

# Estate Planning Update

## Common misconceptions about superannuation death benefits

*People in many cases appear to be under serious misconceptions as to how their superannuation benefits will be dealt with on their death.*

*Some common misconceptions relate to the relationship of the Will to super, who can receive the super and what the tax treatment may be. In this update, we address some of the misconceptions as well as some common questions about superannuation death benefits.*

### Superannuation death benefits do not automatically form part of a deceased estate

The superannuation death benefits of a fund member will only form part of their deceased estate and be disposed of according to their Will if:

- (a) the member has executed a valid binding nomination that directs the benefits to their legal personal representative ("LPR" – that is, their executor or administrator) to be dealt with according to their will; or
- (b) in the absence of any binding nomination, the fund's trustee in its discretion decides to pay the benefits to the LPR.

This means that, without a binding nomination directing the benefits to the member's estate, the fund's trustee may instead decide to directly pay the benefits to one or more of the member's dependants (see below for definition of "superannuation dependants").

### Is a binding nomination always appropriate?

We generally recommend that members of superannuation funds have a properly executed binding nomination in place that provides for the payment of their superannuation benefits on their death. This avoids any doubt or confusion in relation to how these benefits are to be disposed of after their death and ensures that the benefits are disposed of as the member (rather than the fund's trustee) wishes.



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## Inside

*Common misconceptions about superannuation death benefits*

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## Common misconceptions about superannuation death benefits *Continued*

However, a binding nomination does not allow the trustee of the fund any flexibility, and it could create problems in some cases (for instance, where there is an unforeseen divorce or separation). Further, a binding nomination may not be necessary if, for instance, the relevant superannuation benefit is subject to a pension and there is a validly nominated reversionary pensioner. For these reasons, it may sometimes be appropriate to have a non-binding nomination or no nomination at all.

### Who can make a binding nomination and how long does it last?

Superannuation funds may allow members to make binding death benefit nominations, if the fund rules allow it. Except in the case of self managed super funds ("SMSFs"), a binding nomination will lapse after a maximum of three years (or less time, depending on the fund rules) unless it is confirmed in accordance with the rules. The time after which a binding nomination will lapse in an SMSF (if at all) will depend on the terms of the deed.

Regardless of the type of fund, where a binding nomination is in place, the member should ensure that it is reviewed on a regular basis and amended as circumstances require.

### Not anyone can be nominated

Apart from being left to a deceased member's estate, superannuation benefits can only be left to one or more of their so called "superannuation dependants", meaning:

- a member's spouse (including de facto, same sex and former spouse)
- any child (including adopted child and stepchild) of the member
- anyone who was financially dependent on the member, or
- anyone with whom the member has an "interdependency relationship" (meaning,

broadly, that the person has a close personal relationship with the member, lives together with them, at least one of them provides the other with financial support, and at least one of them provides the other with domestic support and personal care)

A member may nominate more than one dependant (and / or their LPR) and may make the nomination conditional or cascading (e.g. "100% to person A, but if person A pre-deceases me, then 100% to person B"). If a member wishes to leave their superannuation benefits to a non-dependant, they may leave their benefits to their LPR to be disposed of according to their Will (but must ensure that the person in question is a beneficiary of their superannuation under that Will).

Take the example of John, a fund member with no superannuation dependants, one living sister, Jane, and two living parents. John is in his twenties and has not made a Will. John nominates Jane to receive his entire superannuation death benefit, with no alternative recipient. Jane is not financially dependant on John or in an interdependent relationship with him. The nomination will fail, meaning that his death benefit will go to his LPR. As John has no Will, the death benefit will be dealt with according to intestacy laws, meaning that his parents will receive the entire benefit to the exclusion of Jane.

### Lump-sum superannuation death benefits are not always tax free

If a lump sum superannuation death benefit is paid directly to a so called "tax dependant" of a member, the payment is generally received tax free. A "tax dependant" is the same as a "superannuation dependant", except that if it is a child of the deceased, they must be under 18, or financially dependant on, or in an interdependency relationship with, the deceased.

Accordingly, there are two key situations in which a lump sum benefit may become taxable:

- the beneficiary is a child of the member who is aged 18 or over and is not otherwise a "tax dependant"; or
- the beneficiary is the member's LPR and the member's Will makes some part of the lump-sum payable to a non-dependant (for tax purposes). This can sometimes occur by omission (e.g. the Will does not specifically deal with how the death benefit should be distributed).

To the extent that tax non-dependants receive a death benefit, the taxable component of the lump sum will generally be taxed at 15% plus Medicare levy. The extent to which there is a taxable component will depend on how the fund benefit is made up.

### Conclusion

There is considerable complexity in superannuation and tax laws in relation to death benefits. There are also a number of pit-falls. Superannuation benefits of fund members need to be considered as part of their estate planning in conjunction with their Will.

We have significant experience in all aspects of estate planning, including the taxation of superannuation funds, taxation of superannuation death benefits and other testamentary benefits. If you require any assistance in this area, or if you are considering establishing – or upgrading – your own SMSF deed, please contact a member of our Estate Planning or Tax and Superannuation teams (see page 1 for full contact details).

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