

## Interdependency & Dependency

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### 1. Introduction

Interdependency and dependency are important concepts in superannuation law. They affect issues such as:

- Whether or not a particular individual can receive another person's superannuation benefit under the Superannuation Industry (Supervision) Act 1993 and its associated regulations – referred to here as SIS;
- The form in which that benefit can be taken; and
- The way in which it will be taxed (ie, under the Income Tax Assessment Acts of 1936 and 1997 and their regulations – referred to here as ITAA 1936 and ITAA 1997).

Recent years have seen several important changes in this regard:

- From 30 June 2004, the definition of an individual's 'dependant' under both SIS and ITAA 1936 was extended to include persons with whom the individual had an 'interdependency relationship';
- From 1 July 2007, the provisions of the ITAA 1936 which deal with dependency and interdependency for superannuation purposes were moved to ITAA 1997 (although this did not change the broad meaning of the terms); and
- From 1 July 2008, definitions of spouse (specifically included as 'dependants' for both tax and superannuation purposes) and child (specifically included as 'dependants' for superannuation purposes but not always for tax purposes) were changed.

More than ever, it has become important to understand exactly who is considered dependant on another party for what purpose. This paper considers two specific issues which are frequently contentious:

- What exactly does an ‘interdependency relationship’ look like – how is it evidenced? What case law exists to demonstrate that a particular relationship meets the requirements? What indicators should advisers look for?
- What exactly does ‘dependence’ entail?

## 2. The importance of ‘dependency’ and ‘interdependency’ in superannuation law

An individual’s superannuation benefits can only be paid to his dependants, estate or – only if neither exist – another person. Dependency is therefore crucial in determining who can receive superannuation benefits directly (although of course a non-dependant could always receive superannuation benefits indirectly via the estate).

In SIS [s 10], a dependant is defined as follows:

***dependant**, in relation to a person, includes the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship.*

Three groups are therefore specifically included in the definition – the deceased’s spouse, child(ren) and anyone with whom the deceased had an interdependency relationship. The definitions of spouse and child are included in Appendix A for completeness and as mentioned earlier they have changed since 1 July 2008. However, they are not the focus of this paper<sup>1</sup>. Rather we are concerned with two issues:

- What exactly is meant by an ‘interdependency relationship’ in this context? and
- Given that the definition is an inclusive one (ie, “*includes* the spouse...”) who else might be included as a dependant other than the spouse, children and people with whom the deceased had an interdependency relationship?

We have therefore considered interdependency in more detail below.

Note that SIS also imposes restrictions on the manner in which benefits can be received. As a general rule, only dependants can receive superannuation death benefits in pension form and even some dependants (generally adult children) cannot

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<sup>1</sup> Other than to perhaps highlight one point – the current definition of spouse includes same sex couples whereas the previous definition did not. Between 30 June 2004 and 1 July 2008, therefore, same sex couples relied on the interdependency relationship (or financial dependency – discussed later) to establish dependence and hence some of the cases referred to in this paper consider whether an interdependency relationship can be identified for particular same sex couples whereas the parties could establish definition using the normal ‘spouse’ definition under current law.

receive benefits in this way. While we mention these points for completeness, they are not the focus of this paper and have not been discussed further.

### 3. The importance of 'dependence' and 'interdependency' in tax law

Once it has been established that a particular individual can receive a superannuation benefit – either because they are:

- a dependant (under the SIS definition);
- not a dependant but are receiving the benefit via the estate or because no estate has been formed and no dependants can be found,

it is necessary to identify how that benefit will be taxed.

At this point, dependency under the ITAA 1997 becomes important – in particular, whether the benefit recipient is a 'death benefits dependant' in accordance with that Act [s 302-195]. Death benefits dependants are entitled to receive lump sum superannuation benefits from self managed funds entirely tax free. Individuals receiving a pension from a self managed fund as a result of another individual's death, will receive various tax concessions. If either the deceased died aged 60 or over, or the recipient is aged 60 or over when receiving a pension instalment, the pension is entirely tax free. Otherwise, the recipient will be entitled to a tax offset of 15% on the taxable portion of the pension (until they reach age 60).

The definition of death benefits dependant includes some specific provisions for members of the defence and police forces but for the remainder of the population it is as follows:

*A **death benefits dependant**, of a person who has died, is:*

- (a) the deceased person's \*spouse or former spouse; or*
- (b) the deceased person's \*child, aged less than 18; or*
- (c) any other person with whom the deceased person had an interdependency relationship under section 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.*

The definition of 'dependant' for tax purposes is therefore subtly different to the SIS definition:

- in some ways it is narrower – it ordinarily excludes adult children; but
- in some ways it is broader – it includes the deceased's former spouse.

Importantly, however, the definition is also an 'inclusive' one and therefore raises the two questions as the SIS definition above – what does an 'interdependency' relationship' really mean? What does 'dependency' entail and who else might be a dependant under this definition?

## 4. Interdependency

### 4.1 Definition

The definitions of 'interdependency relationship' in ITAA 1997 and SIS are not identical but in terms of meaning are sufficiently close for our purposes.

In both cases, there are effectively four criteria to be met to satisfy the definition. Two people will have an interdependency relationship if they:

- (a) They have a close personal relationship; and
- (b) They live together; and
- (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. This final requirement is further qualified in the relevant regulations [SIS r 1.04AAAA(2) and ITAA 1997 r 302-200.02] to specify that the support and care must be of the type and quality normally provided in a close personal relationship rather than by a mere friend or flatmate.

There are exceptions to the last three requirements if they don't meet those requirements because:

- one or the other of them suffers from a physical, intellectual or psychiatric disability; or
- they are temporarily living apart (the two examples provided in the regulations are that one party is overseas or in gaol)

There are also some prescribed circumstances where an interdependency relationship is deemed **not** to exist – for example when care is provided as part of an employment relationship.

Importantly, where an interdependency relationship is established, both individuals are 'dependants' of the other. The same does not apply for (say) financial dependence – discussed further in Section 5 below.

The relevant regulations also provide a useful list of the matters to be taken into account in deciding whether or not an interdependency relationship exists (ie, overlaying – but not replacing – the four requirements above) – SIS r 1.044AAAA(1) and ITAA r 302-200.01:

- (a) *all of the circumstances of the relationship between the persons, including (where relevant):*
  - (i) *the duration of the relationship; and*
  - (ii) *whether or not a sexual relationship exists; and*
  - (iii) *the ownership, use and acquisition of property; and*

- (iv) *the degree of mutual commitment to a shared life; and*
  - (v) *the care and support of children; and*
  - (vi) *the reputation and public aspects of the relationship; and*
  - (vii) *the degree of emotional support;*  
*and*
  - (viii) *the extent to which the relationship is one of mere convenience;*  
*and*
  - (ix) *any evidence suggesting that the parties intend the relationship to be permanent; and*
- (b) *the existence of a statutory declaration signed by 1 of the persons to the effect that the person is, or (in the case of a statutory declaration made after the end of the relationship) was, in an interdependency relationship with the other person.*

Finally, there is very useful guidance in the Explanatory Memoranda (EMs) to the bills which introduced the legislation and the subsequent regulations. The EMs give interpretative guidance for each of the four requirements, which from a practical point of view is valuable in aiding understanding and assessing whether an interdependency relationship exists.

This guidance is referred to regularly in the Private Binding Rulings (PBRs) on interdependency and whilst every relationship is different, a review of the rulings does give some insight into each of the four requirements.

In what follows, we look at each of the four requirements separately, and at PBRs in which the relevant requirement was or was not met.

## 4.2 Close personal relationship

It is not possible to have an interdependency relationship if this requirement is not met, and so it is a natural starting point for the trustee when assessing whether or not an interdependency relationship exists.

The Supplementary Explanatory Memorandum to the Superannuation Legislation Amendment (Choice of Super Fund) Bill 2003 (the SEM) provides some useful guidance to trustees.

The SEM indicates that a close personal relationship will be one that involves a demonstrated and on-going commitment to the emotional support and well being of the two parties. Indicators (not exclusive or required) include:

- the duration of the relationship
- the degree of mutual commitment to a shared life
- the reputation and public aspects of the relationship (such as whether the relationship is publicly acknowledged)

Select Legislative Instrument 2005 No.262 which introduced the regulations effectively captured these points within the longer list of issues to consider shown in Section 4.1 above.

The explanatory memorandum to this instrument (the EM) noted that not all of these points would be relevant in every case where an interdependency relationship exists and hence the list was a guide rather than a definitive set of required circumstances. For example, the presence of sexual relationship was identified as one issue to consider and clearly this would not be relevant when assessing whether or not an interdependency relationship existed between siblings.

Rather, the EM identified that each of the matters listed should be given the appropriate weighting under the circumstances.

One point made by the EM was that generally speaking, it is not expected that children will be in an interdependency relationship with their parents.

In particular, the EM noted that while a normal familial relationship which exists between parent and child would be expected to be **close**, it would also be expected to change over time. In most cases, one would expect the child to establish his or her independence and eventually to move out of the parental home (if that has not already happened). That is, whilst it is convenient (and possibly expected) that young adults will live their parents and be supported financially, domestically and emotionally, it would generally be expected that they would move out eventually.

A number of private binding rulings have considered this in a tax context and concluded that whilst close relationships existed between child and parent in each case, they were nothing more than would be expected in a normal family situation. Importantly, several rulings concluded that they **did not** constitute the type of relationship envisaged as a “close personal relationship” for the purposes of establishing interdependency.

In Private Binding Ruling number 69711 the mother of the deceased was judged **not** to have a close personal relationship with the deceased. Briefly:

- The deceased was living alone at the time of death
- The mother provided the deceased with some personal care and assistance on a daily basis;
- This extended to assisting the deceased to walk, when the deceased was too ill to do so unassisted. The mother also assisted the deceased to bathe and with personal hygiene. In addition, the mother did the housework, laundry and cooked meals and provided other food as necessary.

The key here was that while the relationship was clearly a close familial one, it was not one envisaged by the legislation because (like the normal parent child relationship), there was no on-going mutual commitment to a shared life.

In Private Binding Ruling number 75619, neither parent was judged to have a close personal relationship with their child. Briefly:

- The deceased had always lived with his/her parents and relied upon them to provide for accommodation and domestic support;
- In late 2006, the deceased was involved in a tragic accident and passed away, aged over 18 years old.
- Prior to the accident, the deceased was looking at a promising sporting career not only in Australia but also overseas. The deceased worked part time but the income was insufficient to pay for living expenses and the deceased's sporting commitments.
- The parents provided the deceased with financial support. The parents took an active role in looking after the deceased prior to the accident.

As for the previous case, it was clear that a close familial relationship existed between the parents and the deceased at the time of death. There was no doubt that at the time of the accident, a relationship which involved a demonstrated commitment to the emotional support and well-being of the deceased existed.

However, this situation would not be considered unusual in most families. In fact, it would be typical of most parent/adult child relationships. Similarly, it would be typical for an adult child to leave their parents' home at some point, as their deceased son would have done in this case, and secure independence from the parents.

Again, in this case, there could not be said to have been a mutual commitment to a shared life between the either parent and the deceased.

*So can a close personal relationship (for interdependency purposes) ever exist between parent and adult child?*

The Private Binding Rulings again provide insight into this question.

In the case of Private Binding Ruling number 81288, the deceased was under 25 years of age and still residing in the family home at the time of death. In this case, however, the parents had demonstrated an on-going commitment to the care and well-being of their child in a number of ways:

- the level of care that they had provided prior to the deceased's death;
- by re-arranging their work schedules in the knowledge that their child would need their care for the rest of the child's life;
- the taxpayers attended medical appointments and hospital with the deceased;  
and

- provided physical and personal assistance where required during the duration of the deceased's illness.

In this case it was judged that the relationship between child and parent was more than the normal familial one.

The ruling comments:

*“It can be seen from the above, the care and support provided by the taxpayers is more than that provided in a usual familial relationship. This is because of the kind of illness the deceased had and the degree of care and support required by the deceased from the taxpayers. The relationship between them had ceased to be one of mere convenience and changed to one where the deceased would need the taxpayer's care for the rest of the deceased's life. Therefore, it is accepted that a close personal relationship existed between the deceased and the taxpayers as envisaged by paragraph 302-200(1)(a) of the ITAA 1997.”*

In other words, the facts supported an assertion that there had been a change in the relationship so that now there was a mutual commitment to a shared life together.

Consider also Private Binding Ruling number 90130. In this case, the deceased had lived with a parent for many years and suffered from a significant intellectual disability as well as a number of medical conditions, one of which ultimately led to death. The ruling commented:

*“The relationship between the deceased and the beneficiary was not one of mere convenience. Instead the relationship was, for all intents and purposes, one in which they lived their lives together and particularly one where the deceased would need the beneficiary's care for the rest of the deceased's life because of the intellectual disability.*

*The facts clearly show that the relationship which existed between the deceased and the beneficiary at the time of the deceased's death was a relationship which involved a demonstrated and ongoing mutual commitment to the emotional support and well-being of each other (and the deceased in particular) over a number of years.”*

*What about situations where the child cares for the parent?*

In some cases, an interdependency relationship exists

Consider ATO ID 2005/143 - In this case, the deceased lived with his mother for 6-7 years prior to his death. After moving in, he made financial contributions towards the payment of electricity and telephone bills. He also contributed towards weekly mortgage repayments and, when the mortgage on the home was later refinanced, the lender gave due consideration to the deceased continuing to make contributions

of weekly amounts toward the mortgage repayments. The deceased also assisted by purchasing groceries for the household and contributing to other household bills.

During a period of separation between his mother and her husband, and later, when the husband was ill and unable to work, the deceased made substantial weekly motor vehicle loan repayments. This vehicle had been purchased by his mother.

Household chores performed by the deceased included mowing the lawn, gardening, laundry, and cooking the evening meals. He also did any heavy lifting required around the house and did any maintenance on his mother's vehicle.

Emotional support was provided by the deceased to his mother when his brother was seriously injured, and in particular during the period of her separation and her husband's illness. In particular, during his mother's separation and when her husband was absent from home due to work, the deceased's presence provided his mother with a sense of safety and protection.

In this particular case a close familial relationship existed between the taxpayer and his mother at the time of the taxpayer's death. This was demonstrated in a number of ways such as the emotional support that the taxpayer provided during difficult times.

Some of the assistance provided by the taxpayer showed a concern for his mother's wellbeing and was clearly directed at ensuring her physical comfort. When the emotional support provided by the taxpayer is taken into account, the personal care requirement is considered to have been met.

Consequently, the facts demonstrated that a close personal relationship existed between the deceased and his mother and that the relationship was more than would normally be expected between mother and son.

Consider also Private Binding Ruling number 67744. Over a period of years, as the parent's health deteriorated, the child (who resided at the parent's home, and did not maintain a separate residence after returning from overseas) provided more and more emotional and physical support. In the last years of the deceased's life, this became full-time, punctuated only by respite care.

We quote from the ruling:

*“The facts clearly show that the relationship which existed between the deceased and the beneficiary at the time of the deceased's death was a relationship which involved a demonstrated and ongoing mutual commitment to the emotional support and well-being of each other (and the deceased in particular) over a period of a number of years. Therefore on the facts provided, it is considered that the relationship between the deceased and the beneficiary was a close personal relationship for the purposes of...”*

## *What about one relative for another?*

This issue was considered in Private Binding Ruling number 72267.

Over a number of years, the relative was in frequent (telephone) contact as the deceased became less and less able to manage personal affairs, eventually moving into the deceased's home to provide full-time care up until death.

From the ruling:

*“In this case, the beneficiary is a close family relation of the deceased who provided constant care and assistance to the deceased after the deceased was diagnosed with a medical condition. There was a demonstrated and ongoing commitment to the emotional support and well being of the two parties. From the facts provided it is likely that the beneficiary would have continued to reside with the deceased, providing the deceased with constant care and support for as long as was required. On the facts provided, it is considered that the requirement specified in paragraph 27AAB(1)(a) of the ITAA 1936 has been satisfied in this instance.”* [Note that the section referred to in this ruling is the section, which applied before ITAA 1997 s 302-200. The conclusions are nonetheless instructive given that the old and new legislation both include the same references to a close personal relationship.]

## *What about between two siblings?*

Private Binding Ruling number 1011432524790 concerned two siblings who had always lived together in the family home. A surviving parent had moved into a retirement village some years earlier. A commitment to the on-going emotional support and well being of the two parties was demonstrated in the physical and emotional support each provided the other in difficult times. Their normal close familial relationship had developed into something more over the years of living together, rather than living apart and establishing the normally expected independence from each other.

Private Binding Ruling number 62643 established that two siblings had a close personal relationship after one sibling (the deceased) fell ill, and the other sibling moved themselves and their immediate family interstate to care for the ill sibling. The deceased and their sibling's partner purchased a house together and the deceased and their sibling and the sibling's immediate family all moved in together. It was concluded that in this case, that a willingness to move interstate, and the purchase of a house to live together, demonstrated ongoing-shared commitment.

To summarise the private binding rulings, then, the majority concern whether or not a child and a parent have an interdependency relationship.

In these cases, unless the facts demonstrate that a normal familial relationship has changed so that, at date of death, there is a demonstrated mutual commitment to a shared life together, a close personal relationship of the type envisaged by the

interdependency provisions will not exist. Typically where the condition is met, the changed relationship will be because of illness or injury to either the parent or child.

Similarly, when assessing whether or not a close personal relationship exists between two siblings, or indeed any two people however related by family, it needs to be demonstrated that the relationship has evolved from a familial one, to one in which there is a commitment to a shared life together.

Having said that, and where the familial relationship is not a parent-child one, it can be expected that in some cases (eg, the first of the two sibling cases discussed above) the change in the relationship from a normal familial one, to one which meets the requirements of a close personal relationship, may be driven by factors other than serious illness or injury.

### 4.3 Living together

This will of course be a matter of fact. In the rulings, dictionaries are consulted for the ordinary meaning of living together and reference is made to co-habiting together, which in turn requires permanency in residing together. It is not enough, for instance, that two people might reside together for three or four nights of the week.

As mentioned earlier, it is possible to meet the interdependency requirements under some circumstances even if the two people concerned are temporarily living apart.

### 4.4 Financial Support

Prior to 1 July 2004 (ie, before interdependency was introduced), an individual could become a dependant of another via financial dependency. However, this involved substantial support (discussed in Section 5 below).

In contrast, the requirement for one or each of the persons ostensibly in an interdependency relationship to “provide[s] the other with financial support” simply means that *some* level (not necessarily substantial) of financial support is being provided by one (or each of them) to the other.

In other words, the actual level of financial support is less important – there simply must be *some* level of support.

In the private binding rulings we have examined, establishing the fact that some level of financial support exists is generally relatively straightforward in practice. The facts presented invariably show that there is some level of financial support provided by at least one of the parties for the other (and very often by both for each other).

In Private Binding Ruling number 69711 referred to earlier [the deceased child lived alone but the mother provided daily car, laundry, housework etc] the ruling states:

*“It is evident from the facts presented that the taxpayer contributed toward household expenses of the deceased and also contributed to the deceased’s personal expenses. In this instance, both the existence and the level of financial assistance provided by the taxpayer to the deceased is established*

*and it is not necessary to look at the level of financial support provided, but merely to establish that such support existed.”*

In practice then, it is just a matter of establishing that some level of financial support existed by detailing the facts. Interestingly, the financial support can be minor, and not even required to support the daily living needs of the recipient.

- 4.5** In Private Binding Ruling number 67992 for instance, where a father and son shared a common interest, financial support by the father for the son was established by the fact that the father paid for his son’s costs in relation to their shared interest. The ruling says that even though the support did not go to the necessities of life, but rather to the maintenance of a lifestyle, it nevertheless was a form of support and financial support. **Domestic Support and Personal Care**

As mentioned above, the regulations to the two Acts emphasise that the support and care must be the type and quality normally associated with a close personal relationship (Section 4.2 above) rather than the type of care and support one might expect from a ‘mere’ friend or flatmate. The regulations provide two examples of such support and care:

- significant care provided to the other person when he or she is unwell; and
- significant care provided to the other person when he or she is suffering emotionally.

The Supplementary Explanatory Memorandum to the Superannuation Legislation Amendment (Choice of Super Fund) Bill 2003 (the SEM) provides additional guidance on this point:

*“Domestic support and personal care will commonly be of a frequent and ongoing nature. For example, domestic support services will consist of attending to the household shopping, cleaning, laundry and like activities. Personal care services may commonly consist of assistance with mobility, personal hygiene and generally ensuring the physical and emotional comfort of a person.”*

We also find guidance in The Explanatory Memorandum to Select Legislative Instrument 2005 No.262:

*“The preparation of a meal or assistance with medication when a person is unwell would not normally of itself satisfy this provision. More likely the kind of care and support normally provided in a close personal relationship would extend to constant care (for example, overnight), attending medical appointments with the person or the provision of personal and physical assistance where required.*

*This provision distinguishes between the kind of care outlined above and the care that a friend or flatmate might reasonably be expected to provide, for*

*example merely checking in on a person when they are unwell and cooking or providing pre-cooked meals.”*

To illustrate, we again look at some cases from the PBRs:

In Private Binding Ruling number 69711 [the mother who visited her child at least daily and provided significant care and support], was considered to meet this requirement. Her care and support extended to:

- cooking her child’s meals, doing the housework and laundry;
- assisting her child to bathe and monitoring his medication;
- at times, assisting her child to walk;
- driving her child to appointments, errands; and
- initiating and receiving several phone calls to and from her child each day

In Private Binding Ruling number 90125, parents who provided care and support for their sick child [who lived with them and suffered from depression] were not considered to have met this requirement.

In that case, whilst it was evident that each provided the other with domestic support, the type of personal care provided by the parents was considered to be not uncommon in a typical familial relationship, and not of the type envisaged by the legislation. In coming to this conclusion, the ruling notes that the child was able to hold a job and socialise, and that the parents provided personal care when required (the parents had to be alert for emergencies and enlist medical care when necessary).

In Private Binding Ruling number 75619 [healthy child over 18 living at home tragically killed in an accident], it was accepted that both the parents and child provided each other with domestic support **but** it was concluded that there was no evidence to suggest that personal care was provided of a type envisaged by the legislation.

As with the “close personal relationship” test, when looking at relationships involving family members, it will be necessary to show that the domestic support and personal care provided by at least one to the other is of a type over and above that which is expected in a normal familial relationship.

The words used in EM “Domestic support and personal care will commonly be of a frequent and ongoing nature” also imply it will be substantial support and care.

#### **4.6 Interdependency – is it really that easy?**

When the interdependency relationship concept was first introduced by the Government, it was heralded as a means of ensuring that (say) two elderly sisters

who had always lived together and effectively ran their lives together could leave each other their superannuation benefits on a concessional tax basis.

While it is certainly the only way (other than financial dependency) such a relationship could fall within the definition of dependant for superannuation and tax purposes, we believe there are still challenges in arguing that such a relationship constitutes interdependency.

In particular, the cases considered so far have placed such significant emphasis on the fact that family members would **normally** have a close personal relationship and provide each other with support and care and that these have to reach a new level (demonstrating a commitment to a shared life together etc) to demonstrate interdependency.

In fact, we wonder whether it will be easier to demonstrate an interdependency relationship between unrelated individuals because there is a lower base level of closeness, care, support assumed when no family relationship exists. Similarly, it would seem that demonstrating interdependency is likely to be easier between siblings than parents and children – again, because the assumed ‘normal’ relationship is not assumed to be as close.

## 5. Other forms of dependence

Being an inclusive definition, ‘dependant’ for both the ITAA 1997 and SIS also includes its ordinary meaning.

Because of the fiscal nature of the relevant legislation (ie receiving superannuation benefits and paying (or not paying) tax on them), the courts have placed most emphasis on financial dependency.

In ATO Interpretative Decision (ID) 2002/731, the ATO also considered this issue and noted that in accordance with paragraph 41 of Tax Ruling IT 2168, a person who was not specifically included as a dependant (spouse, ex-spouse, child under 18 and – more recently – a person with whom the deceased had an interdependency relationship) will only be a dependant, if he or she was actually dependent upon the deceased for maintenance and support.

Dictionary definitions of “dependant” then led the ATO to the view that the ordinary meaning of dependant emphasises a requirement for substantial support or maintenance. Further, and citing cases, the ATO expressed the view that because of the context (ie the fiscal nature of the relevant legislation), the relevant sense (of dependency) is financial dependency. Or in other words, the relevant question is whether a person is financially dependent on another.

Therefore, and unlike financial support, it is necessary to establish the actual level of support. The ATO comments in ID 2002/731:

*“Where the level of financial support provided to a person is substantial then that person can be regarded as a dependant. So a ‘financial dependant’ is considered to be a person to whom another person contributes all or a major*

*amount of necessary financial support. If the level of financial support is insignificant or minor, then the person cannot be regarded as a dependant.”*

This view goes back to Malek’s case (*Malek v. Federal Commissioner of Taxation* 42 ATR 1203, 99 ATC 2294).

In that case, the Commissioner argued that the deceased member’s mother could not be considered to be his dependant unless she was substantially maintained or supported financially by her son, and the amount she applied from her own resources to pay for the necessities of life was less than 50% of the funds required.

The senior member of the AAT concluded that the relevant level of financial support is that required to maintain the person’s normal standard of living and the question of fact to be answered is whether the person was reliant on the regular and continuous contribution of the other person to maintain that standard.

Senior member Pascoe stated:

*“In my view, the question is not to be decided by counting up the dollars required to be spent on the necessities of life for [Mrs Malek], then calculating the proportion of those dollars provided by the [son] and regarding her as a dependant only if that proportion exceeds 50%...In my view, the relevant financial support is that required to maintain the person’s normal standard of living and the question of fact to be answered is whether the alleged dependant was reliant on the regular continuous contribution of the other person to maintain that standard.”*

In Malek’s case (says the ATO in ID 2002/731), the evidence demonstrated that a mother had received significant financial support from her deceased son. The son had accepted responsibility for mortgage payments, maintenance and other expenses of the unit in which the mother lived, and it was unlikely that, following her son’s death, she would be able to continue to maintain her normal standard of living.

Note that the test to be applied is in relation to a person’s normal (for them) standard of living, it is not about whether the financial support is needed to meet some defined level of daily needs – for example basic daily survival needs.

Towards the end of ID 2002/731, the ATO comments:

*“Taking into account all of the above, it is considered that financial dependence occurs where a person is wholly or substantially maintained financially by another person.*

*The test to be applied is: if the financial support received by a person were withdrawn would the person be able to meet his daily needs.”*

In a recent Private Binding Ruling (number 91657), The ATO expressed the same views, citing the same cases and arguments, and commented:

*“If the financial support provided merely supplements the person’s income and represents ‘quality of life’ payments, then it would not be considered substantial support. What needs to be determined is whether or not the person would be able to meet their daily basic necessities (shelter, food, clothing, etc.) without the additional financial support.”*

In that particular case, in determining that there **was** financial dependency, the Private Binding Ruling states:

*“In this case, your client was an adult child of the deceased at the time of the death of the deceased. Hence the point to be considered is whether the facts show that your client depended or relied on the earnings of the deceased for his day to day sustenance at the time of the deceased’s death.*

*Your client was unable to hold down a job in recent years on account of his ill health and therefore needed financial help. Your client had been hospitalised twice.*

*Your client’s bank account records show that your client received increasing financial support from the deceased from the relevant financial year onwards culminating in a final substantial amount. It is noted that in recent years payments by the deceased were made on a yearly basis around the middle of each financial year.*

*The credit card statements provided show that the deceased regularly also paid directly into your client’s credit card account. The deceased had helped purchase a car for your client and paid for its registration and insurance. He also paid for your client’s health insurance.*

*Though actual details of your client’s day to day expenses have not been provided it is clear that financial support from the deceased started as small amounts in the relevant income year and progressively got larger. Particularly close to the death of the deceased the financial support was substantial.*

*The above shows that the deceased paid money to cover your client’s day to day living expenses. He did not pay the expenses directly but gave your client money to meet his living expenses.*

*It is concluded that your client would have been unable to meet his basic necessities without the additional financial support of his parent.*

*In view of the above, it is considered that your client was financially dependant on the deceased at the time of the deceased’s death. Therefore your client is considered to be a dependant of the deceased within the definition of ‘death benefit dependant’ in section 302-195 of the ITAA 1997.”*

In another Private Binding Ruling (number 75764) where it was concluded that financial dependency did not exist, the reasoning was as follows:

*“Details of the annual household and living expenses of the beneficiary and the beneficiary’s family for the relevant income years were provided. An examination of the information provided shows that the beneficiary was not substantially dependent upon the deceased either prior to or at the time of the deceased’s death.*

*Essentially, the deceased contributed financial support to the annual household and living expenses of the beneficiary and the beneficiary’s family, during each of relevant income years, which was not required to cover the beneficiary’s normal household expenses. In each of these income years, the beneficiary’s income before tax exceeded the beneficiary’s total household expenses.*

*The prepayment by the deceased prior to the deceased’s death of the fares and accommodation for a holiday the beneficiary and the beneficiary’s family made after the deceased’s death, and the provision of additional cash towards other holiday expenses, both represent ‘quality of life’ payments which cannot be considered to be a substantial financial support in the relevant income year.*

*Rather, the level of financial support provided to the beneficiary by the deceased is regarded as part of their domestic and/or familial arrangements and does not represent any dependency relationship.”*

In our view, these cases, rulings and interpretative decisions highlight that financial dependence is not as simple to demonstrate as may sometimes be claimed. Clearly simply providing minor financial contributions to meeting a household’s expenses will not be sufficient. While this may establish financial support (for the purposes of the interdependency definition) it will not necessarily be enough to demonstrate financial dependence.

Interestingly, the provision of third party financial support from another party does not necessarily rule out the existence of a financial dependency relationship. In Malek’s case, for example, the mother was in receipt of a disability support pension. Notwithstanding that, she was able to demonstrate financial dependence on her son to maintain her normal standard of living. In Aafjes’ case, a child received support from her mother and stepfather, but was nonetheless considered a financial dependant of her natural father, who paid maintenance in respect of her.

Financial dependence could also be demonstrated in cases where a legal right to support exists if a particular individual was in a position, immediately prior to the deceased’s death, to enforce an order granted by a court, tribunal or other authority, or to enforce some other obligation arising at law, under which the deceased was required to provide financial support to the individual.

Furthermore, the fact that the deceased was not meeting their obligations at the time of their death does not necessarily rule out financial dependency on the part of a particular individual. Of course, an assessment must be made as to whether enforcement of the relevant legal right was more than a technical possibility. In *Potts v Niddrie & Benhar Coal Co Ltd (1913) AC 531* a court order was granted against a

husband prior to his death for the maintenance of his wife and children. Although no money was obtained in the 2 years he was alive after the order was made, and the legal support was not being enforced at the time of death, it did not affect the conclusion that there was a legal right upon which the family could depend.

By way of contrast, in *Northern Star Ltd v Mullen (1986) CA 168*, a wife had left her husband twenty years prior to his death, and was no longer looking to him to support his children. It was held that even though there was a legal right to support, there was no dependency as the wife and children had been independent of the husband for 20 years prior to his death.

One example often cited is establishing financial dependence by (say) having a grandparent pay the private school fees of their grandchild.

Certainly a reading of the cases above would suggest it is not impossible for this to create dependency – since dependence hinges on whether the support is crucial to meet current **actual** expenditure rather than (say) **survival** needs, the fact that the money is being used to finance something discretionary (and arguably a luxury) does not necessarily preclude dependence from existing.

However, the cases above clearly indicated that the withdrawal of support would need to have a material impact on the dependant's ability to live his or her normal life. In the example cited above, we believe this raises a number of issues:

- Given that a minor child would normally be dependant on his or her parents, payment of the school fees would not necessarily make the **child** a dependant of the grandparents, it might well make the **parents** dependant on the grandparents;
- Without the grandparents' intervention, would the parents have the financial capacity to continue meeting the school fees? (ie, have they simply chosen not to at this stage because the grandparents are willing to do so). For instance, if the parents' lifestyle is not too dissimilar to that of other parents whose children attend the same school, or indeed if it is wealthier, we believe that it would be hard to argue that the child is dependent on the grandparent as the parents could take up the cost. In our view, the parents' lifestyle would need to be demonstrably less wealthy than that of other parents whose children attend the same school to put the issue beyond doubt. For instance, and in accordance with number 75764, at the very least it would be reasonable to ask the parents to show that their annual combined income did not exceed their family's normal cost of living by more than annual school fee costs.

On the other hand, if having applied these tests and the conclusion was that neither the parents nor the child could finance the child's on-going private school fees, then perhaps a case could be made for being a dependant of the grandparent, given that withdrawal of the grandparent's financial support would then result in the child not being able to continue his/her education at the private school – a normal and significant part of their daily needs.

Perhaps most importantly, any attempt to demonstrate dependence in these circumstances should focus not only on whether or not the support occurs (ie, the grandparents make the payments) but also on whether it is relied upon.

One final point to note is that establishing financial dependence makes one party (the recipient of the financial aid) dependent on another (the provider). This is in direct contrast between interdependency relationships where both parties are dependants of each other. In other words, two people in an interdependency relationship could leave their superannuation benefits to each other in a tax effective manner whereas if we were instead considering two persons – one of whom was financially dependent on the other – only the financial dependant could receive the provider's superannuation on a concessional tax basis, not vice versa.

## 6. Conclusion

In this paper, we have explored just a few aspects of 'dependence' for superannuation purposes:

- how an interdependency relationship might exist – what do recent cases tell us?
- How the requirement for the provision of 'financial support' in that definition is different to 'financial dependence'

In our view, care is needed in demonstrating an interdependency relationship between (say) family members where some of the requirements (a close personal relationship, care and support) would be expected to form part of any family relationship (particularly where the parties are living together). To be considered an interdependency relationship, the level of care, support and closeness etc needs to be greater than one would expect in a typical family situation.

Finally, financial support (in an interdependency context) is quite different to financial dependence (in a broader dependence context). Many commentators suggest that financial dependence can be demonstrated simply by identifying regular financial help provided by one party to another. In fact, our reading of the cases suggest that financial dependence is only present when that assistance is actually required to help the recipient meet their normal expenses. Simply providing a financial contribution (which may or may not be crucial to maintaining a specific lifestyle) falls more into the category of 'financial support' (which is relevant for the interdependency definition).

## Appendix A

For the purposes of the Superannuation Industry (Supervision) Act 1993, 'spouse' and 'child' are defined as follows:

**Spouse** of a person includes:

- (a) another person (whether of the same sex or a different sex) with whom the person is in a relationship that is registered under a law of a State or Territory prescribed for the purposes of section 22B of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purpose of that section; and
- (b) another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple.

The laws and relationship types prescribed for the purposes of section 22B of the *Acts Interpretation Act 1901* (in Regulation 3 of the *Acts Interpretation (Registered Relationships) Regulations 2008*) are (at the time of writing):

- Relationships under section 10(3)(a) of the *Relationships Act 2008 (Vic)*
- Relationships under section 4 of the *Relationships Act 2003 (Tas)*
- Relationships under section 6 of the *Civil Partnerships Act 2009 (ACT)*.
- Relationships under section 5 of the *Relationships Register Act 2010 (NSW)*

Accordingly, spouses for superannuation law purposes are now:

- Legal spouses
- De facto spouses (same sex or different sex)
- Members of prescribed relationships as set out above.

Note that subsection (b) of the definition above (de factos) includes both same sex and different sex couples despite the lack of specific wording as in subsection (a).

Previously (and before Commonwealth law was changed to prevent discrimination against same sex couples), a spouse did not include same sex partner as the definition included references to living as the other person's husband or wife.

How do we identify a spouse? Anyone who is a legal spouse or a spouse under leg (a) will be able prove so by production of a marriage certificate or relevant registration document.

In identifying potential de-factos, the decision of Powell J in *Roy v Sturgeon* (1986) 11 NSWLR 454 is sometimes quoted as it includes a checklist of matters to be considered in determining whether or not a spousal relationship existed:

- the duration of the relationship;
- the nature and extent of the common residence;
- whether or not a sexual relationship existed;

- the degree of financial interdependence, and any arrangements for support, between or by the parties;
- the ownership, use and acquisition of property;
- the procreation of children;
- the care and support of children;
- the performance of household duties;
- the degree of mutual commitment and mutual support;
- reputation and "public" aspects of the relationship.

**Child** in relation to a person includes:

*(a) an adopted child, a stepchild or an ex-nuptial child of the person; and*

*(b) a child of the person's spouse; and*

*(c) someone who is a child of the person within the meaning of the Family Law Act 1975.*

For our purposes, the Income Tax Assessment Act 1997 definitions are identical in that the differences have no impact on meaning (for example, replacement of the word "person" with "individual").