

**WHAT HAPPENS TO YOUR
SUPERANNUATION WHEN
YOU DIE?**

**MAKE SURE YOU GET IT
RIGHT, AND USE BINDING
DEATH NOMINATIONS
CORRECTLY!**



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Binding Death Benefit Nominations in a superannuation fund can provide useful direction to the Trustee of a fund after death, for distribution of benefits. However, there have been some common issues that we've encountered lately where people thought they had things right, but didn't understand the way that super works legally. We summarise them as follows:

1. Issue: 'Everything will be OK, my family will look after it.'

Many members of superannuation funds, and particularly Self-Managed Super Funds ("SMSFs") make the incorrect assumption that just because everything was all 'peace and harmony' while they were alive, this will continue on their demise. While most disputes are settled prior to getting to a court hearing, there are enough cases where the apparent intention of the deceased, made clear during their life, was never committed to writing. The result is that unintended family members may end up with superannuation to the detriment of others.

Make sure that your intention to pay super benefits to particular family members is put in writing, as a binding direction to the Trustee of the fund.

2. Issue: Not understanding who can make a claim or receive a superannuation death benefit.

Superannuation laws have strict rules around who can receive your death benefit. The laws limit your superannuation death benefit to your dependents, plus it can be paid to your estate via your Legal Personal Representative. Your dependents for super purposes include your spouse, children, anyone dependent on you for support and anyone with whom you have an interdependency relationship.

If your super is paid to your estate, then the tax rate for non-dependents (as defined by the tax law) is 16.5% on the super funds that they receive. So, it is important that dependency is shown in a number of instances to protect the superannuation from this potential tax.

Make sure you are clear about who should receive your superannuation after your death.

3. Issue: Not understanding the place of superannuation in your Last Will and Testament.

One very common misunderstanding is that your Last Will and Testament can decide how your superannuation will be distributed amongst your beneficiaries. This is incorrect, as the rules of your super fund initially determine how your super is to be distributed. Some funds don't allow Binding Death Benefit Nominations at all, while others allow for more detailed Binding Death Benefit Nominations.

Your fund may allow you to make a Binding Death Benefit Nomination which directs the Trustees of the fund as to who is to receive your superannuation.

This includes your dependents, and you can have your super paid to your Legal Personal Representative (usually the Executor of your estate), who is responsible to distribute the amount received as instructed in your Will. If you don't have a Binding Death Benefit Nomination, then the rules of the fund may allow the Trustees the discretion to distribute your super benefit to your dependents, including to your estate, via your Legal Personal Representative.

Make sure you have a clear direction for the distribution of your superannuation otherwise payment decisions may be up to the Trustees of your fund after your death.

4. Issue: Incorrect Binding Death Benefit Nominations.

Many super funds have trust deeds which include standard Binding Death Benefit Nominations or, require that the nominations follow a set format. If they do, then make sure any nomination that you sign is consistent with that format.

Make sure you use a nomination that satisfies the trust deed or the distribution of your death benefit may be at the discretion of the fund Trustees.

5. Issue: Incorrectly completed Binding Death Benefit Nominations.

We often see Binding Death Benefit Nominations that are incomplete or are incorrect. The information that is required to be included in the nomination will depend on the particular form, but it will usually include:

- the Member's name;
- who the Member nominates to receive the death benefit;
- how much of the death benefit is to be paid to the dependent/s or Legal Personal Representative;
- any other instructions concerning payment of the death benefit;
- the Member's signature and be dated; and
- the Witnesses' name/s, signature/s and be dated.

It is common for Binding Death Benefit Nominations to have one or more of these items missing, which may render the nomination invalid or limit who may be eligible to receive the death benefit. If the nomination is considered invalid it may then be left to the fund Trustees' discretion as to the distribution of the death benefit.

Make sure your Binding Death Benefit Nomination has been completed correctly or it may be up to the Trustees to decide how your death benefit will be distributed.

6. Issue: Not keeping the Binding Death Benefit Nomination up to date.

As things change during your life, you may wish to direct the payment of your superannuation to someone other than who you originally nominated. This may occur if you have children, change relationships or someone becomes dependent upon you for support.

Each time your family or relationship circumstances change, review your Binding Death Benefit Nomination to check whether any changes are required.

7. Issue: Failure to finalise a marriage breakdown.

Superannuation splitting is usually included as part of a marriage or relationship settlement. However, any Binding Death Benefit Nomination that is in place at the time of the settlement may still be valid and it is possible for benefits to be paid to your ex-partner.

As part of the settlement, be sure to review your Binding Death Benefit Nomination and make any amendments necessary to take into account your changed circumstances.

8. Issue: SMSFs - Not addressing the legal competency of fund Members.

Whether a Trustee of an SMSF is competent to act in the interests of a deceased Member is something that should be under consideration at all times. If the Trustee is unable to act in that capacity, then who would take over the running of the fund?

To cater for this situation the trust deed of the fund or Constitution of the corporate Trustee should provide an alternative if the primary Trustee or director of the corporate Trustee become legally incompetent due to disability. Another option could be for the Trustee to grant an Enduring Power of Attorney to another person who could take over, should they personally become unable to act.

Being prepared when a Trustee is unable to act by using an Enduring Power of Attorney may allow an SMSF to continue in difficult times.

9. Issue: Not taking the specific make-up of an SMSF into consideration.

SMSFs operate in a unique way and may hold investments which can be retained in the fund or transferred to the Beneficiary as part of the payment of a death benefit. It is possible for a Binding Death Benefit Nomination to direct particular assets to one or more Beneficiaries.

Consideration needs to be taken of the fund's assets in satisfaction of the payment of a death benefit. This may involve taxation issues, including income tax and stamp duty, in relation to the transfer.

10. Issue: Taking Estate Planning considerations into account.

Estate planning has become more important since the commencement of the Transfer Balance Cap from 1 July 2017. The cap restricts the amount that can be used to start an income stream(s) in a superannuation fund, including Death Benefit Pensions.

If a person becomes entitled to a Reversionary or Death Benefit Pension there is potential that their Transfer Balance Cap of \$1.6million has been exceeded. This may require the transfer of part of the death benefit out of the fund as a lump sum. Depending on the wishes of the deceased it may be paid to a dependent or to their estate and have different tax consequences.

As part of deciding what is to happen with your death benefit, the Estate Planning issues should be taken into account.

It doesn't matter whether you have an SMSF or belong to one of the larger industry or retail super funds, the distribution of your death benefit should be made by the fund Trustees in accordance with your wishes. Any directions or instructions provided to the Trustee must be clear and as required by the fund's trust deed. Otherwise, payment of your death benefit may be left up to the Trustee's discretion and may end up in the hands of someone you never intended.

For any assistance in relation to your estate, your superannuation or your overall financial position, please contact our Client Services team on (08) 9227 6300 or email clientservices@austasiagroup.com.

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