ISSUE 51

# WEALTH MATTERS

*Your personal guide to wealth creation*

## INSIDE:

- Are you considering a home equity release?
- Selling a deceased real estate property
- Paying tax on shares
- And more

Langley|McKimmie
Chartered Accountants

## When debt is no longer manageable

*Bankruptcy is a legal process designed to give individuals faced with financial hardship a second chance.*

During the current economic circumstances, it is not uncommon for individuals to be experiencing the effects of debt more than usual. In the event that you are being pursued by creditors or are handling more debt than you can manage, don't panic. Make arrangements with your creditors immediately and consider seeking professional advice.

However, if declaring bankruptcy is starting to become a likely option, know that the legal process is designed to be tolerant and fair to all parties. Whether it is due to circumstances out of your control, bad-decision making or simply bad luck, declaring bankruptcy means release from most of your debt and emotional relief.

Declaring bankruptcy may be worth considering if you have far more debt than money to cover them and don't foresee a change anytime soon. Individuals can apply for bankruptcy in Australia if they are:

- unable to pay debts when they are due (insolvent), and
- present in Australia or have a residential or business connection to Australia.

There is no minimum or maximum amount of debt or income you need to be eligible, nor is there a fee when applying for bankruptcy. Bankruptcy normally lasts for 3 years and 1 day.

### What happens when you declare bankruptcy?

When you become bankrupt, the ASFA (Australian Financial Security Authority) will appoint a trustee to manage your bankruptcy. A trustee also notifies creditors of your bankruptcy to prevent them from contacting you further. Your trustee will also have access to your debt, income and asset details and can sell your assets to help pay your remaining debts.

A trustee will evaluate your financial position and lifestyle and devise a workable plan accordingly. Trustees can assess your financial position by making a fair evaluation of your:

- income - payments proportional to your income will go towards paying off your debt,
- property,
- monetary assets - including inheritance and superannuation (received before declaring bankruptcy); and
- vehicle - however restrictions concerning the value of your vehicle and repayments will be imposed.

### How do you declare bankruptcy?

Submit a Bankruptcy Form with the AFSA to declare bankruptcy. The AFSA recommends discussing your situation with a financial counsellor or accountant before committing to bankruptcy as the consequences of bankruptcy are serious and cannot be changed if you change your mind. For example, if you are currently bankrupt, you are not legally allowed to be the director of a company or manage a company unless you have the permission of a court. It may take up to 6 months for your claim to be processed.

LANGLEY MCKIMMIE

Langley McKimmie Chartered Accountants are Corporate Authorised Representatives of SMSF Advisers Network Pty Ltd AFSL No. 430062

CHARTERED ACCOUNTANTS AUSTRALIA + NEW ZEALAND



17 NICHOLSON STREET, WOODEND VIC 3442
**TEL** (03) 5427 8100
**FAX** (03) 5427 3793

**EMAIL**
**info@lmck.com.au**

**WEBSITE**
www.langleymckimmie.com.au

Andrew Marshall
Janine Orpwood
Bryan McKimmie

Business Services & Taxation
Audit
Self Managed Superannuation Funds
Retirement

# Dividing SMSF assets after a relationship breakdown

*Running an SMSF during normal circumstances comes with enough challenges as it is. Adding divorce or separation into the equation can raise even more legal and tax issues that need to be resolved.*

The breakdown of your relationship does not absolve you from your responsibilities as an SMSF trustee; you are still expected to continue acting in accordance with super laws and in the interests of all members. As a trustee, you must:

- include another trustee in the decision-making process, and
- acknowledge requests to redeem assets and rollover benefits to another super fund.

When it comes to dividing SMSF assets, separating couples can transfer assets, such as property, from one SMSF fund into another. During this process it is important to consider:

- How they will decide to split their superannuation fund. They can choose to enter into a formal written agreement, seek consent orders, or if the separating couple cannot reach an agreement, they can seek a court order.
- Whether they have the necessary documentation readily available, as it is essential in the event of an ATO audit. Due to there being beneficial tax consequences in splitting a superannuation fund, it is essential that the documentation, such as the notice for splitting the super, shows a genuine separation.
- Where the new fund is to be a single member fund, it is advisable to incorporate a special purpose company to be the trustee. This avoids having a second person as a trustee.

## Can your will be challenged after you die?

*It is a common misbelief that a will is executed in a way the Testator originally plans it.*

When preparing your will, it is important first to understand how another individual can challenge these intentions.

Family members have the right to challenge your will under the Family Provisions legislation. Only eligible persons can make a valid Family Provision claim, generally within 12 months of the will coming into effect. Eligible family members can argue that they have not received a fair amount from your estate and deserve a larger portion to be considered 'adequately looked after.' Disputes from your family may arise in circumstances where a family member is partially or fully dependent on you, your will is not clear in its intentions, or they can prove you were not of sound mind when preparing your will.

Specifically, claims of undue influence can arise. Undue influence refers to a circumstance where the will in question is not an accurate testament to your true intentions for your estate because you have been coerced or influenced by another person to favour them over others in your will.

To prevent a will from being contested:

- carefully word your will, making sure it is clear and unambiguous;
- review your will regularly to represent any changes within the family;
- include a clause on why dependants have been excluded;
- adequately provide for each eligible family member to minimise the likelihood of future claims and your estate being eroded by legal bills.

# Preparing your succession with a testamentary trust

*Testamentary trusts provide asset protection and tax advantages to the beneficiaries of your will when they inherit your estate.*

A testamentary trust is established under a valid will, where a nominated trustee will oversee the distribution of assets to a group of beneficiaries. Unlike a standard will where the distribution of your assets is immediate, a testamentary trust allows you to vary how and when your assets are passed onto beneficiaries. A testamentary trust can stay in effect for up to 80 years after you die and offers advantages such as long-term asset protection and tax benefits.

### Types of testamentary trusts

There are two main types of testamentary trusts:

- Discretionary trusts separate the trust to the deceased estate and the trustee has the discretion to distribute capital between a group of beneficiaries nominated in the will.
- Protective trusts are established in the interest of an individual incapable of managing their affairs.

### Tax outcomes

The beneficiaries of discretionary trusts should be consulted so the trustee can gain an understanding of their tax profile. This knowledge will enable trustees to distribute their estate to beneficiaries with differing incomes to reduce the tax burden on the total sum.

Consider the following options for getting you started:

- Pay to a child under 18 to get taxed at adult marginal rates and to be eligible for a low-income tax offset up to $445.
- Consider tax advantages of those with high personal marginal rates, a partner on lower income, minor children and grandchildren with no or little taxable income and those on the tax-free threshold.

### Asset protection

Your trust can also be used to protect your assets in the following circumstances:

- Protect super death benefits paid to your beneficiaries that may otherwise be vulnerable for seizure by creditors.
- Help beneficiaries in vulnerable financial situations or work in a high-risk environment.
- Protect assets in the event a beneficiary's assets are split during a separation.

# Are you considering a home equity release?

*Australians who are 60 years or over, own a home and need to access money may find applying for a home equity release a viable option.*

A home equity release allows you to access some of your equity (the value of your home) to help with your living costs and is a type of loan offered by banks. There are two types of home equity releases available to you.

### Reverse mortgage

A reverse mortgage allows retirees to access money without having to sell their house. It is a type of home loan that allows the homeowner to borrow money using equity in their home as a security. Those who are over 60 years of age can generally borrow 15 to 20 per cent of the value of their home and this percentage rises by one for each year older than 60.

During the period in which you take out a reverse mortgage, you do not have to make repayments while living in your home. A reverse mortgage is beneficial for retirees looking for a small amount of money each year to supplement their income, or to free up money for urgent needs such as medical treatment.

Just like a normal loan, interest is charged on a reverse mortgage. However, instead of making regular repayments, borrowers can either repay the loan in full when they sell or move out of their home, or make voluntary payments earlier. In exchange, the interest on a reverse mortgage loan compounds over time so you may see your debt grow despite your equity decreasing. In the case that the borrower of a reverse mortgage passes away, moves into an aged care or sells the property, the loan must be paid in full.

### Home reversion

Home reversion allows you to sell a share of the future value of your home while you live there. Unlike a reverse mortgage, a home reversion is not a loan so you don't have to pay interest. However, you have to pay a fee to get your home valued, which is usually around $2,000.

A home reversion costs you the difference between what you get for the share of your home you sell now, and what it is worth in the future. Keep in mind that in the case of a home reversion, the more the value of your property goes up, the more you will have to pay the provider when you sell it. Home reversions may be a good option for older retirees.

Entering a loan at a later stage in life should not be considered lightly as there are a number of considerations to be aware of. Weigh up the benefits of a loan with respect to your age, health, financial position and dependence, and invest in financial advice for more insight.

# Six-month moratorium on tenancy evictions

*A six-month moratorium on residential tenancy evictions has been introduced by the Federal Government, but each state has its own rules. Here's what property investors need to know.*

### New South Wales:

NSW has an interim 60-day pause on landlords wishing to evict tenants due to rental arrears caused by COVID-19. Landlords are also restricted from evicting tenants at a financial disadvantage as a result of COVID-19 and have experienced at least a 25% reduction of income. Landlords and tenants are expected to negotiate rental payments and reductions in good faith. Tenants who fail to pay the newly agreed amount of rent will have this rent accrued in arrears owed to the landlord.

Tenants who have not been affected by COVID-19 are expected to adhere to existing tenancy agreements.

### Victoria:

Property investors in Victoria are required to adhere to a sixth-month moratorium on evictions as well as rental increases. Investors who reduce rent for tenants experiencing financial challenges due to COVID-19 may be eligible for a 25% land tax reduction or a deferment to 31 March 2021.

### Queensland:

In addition to the moratorium, property investors in Queensland landowners may be able to apply for up to three months waiver and deferral of land tax. To be eligible, requirements for landlords include:

- Rent negotiations are made with tenants who are struggling to pay rent due to COVID-19.
- Tenancies are not ended for unapproved reasons, including the inability to pay rent.
- Break lease fees are not imposed upon tenants who need to end a fixed-term tenancy early as a result of COVID-19.

### South Australia:

Rent increases and evictions have been banned for at least six months. A 25% reduction on land tax may also be available for landlords who provide rent relief for tenants experiencing financial hardship due to COVID-19.

### Western Australia:

WA's sixth-month moratorium includes a ban on rent increases during the period. Tenants can still be evicted if they are damaging the property, are a threat to neighbours, refusing to come to a rent payment agreement, or have abandoned the property.

### Tasmania:

Tasmanian property investors are subject to a 120-day emergency period until 25 July 2020. During this time, landlords are prohibited from evicting tenants for falling into rental arrears. However, landlords or tenants may still apply to break a fixed term lease if its continuation would cause severe hardship.

## We are here to help

Make use of us! This guide is merely a starting point, designed to help you identify areas that might have a significant impact on your personal and business planning.

We are always pleased to discuss matters with you and advise in any way we can.

# Paying tax on shares

*There has been an increase in share trading over the last several months, but how many of these investors understand the potential tax consequences of their actions?*

### Share trading as a business

A share trader conducts business activities for the purpose of earning income from buying or selling shares. When considering if someone is a share trader, the ATO considers:

- The share trader's expertise in the area, which may be assessed through qualifications, skills, or training.
- The regularity and frequency of trading.
- The nature of activity and purpose of profit making: share traders may conduct business activities that involve analysing the current market, making an assessment of each potential investment, and the decision making process of when to hold shares.

Tax implications for share traders are as follows:

- Dividends and the receipts from selling shares are considered assessable income.
- The expenses incurred for the purpose of share investments are deductible in the year in which they are incurred. This includes the cost of buying and selling shares.
- Shares that have been purchased are regarded as trading stock.

### Shareholding as an investor

A shareholder holds shares for the purpose of earning income from dividends and capital growth. Shareholders are subject to the following tax implications:

- Receipts from selling shares are not considered part of assessable income.
- The transaction costs of buying and selling shares are not deductible, however, they are considered when determining the amount of any capital gain.
- Dividends and similar receipts from shares will be part of assessable income.
- When a net capital loss is incurred when selling shares, it cannot be offset against income from other sources. However, it can be offset against another capital gain or carried forward in order to offset against future capital gains.

When a share investor sells shares for more than they paid for them, a capital gain is made, which is subject to capital gains tax (CGT). How much CGT you need to pay varies depending on:

- How long you've owned the shares for: if you have held the shares for more than 12 months, you can usually discount a capital gain by 50%.
- Your marginal tax rate: your capital gain will be added to your assessable income in your tax return and taxed as part of your income at your marginal tax rate.
- If you've also made any capital losses: only your net capital gain will be taxed with your assessable income, meaning that if you've also made capital losses then they will be subtracted from your capital gains. If you have more capital losses than gains, you are generally able to carry the capital loss forward and deduct it from any capital gains you make in future years.

# Selling a deceased real estate property

*It is inevitable that all of us will at some point have to deal with deceased estate when a loved one passess away, so it is important to understand what the process is.*

When an individual passes away, an executor is responsible for administering their will. An executor is a person nominated by the deceased upon the creation of their will and acts as their legal representative.

Before being able to manage the deceased individual's assets, the executor needs to apply to the court for probate, which verifies the will. When probate has been granted, the executor will then be able to distribute the deceased individual's estate to their nominated beneficiaries, in accordance with the will.

A deceased estate can be transferred to beneficiaries through inheritance or can be sold. Selling can only take place after probate has been granted and after the title of ownership has been transferred from the deceased to the joint tenant, executor, or personal representative. Selling a deceased estate is similar to selling any other property, however, it also requires the executor to:

- Obtain property appraisals from real estate agents.
- Inspect the property and gather quotes for any costs related to the sale of the property. This can include the repair costs and hiring an agent.
- Prepare the house for sale and work with an agent to list the property for sale.
- Provide the necessary documentation required to support the completion of the sale.
- Distribute the value from the sale to the beneficiaries in accordance with the will.
- Maintain transparency with all beneficiaries and keep them informed at each stage of the process.

Selling a deceased estate also comes with tax obligations that executors and beneficiaries need to be aware of. These include:

- The three-year rule: this applies if there are no named beneficiaries of the property. In this case, the deceased estate is treated as a trust and the executor as a trustee. For the first three years following an individual's death, their estate will be taxed at the individual income rate with the full tax-free threshold available. Once the initial three-year period ends, the tax rates will change according to specific circumstances.
- Capital gains tax (CGT): after selling a deceased estate, capital gains tax on the sale will be due. When an executor disposes of an asset, any capital gains acquired must be included on their trust tax return. CGT generally only applies if the sale of the deceased estate property occurs over two years after inheritance.