

## Superannuation death benefits

*Nowadays every working adult has superannuation benefits, but it is important to understand how these are dealt with upon death.*

### Common misconceptions

Some common misconceptions relate to the relationship between a person's Will and their superannuation: who can receive the superannuation death benefits, the role of binding and non-binding death benefit nominations, and what the tax treatment may be.

### Do superannuation death benefits automatically form part of a deceased person's estate?

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

- > the member has executed a valid binding death benefit nomination (**BDBN**) that directs the trustee of the superannuation fund to pay their superannuation death benefits to the member's legal personal representative (**LPR**); that is, the executor appointed under the deceased member's Will, or an administrator appointed by the court for the deceased member's estate; or
- > in the absence of any valid BDBN, the fund's trustee exercises its discretion to pay the superannuation death benefits to the deceased member's LPR.

If there is no BDBN in place nominating the LPR, then the fund's trustee may decide to pay the superannuation death benefits directly to one or more of the member's superannuation dependants.

### Who qualifies as a superannuation dependant?

- > A member's spouse, which includes a domestic partner.
- > A member's child, regardless of age.
- > Anyone who was financially dependent on the member at the date of their death.
- > Anyone who was in an inter-dependant relationship with the member at the date of their death.

### Why the type of superannuation fund is important

The type of superannuation fund that a person is a member of is an important consideration in the estate planning process, particularly when considering whether that member should execute a BDBN.

Self-managed superannuation funds (**SMSFs**) can offer their members a greater degree of flexibility insofar as the payment of their death benefits is concerned. Depending on the wording used in the SMSF's trust deed, a member may be able to put in place a BDBN which:

- > nominates specific underlying assets of the SMSF to pass to their nominated beneficiaries, such as real property or shares; and
- > allows for contingencies, such as where a nominated beneficiary predeceases the member, to ensure that the member's wishes can be implemented.

For example, a member may wish for their death benefit to pass to their surviving spouse, and should the spouse die before the member, then the member may want their death benefit to pass equally to their children.

The BDBNs that members of retail and industry superannuation funds can put in place are generally more restrictive when compared to SMSFs. While such funds may allow their members to execute valid BDBNs which allow for their death benefits to be paid to more than one dependant, they generally don't allow for:

- > underlying assets of the superannuation fund to pass to a person's nominated beneficiaries – only benefits in the form of cash are paid to a beneficiary;
- > contingencies in the event where a nominated beneficiary has predeceased the member; and
- > non lapsing BDBNs.

### **Is a BDBN always appropriate?**

The short answer is 'no'. However, there are many circumstances which warrant the use of a BDBN, for example, where you wish to benefit one person over another, or your Will might be challenged.

Generally, we recommend that a member of a superannuation fund has a validly executed BDBN that provides for the payment of their superannuation death benefits upon their death. This avoids any doubt in relation to how these superannuation death benefits are to be dealt with after a member's death. It also ensures that the superannuation death benefits are disposed of in accordance with the wishes of the member, rather than pursuant to the decision of the trustee of the member's superannuation fund.

However, a BDBN does not allow the fund trustee any flexibility, and in some cases it could create problems. For instance, where there is marital separation and the member dies before the divorce is finalised and the BDBN has not been altered to reflect the change in the member's circumstances.

Further, a BDBN may not be necessary if, for example, the superannuation benefit is subject to a pension and there is a validly nominated reversionary pensioner.

For these reasons, it may be appropriate to have a non-binding nomination in place, or no nomination at all. Advice should be obtained for your individual circumstance.



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

A member can only make a BDBN if the governing rules of the superannuation fund provides and allows for it.

Many retail and industry superannuation funds only allow their members to put in place BDBNs which are valid for three years, after which they lapse and require a new BDBN to be executed.

In the case of SMSFs, the BDBN may lapse after a stipulated time but this depends upon the terms of the fund's deed. The deeds of many SMSFs allow their members to put in place BDBNs which do not lapse.

Regardless of whether a BDBN lapses or is non-lapsing, a member should ensure that it is reviewed on a regular basis and amended to reflect any changes in the member's circumstances. This should be done at the same time you review your will. We recommend that you review your estate planning at least every two to three years.

## Are lump-sum superannuation death benefits always paid tax free?

The short answer is 'no'. However, if a lump sum superannuation death benefit is paid directly to a 'tax dependant' of a member, the payment is generally received tax free.

A 'tax dependant' is the same as a 'superannuation dependant', except that:

- > a child of the deceased member must be under 18 years of age or under a disability;
- > they must be financially dependant on the deceased; or
- > they must be in an interdependent relationship with the deceased.

There are generally two situations in which a lump sum benefit may be taxable:

- > The proceeds are paid to a child of the member who is aged 18 or over and is not otherwise a 'tax dependant'; or
- > The proceeds are paid to the member's LPR and the member's Will distributes some or all of the superannuation death benefit to a non-tax dependant.



### Peter's story

Peter has no superannuation dependants, one living sister, Jane, and two living parents. Peter is in his 20's and has not made a Will.

Peter nominates Jane to receive his entire superannuation death benefit, with no alternative recipient. Jane is not financially dependent on Peter, nor is she in an interdependency relationship with him.

Peter dies in a motor vehicle accident. Jane, knowing Peter has nominated her as the beneficiary of his superannuation, contacts his superannuation fund requesting that Peter's death benefit be paid to her.

Jane was surprised to discover Peter's nomination was invalid, resulting in his superannuation death benefit being paid to his LPR.

As Peter had no Will, all of Peter's estate – including his superannuation death benefit – will be dealt with according to intestacy laws, resulting in his parents receiving all of Peter's superannuation to the exclusion of Jane.

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