Tax = \$17,000

Net benefit = \$83,000

- Tadej working full time, assume he is a tax-payer
- If beneficiary on lower marginal rate, excess withholding refunded

Via Estate

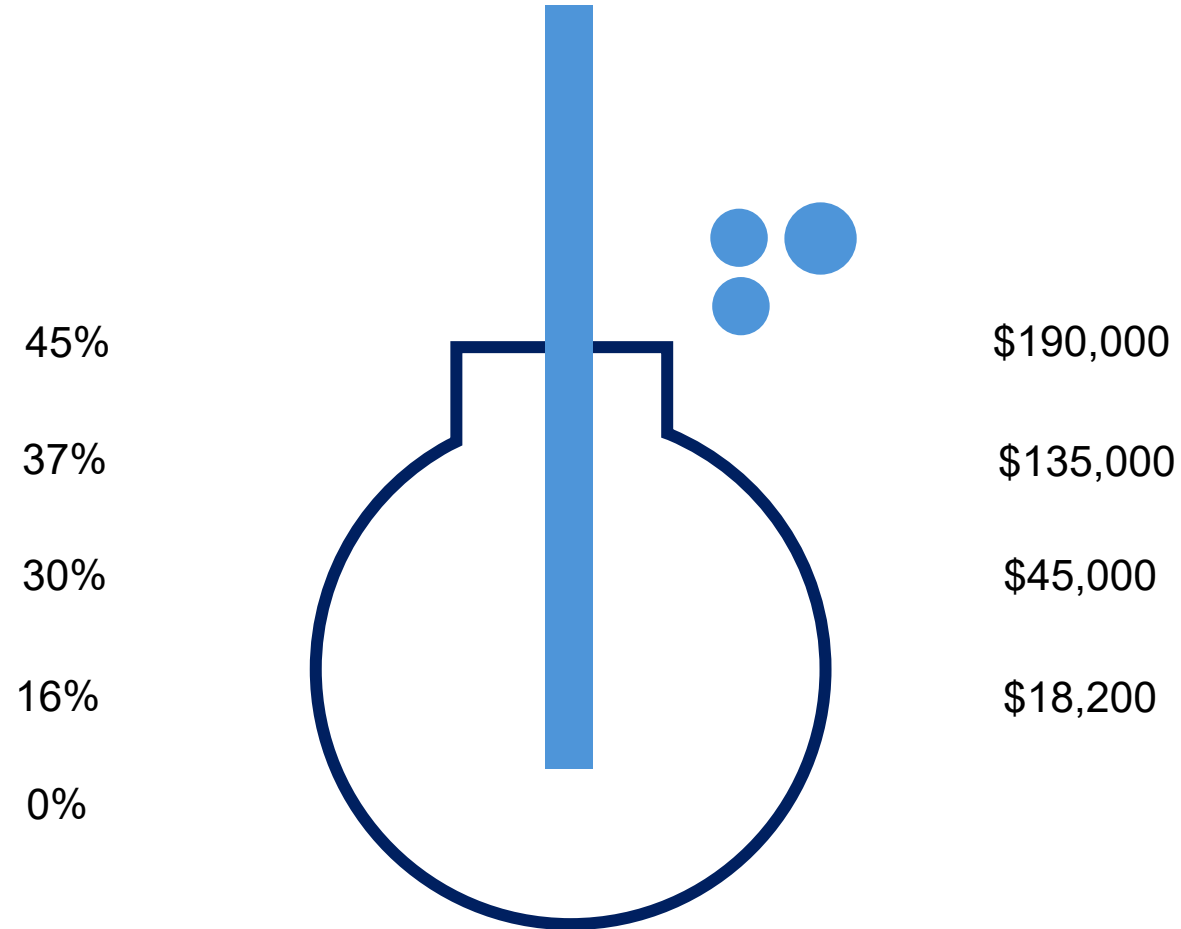
Tax = 15% x (\$100,000 - \$18,200)

Tax = \$12,270

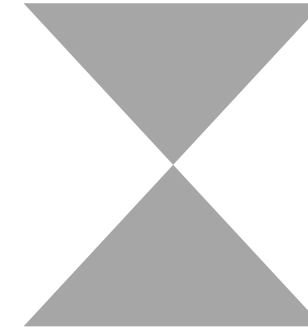
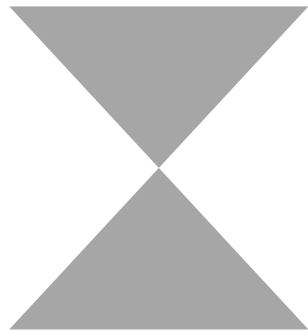
Net benefit = \$87,730

- No Medicare levy
- Tax-free threshold available to estate

Marginal tax on each incremental dollar



A cocktail of income sources



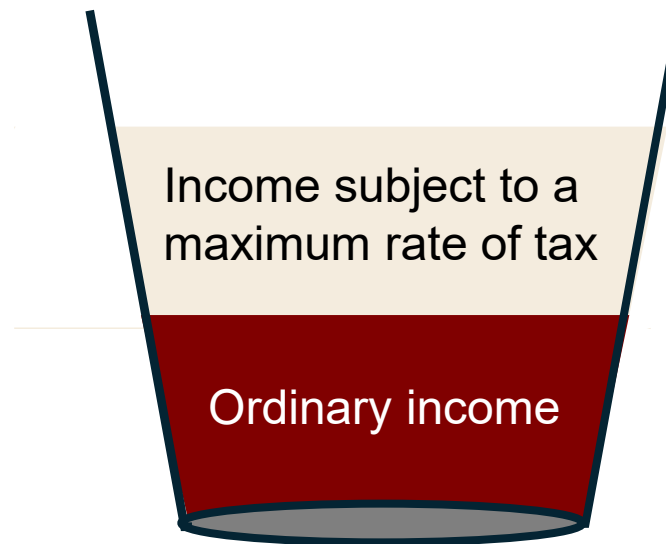
45%

37%

30%

16%

0%



\$190,000

\$135,000

\$45,000

\$18,200

Baby Guinness

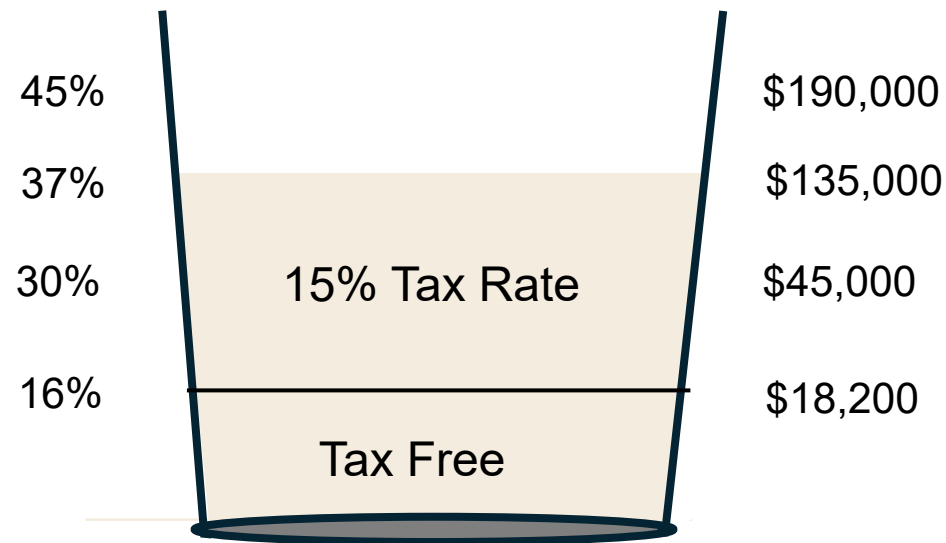
Pour 1 shot of Kahlua into shot glass. Pour 1 shot of baileys into shot glass with a cold spoon

Income subject to a maximum rate of tax

Income subject to a maximum rate of tax is taxed at the lesser of:

- Marginal tax rate
- Maximum tax rate

Income subject to a maximum tax rate can benefit from the tax-free threshold



Case study: Jonas



Jonas
(father)

Jonas age 60 has minimal potential estate assets. He has \$100,000 in super (all taxable component).

He also has \$50,000 in life cover making the total gross death benefit \$150,000.

He wants to leave his super to his adult son Tadej who is working full time.



Tadej
(son)

Poll question 2

If Jonas dies today will Tadej receive more in net proceeds if he receives a death benefit directly from super or the death benefit via the estate?

Assume:

Untaxed element \$21,425

Taxed element \$128,575

The same

Estate

Super

Calculating Jonas' taxable components

Untaxed element = taxable component – taxed element, where:

$$\text{Taxed element} = \text{Amount of super lump sum (including insurance)} \times \left[\frac{\text{Service days}}{\text{Service days} + \text{days to retirement}} \right] - \text{tax free component}$$

Where:

- Days to retirement = number of days from the date of death to the deceased's last retirement day (generally age 65)
- Service days = number of days from the member's eligible service date to date of death
- Eligible service date is the earlier of:
 - The date the member joined the fund, or
 - If a rollover amount was received by the fund with an earlier service period start date, or
 - If the member's employment commenced before they joined the fund, their employment commencement date where the employer contributed to their fund (for employer-sponsored funds)

This calculation is determined under s307.290 ITAA97 – “taxed and untaxed elements of death benefit superannuation lump sums”

Calculating Jonas' taxable components

Taxed element:

$$\text{Amount of benefit} \times \frac{\text{service days}}{\text{service days} + \text{days to retirement}}$$

$$= \$150,000 \times \frac{10,957}{10,957 + 1,825}$$

$$= \$128,575$$

Therefore, **untaxed element** = taxable component – taxed element

$$= \$150,000 - \$128,575$$

$$= \$21,425$$

Assumptions:

- DOB: 1/1/1965
- Date of death: 1/1/2025 (60 yo)
- Eligible service date: 1/1/1995
- Gross sum insured: \$50K death
- Existing super balance: \$100K (100% taxable component)

Therefore:

- Days to retirement = 1,825 (from 1/1/2025 to 1/1/2030 ie, the date Jonas would reach age 65)
- Service days = 10,957 (from 1/1/1995 to 1/1/2025)

Outcome

Death benefit via super

	Gross payment	Max tax rate	PAYG
Taxable component (taxed element)	\$128,575	17%	\$21,855
Taxable component (untaxed)	\$21,425	32%	\$6,855
	\$150,000		\$28,710
	Net payment		\$121,290

Death benefit via estate

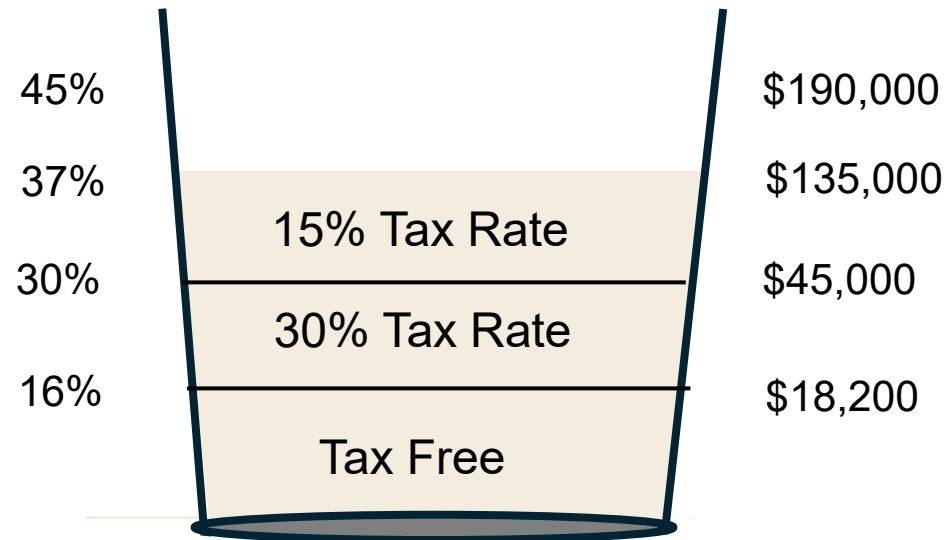
	Gross payment	Max tax rate	Estate tax
Taxable component (taxed element)	\$128,575	15%	\$19,285
Taxable component (untaxed)	\$21,425	30%	\$515
	\$150,000		\$19,800
	Net payment		\$130,200

Income subject to a maximum rate of tax

Where there are multiple sources of income with different maximum tax rates the income is 'layered' in the way most favorable to the taxpayer

Where there is income with a maximum tax rate of 30% and income subject to a maximum tax rate of 15%, then income subject to 30% tax will be 'compared' to lower marginal rates, with the lower of the two applying

Income subject to a maximum rate of 15% will be compared to income on higher marginal rates and again the lower of the two will apply





Jonas
(father)

Jonas age 60 dies on 1 January 2025. His son Tadej is the executor of Jonas' estate and trustee of the Jonas Tadej SMSF.

As executor Tadej sells a number of Jonas' investments and realises large capital gains.

As SMSF trustee he pays a \$100,000 death benefit to Jonas' estate. All taxable component and no insurance.



Tadej
(son)

Poll question 3

If the estate pays Tadej the super death benefit, how will it be taxed?

Entire amount taxed at 15%

Entire amount taxed at 17%

Neither of the above

Death and the Age Pension



Case study: Charles and Camilla

Charles and Camilla are on a part Age Pension (\$12,397 combined)

Asset	Charles	Camilla	Joint
House			\$2,000,000
Bank			\$80,000
Personal			\$20,000
Super		\$400,000	
Super	\$400,000		
Total Assessable Assets			\$900,000

Assume couple subject to asset test not income test



Case study: Charles and Camilla

- Charles dies and leaving everything to Camilla including a reversionary pension

Homeowner	Full Pension	Cut-Off
Single	\$321,500	\$704,500
Couple	\$481,500	\$1,059,000

Asset	Camilla
House	\$2,000,000
Bank	\$80,000
Personal	\$20,000
Death ABP	\$400,000
ABP	\$400,000
Total Assessable Assets	\$900,000

- Camilla's assets exceed the upper threshold for a single person \$704,500
- Camilla is not entitled to any age pension

Case study: Camilla



Camilla

Camilla is upset that she is no longer entitled to an Age Pension.

She wants to reduce her assessable assets so decides to cash out the reversionary pension and gifts it to her daughter, Catherine.



Catherine

Will Camilla be entitled to a part Age Pension?

Poll question

Will Camillia be entitled to a part Age Pension with the following assets?

Asset	Camilla
House	\$2,000,000
Bank	\$80,000
Personal	\$20,000
ABP	\$400,000

Homeowner	Full Pension	Cut-off
Status - single	\$321,500	\$704,500

a) Yes

b) No

c) Maybe in 5 years

Deprivation rules

Asset	Camilla
House	\$2,000,000
Bank	\$80,000
Personal	\$20,000
ABP	\$400,000
Deprived asset	\$390,000
Total assessable assets	\$890,000

*Single homeowner asset test cut-off \$704,500

- Up to \$10,000 of assets per financial year, and \$30,000 over any rolling 5 financial year period may be gifted.
- Gifts exceeding this amount captured as a deprived asset for 5 years from anniversary of gift.
- Could this have been avoided?

Gifting via the estate

Asset	Camilla
House	\$2,000,000
Bank	\$80,000
Personal	\$20,000
ABP	\$400,000
Total assessable assets	\$500,000

*Single homeowner asset test cut-off \$704,500

Prior to death Charles could
 have nominated daughter
 Catherine as beneficiary or gifted
 via estate

- If the couple had an SMSF and Charles had a non-binding nomination in favor of Camilla, Camilla (as trustee) might have used her discretion to pay the benefit to Catherine
- Decision made in capacity of trustee (rather than beneficiary) not caught by deprivation rules
- Camilla's Age Pension entitlement is \$15,950 per year

Recap and reminders

1

- Non-binding nominations very uncertain in large funds

2

- Non-binding nominations may be beneficial in SMSFs – but can you trust the trustee or the courts

3

- SMSF trustee discretion must not be made in 'bad faith' higher threshold than 'unreasonable'

4

- Death benefits paid to a non-tax dependant via the estate may be more tax-effective

5

- Don't forget any untaxed element on death benefit lump sums containing insurance proceeds

6

- Gifting assets may trigger Age Pension deprivation rules

7

- Gifting via the estate may help surviving spouse retain or increase their Age Pension or if a member of an SMSF consider a non-binding death nomination



Thank you

Follow us on social media or visit
www.ifpa.com.au

