

Superannuation Death Benefit FAQs

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Are superannuation death benefits an estate asset?

Superannuation death benefits do not automatically form part of the estate of a deceased member. In many cases, the trustee of a superannuation fund will pay the death benefits directly to the deceased's dependants and in that event the death benefits will not form part of the estate. However, in some cases a superannuation fund will pay the death benefits, or part of them, to the deceased's legal personal representative (that is, the executor or administrator of the estate), and in that event the superannuation death benefits will form part of the estate and pass in accordance with the deceased's will or on intestacy if there is no will (subject, of course, to any court order). The destination of superannuation death benefits will depend on a number of factors including the terms of the superannuation fund's trust deed, the applicable legislation and any current valid beneficiary nomination the deceased has made.

What if there is no person who fits the definition of dependant for superannuation purposes?

Where there is no person who is a dependant under the *Superannuation Industry (Supervision) Act 1993* ("SIS Act"), superannuation death benefits may be paid to member's legal personal representative (that is, the executor or administrator of the estate). If this is done, the superannuation death benefits will form part of the estate and be dealt with in accordance with the member's will or, if there is no will, in accordance with intestacy (subject, of course, to any court order).

What if there is no legal personal representative?

Clause 6.22 of the Superannuation Industry (Supervision) Regulations 1994 ("SIS Regulations") provides that if a trustee has not, after making reasonable enquiries, found either a legal personal representative, or a dependant, of the member, then the trustee may pay the benefit to an individual.¹ This has to be allowed by the funds' trust deed.²

What is the role of the Australian Financial Complaints Authority in relation to superannuation death benefits?

From 1 November 2018 the Australian Financial Complaints Authority³ ("AFCA") replaced the Superannuation Complaints Tribunal ("SCT") as the statutory body that is able to deal with complaints about decisions of trustees of non-self-managed superannuation funds as to the distribution of superannuation death benefits amongst beneficiaries (or potential beneficiaries) as well as the amount of death benefits (for example, whether an insured component is payable). When reviewing decisions of the trustee of a superannuation fund, AFCA cannot provide a remedy that is contrary to the fund's trust deed and it cannot review or alter the distribution of death benefits required by a current and valid binding beneficiary nomination.

AFCA's website contains Rules and Operational Guidelines setting out and explaining the complaint resolution process.

¹ Instances where the Superannuation Complaints Tribunal has been involved in such a payment are D1112\085, D13-14\213 [2014] SCTA 106; D14-15\009 [2014] SCTA 154, D14-15\051 [2014] SCTA 194; D1415\052 [2014] SCTA 195, and D14-15\094 [2014] SCTA 238.

² See, for instance, D11-12\092 [2012] SCTA 52, [45]–[47].

³ <https://www.afca.org.au/>.

AFCA is unable to deal with complaints regarding superannuation funds that are not regulated, nor complaints regarding self-managed superannuation funds.

Can superannuation be paid to a discretionary trust?

In short, not directly. Superannuation death benefits can only be paid to one or more of the deceased member's dependants or to his or her legal personal representative (that is, the executor or administrator of the estate, bearing in mind that the roles of an "executor" and a "trustee" of a deceased estate are distinct.⁸ Dependants are defined in section 10 of the SIS Act and include spouses (including de facto and same sex partners), children (including step-children) of any age, persons who are dependent on the deceased member and persons who are in an interdependency relationship with the deceased.

If a member wants to ensure that death benefits are paid other than to a dependant, e.g. to a discretionary trust, the death benefits will need to be paid to the legal personal representative and dealt with under the member's will.

If the death benefits are paid, either directly or via the will, to persons who fit the definition of "death benefit dependant" as set out in section 302-195 of the *Income Tax Assessment Act 1997* ("ITA Act 1997"), no tax will be payable.

If superannuation death benefits are paid to the legal personal representative and then to a discretionary trust, the legal personal representative will be responsible for paying tax on the taxable component of the death benefit, unless all of the beneficiaries of the discretionary trust fit within the definition of "death benefit dependant" as set out above.

What action can a member's attorney take on behalf of the member?

An attorney appointed under an enduring power of attorney in NSW (or the equivalent in other states/territories) may have the same capabilities as the individual in relation to superannuation death benefits.

The first consideration must be to check the trust deed for the fund as some will specify whether they will accept an attorney acting on the member's behalf at all, and if so what an attorney may or may not do.

Where a trust deed is silent, many fund trustees will allow an attorney to undertake the tasks such as the following without reservation: making a contribution, withdrawing a benefit, rolling over or transferring benefits to another fund, commencing or ceasing a pension, changing a reversionary beneficiary, varying pension payments, and selecting an investment option (Please note that this is not an exhaustive list).

There has, however, been considerable debate as to whether an attorney may make/revoke/vary/renew a binding death benefit nomination. The position has recently been clarified:⁴

- There is nothing within superannuation legislation that prevents a member's attorney from doing so.
- It is necessary, though, to consider whether the particular fund deed expressly permits, or prohibits, an attorney from doing so, or imposes limitations on the extent to which an attorney may do so.
- It is important to consider whether there may be any conflict of interest and duty, in an attorney doing so. There may be nothing improper per se with the attorney exercising a power which results in him or her receiving a benefit, if the benefit is, in all the circumstances, an inevitable consequence of his or

⁴ *Re Narumon Pty Ltd* [2018] QSC 185.

her proper exercise of the power which produces it. In this regard, the court will look to see whether the member has, as principal, authorised the attorney to confer a benefit of that type on the attorney or a third party. There may be a difference between an attorney extending/renewing a nomination, and making a fresh beneficiary nomination.

Some funds will not accept a nomination provided by an attorney.

As a result of these complexities and given the risk for the member in having their attorney take this action, it is important that solicitors advising a client on their estate planning, where there is superannuation involved, discuss at the time of taking instructions the role that the member may want their attorney to fulfil in relation to death benefits.

How can a claim be made for the death benefit after the member's death?

The process involved, the relevant considerations and the documentation required will differ between superannuation funds and will depend on a number of factors. These factors will include the applicable legislation, the terms of the superannuation fund's trust deed and any current valid beneficiary nomination the deceased had made. Due to the significant differences between types of superannuation funds (and indeed, significant differences between funds of the same type) it is not possible to provide a comprehensive overview of the processes involved.

In some circumstances the trustee of the superannuation fund may have discretion to determine who will receive the superannuation death benefit and in what proportions. In other circumstances the trustee will have no discretion in that regard and the destination of the superannuation death benefits will be determined by a valid binding nomination made by the deceased, the terms of the superannuation fund's trust deed or by the legislation applicable to the fund.

The executor or administrator of a deceased member's estate may, in some circumstances, be subject to a duty to apply to the trustee for the benefit to be paid to the estate.⁵

The first step in claiming a death benefit will usually be to contact the trustee of the superannuation fund to obtain information relevant to claiming a death benefit and to find out what documentation the trustee requires. The documentation required may include a completed death benefit claim form, death certificate of the member, a copy of the grant of probate or administration of the deceased's estate, documents evidencing the identity of the claimant and information as to the identity of all dependants who are entitled to be considered for receipt of the death benefit and whether those dependants wish to be considered.

Depending on the circumstances it may be appropriate to request from the trustee a copy of the trust deed, details of any beneficiary nomination made by the deceased and details of any relevant policies of the fund. This information may assist when collating the information required by the fund and in the formulation of any submissions to the fund as to why the claimant should receive all or part of the death benefit.

It is important to be aware of the role of the AFCA when making a claim for a death benefit. The AFCA is able to deal with complaints regarding the decisions of trustees of non-self-managed superannuation funds as to the distribution of superannuation death benefits amongst beneficiaries or potential beneficiaries (however, strict time limits apply).

⁵ *McIntosh v McIntosh* [2014] QSC 99; *Brine v Carter* [2015] SASC 205; *Brooks v Young* [2018] SASCFC 81, [92]-[94]; *Burgess v Burgess* [2018] WASC 279.

In the case of self-managed superannuation funds, in the absence of a valid binding beneficiary nomination, the matter of control of the fund after the death of the member will be an important matter in the determination of entitlement to death benefits.

Finally, it is important to keep in mind that if a family provision claim is made against the deceased's estate there is the potential for a notional estate order to be made under Chapter 3 of the *Succession Act 2006* (NSW) in relation to a superannuation death benefit which is not paid to the legal personal representative (that is, the executor or administrator of the estate).

Death Benefit nominations

How does a fund member make a beneficiary nomination?

A death benefit nomination is a formal nomination by a member to the trustee of a superannuation fund as to who the intended beneficiary of their superannuation benefits will be upon their death. Depending on the terms of the superannuation fund deed, the nomination can be binding or non-binding and lapsing or non-lapsing.

Before making a death benefit nomination, the trust deed of the fund should be reviewed to check whether nominations are allowed and ensure the proposed form is appropriate and complies with the requirements of the fund. Most retail and industry funds will have a nomination form that they require to be completed and so it is best to ask for that nomination form rather than prepare something bespoke. Self-managed superannuation funds may have a nomination form annexed to the trust deed and will almost certainly have the requirements for the nomination set out in the body of the trust deed. It is therefore important to review the trust deed carefully.

The SIS Act and SIS Regulations permit a trust deed to contain provisions enabling a member to make a binding death benefit nomination. The trust deed may adopt the formal requirements for binding death benefit nominations for a non-self-managed fund which are set out in SIS Regulations s 6.17A. Some of the key formal requirements are below:

- (i) The trustee must provide sufficient information to ensure the member understands their right to make a binding nomination.
- (ii) The nominees must be dependants or the legal personal representative (that is, the executor or administrator of the estate).
- (iii) The proportion payable to each nominee must be certain.
- (iv) The nomination must be in writing, signed by the member in the presence of two witnesses who are over 18 and not mentioned in the nomination.

SIS Regulations s 6.17A also states that unless revoked by the member, a binding death benefit nomination will lapse after three years or such shorter period as the fund's deed may specify (but note this does not apply to self-managed superannuation funds).

It is important to be aware that the trust deeds of some retail superannuation funds permit members to make non-lapsing beneficiary nominations which are expressed not to lapse after 3 years. These nominations may or may not be legally binding on the trustee – it depends on the terms of the applicable trust deed.

What types of beneficiary nominations can be made?

Most superannuation funds allow members to nominate how they would like their superannuation death benefits to be dealt with by the trustee of the fund in the event of the member's death. It is important to review the applicable trust deed of the superannuation fund to determine:

- (i) whether the fund permits death benefit nominations; and
- (ii) if so, the type of nomination permitted; and
- (iii) any requirements for the form and service of the nomination.

Some funds do not allow members to make nominations which are legally binding on the trustee. Instead, they may only allow members to make non-binding nominations (sometimes referred to as 'preferred nominations'). The trustee retains the discretion to not follow non-binding nominations.

It is important to look beyond the language used by the fund and ascertain the true legal effect of the nomination. Ask yourself the question, "Is this nomination truly binding on the trustee of the fund or can the trustee determine it is invalid for some reason?"

For example, some funds retain discretion for the trustee to not follow a nomination made by a member if the member enters into a domestic relationship after the nomination is made.

Check the trust deed to determine if the nomination will lapse after a period of time (commonly three years). Some funds offer members the ability to make non-lapsing nominations, although be aware that the terms of the fund's trust deed may mean that these non-lapsing nominations are not legally binding on the trustee of the fund.

Finally, be careful to follow the governing rules of the fund when completing and lodging any death benefit nomination forms. Some funds specify that black pen, capital letters and no staples are to be used on the nomination form. Binding nominations may require two witnesses who must watch the member sign in their presence. Most binding nominations need to be forwarded to the fund trustee by post. Once again, each fund has its own rules and there is no substitute for closely reading the applicable trust deed before completing the nomination form.

If in doubt, email the fund and keep a record on file of your question and the fund's response.

Who can be validly nominated as a beneficiary of superannuation death benefits?

The terms of the trust deed for the member's superannuation fund specify the persons who may benefit from the member's death benefit. Usually, superannuation death benefits can be paid to a dependant of the deceased member or their legal personal representative (the executor or administrator of the estate of the deceased member). These terms are usually defined in the trust deed. Commonly, the definitions in the SIS Act are adopted, although the trust deed should always be checked to ascertain if that is the position with the particular fund.

Section 10 of the SIS Act defines 'dependant' to include: (i) spouse of the member ('spouse' includes a de-facto partner and a same sex partner); (ii) children of the member (child or children includes adopted children, step children, ex-nuptial children, a child of the principal person's spouse (for the period that the child's parent remains the principal person's spouse), and any other person deemed to be a child of the principal person under the *Family Law Act 1975*); and (iii) a person with whom the member was in an interdependent relationship at the time of their death. 'Interdependent relationship' is defined by the SIS Act as a close personal relationship between two people who live together, where one or both provides financial, domestic and personal support of the other.

The definition of 'dependant' is inclusive, and a person who is dependent on the member at the time of death need not also fit in one of the above categories to be a recipient of superannuation death benefits.

Note that while dependents under the SIS Act may be the recipient of superannuation death benefits, they may not be entitled to receive them tax-free under the ITA Act 1997.

On what basis can a binding nomination be challenged after the member's death?

Depending on the terms of the trust deed, the process for making a binding nomination can be technical. It may resemble the process for will making (such as requiring the signing of a document in writing before two independent witnesses). The failure to properly observe the process is a basis for challenging the validity of the nomination (although, depending on the terms of the fund deed, a notice containing various nominations, of which one or more is in favour of a person who is not a dependant or legal personal representative of the deceased member, may nevertheless be binding on the trustee of the fund, to the extent that the person(s) nominated in it are the member's dependant or legal personal representative).⁶ Other examples of the basis for a challenge are:

- (i) The nominated person wasn't eligible because the person didn't fit the description of an eligible beneficiary contained in the trust deed that existed at the date of the member's death. The eligible beneficiary must usually be a dependant or legal personal representative. That description must be met at the date of the member's death and at the date of payment.
- (ii) Depending on the terms of the relevant trust deed, the nomination must dispose of all of the member's death benefit to one or more eligible persons.⁷ (Sometimes the trust deed can provide otherwise.)⁸
- (iii) The nomination was not received by the trustee of the fund before the member's death.⁹
- (iv) The nomination was not made voluntarily.¹⁰
- (v) The nomination was made at a time when the member lacked mental capacity¹¹ or legal capacity.
- (vi) By reason of the application of the forfeiture rule.¹²

⁶ *Re Narumon Pty Ltd* [2018] QSC 185, [50], [92].

⁷ Examples of successful challenges on this basis include D13-14\149 [2014] SCTA 42.

⁸ An example of a trust deed which provides otherwise is that which is relevant to the decision in D1617\065 [2016] SCTA 335, [20]. See also *Re Narumon Pty Ltd* [2018] QSC 185, [50], [92]; D16-17\149 [2017] SCTA 38.

⁹ Examples of successful challenges on this basis include D11-12\066 [2012] SCTA 27, D12-13\017 [2012] SCTA 71, D13-14\056 [2013] SCTA 137 and D15-16\112 [2016] SCTA 214, [32]. See also *Perry v Nicholson* [2017] QSC 163 and *Cantor Management Services v Booth* [2017] SASCFC 122. However, note D16-17\050 [2016] SCTA 318 and D14-15\103 [2014] SCTA 247, [17], [30] to the contrary.

¹⁰ In D17-18\120 [2018] SCTA 21 it was argued that the binding nomination was produced by duress, undue influence and amounted to unconscionable conduct: [48]. Other common bases for legal redress based on lack of voluntariness are fraud, misrepresentation, breach of fiduciary duty as well as *non est factum*.

¹¹ See D14-15\172 [2015] SCTA 31; D16-17\004 [2016] SCTA 274; D16-17\124 [2017] SCTA 13 and D1617\147 [2017] SCTA 36.

¹² *In the Estate of the Late Fiona Ellen Fitter & The Forfeiture Act 1995; Public Trustee of New South Wales v Fitter* [2005] NSWSC 1188; 97\111 [1997] SCTA 111; D16-17\116 [2017] SCTA 8.

Taxation of superannuation death benefits

Who is a dependant for superannuation death benefit tax purposes and what are the benefits of ensuring superannuation death benefits are received by a dependant for tax purposes?

Superannuation lump sum death benefits are tax free if paid to a “death benefits dependant” for tax purposes.

A “death benefits dependant” is defined in section 302-195 of the ITA Act 1997 as:

- The deceased persons spouse or de facto spouse;
- The deceased persons ex-spouse or ex-de facto spouse;
- The deceased persons child aged under 18 years of age;
- Any other person who the deceased person had an interdependency relationship just before he or she died; or
- Any other person who was dependent on the deceased person just before he or she died.

An interdependency relationship exists if two people:

- have a close personal relationship;
- live together; and
- provide each other with financial support or domestic support and personal care.

Note that the definition of a “death benefits dependant” under taxation law (i.e. who can receive a death benefit tax free) is slightly different to the definition of a “dependant” under superannuation law (i.e. who can receive a death benefit).

What are the taxation consequences if superannuation death benefits are paid to the estate?

When superannuation death benefits are paid directly by the trustee of the fund to a dependant who is not a death benefits dependant (for example a child of the member who is over 18 and not a dependant of the deceased at death), the trustee of the fund will be responsible for calculating and deducting from the payment any superannuation death benefits tax. When superannuation death benefits are paid to the legal personal representative (that is, the executor or administrator of the estate), the trustee of the fund does not deduct any tax but provides the legal personal representative with a statement setting out the taxable components of the payment.

It is the responsibility of the legal personal representative to pay any superannuation death benefits tax from the estate before it is distributed. If superannuation death benefits are paid to the legal personal representative and then to a “death benefits dependant” as set out in section 302-195 of the ITA Act 1997 no tax will be payable. If, however, any part of the superannuation death benefit is payable under the will or on intestacy to a beneficiary who does not fall within that definition, the legal personal representative will be responsible for declaring and paying tax on the taxable component of the death benefit.

If tax is payable, what amount will be payable?

The amount of tax payable on superannuation death benefits passing to a recipient who is not a death benefit dependant for tax purposes will be calculated at different rates on the taxable components of the death benefit that were taxed or untaxed in the fund. More

Self-managed Superannuation Funds

What are the main differences between SMSFs and other types of funds?

Self-Managed Super Funds (“SMSFs”) are regulated superannuation funds where:

- There are no more than four members (but note it has been announced by the Commonwealth Government that this number may be increased to six);¹³
- All members are trustees or directors of the trustee company;
- All trustees or directors are members (except there may be a non-member trustee or director of a single member fund);
- No members are employees of other members (unless they are relatives); and
- No trustee of the fund is remunerated for that role.

SMSFs differ from other types of funds in a number of ways, including:

- They are regulated by the ATO, not by APRA;
- There is no recourse to the Superannuation Complaints Tribunal; and
- Section 59 of the SIS Act and regulation 6.17A of the SIS Regulations do not apply to SMSFs, unless ‘imported’ by the terms of the SMSF’s deed.¹⁴ This means that the governing rules of a SMSF may permit members to make death benefit nominations that are binding on the trustee, whether or not in circumstances that accord with the rules in regulation 6.17A of the SIS Regulations. Importantly, there is no requirement that a binding death benefit nomination lapse after three years.¹⁵

What are the different SMSF control structures?

SMSFs can have between one and four members (but note it was announced by the Commonwealth Government in April 2018 that the upper limit may be increased to six). The main difference between an SMSF and other superannuation funds is that the members of an SMSF are also the trustees of the fund, or otherwise they are the directors of the corporate trustee.

For a fund with more than one member, if the SMSF has a corporate trustee then each director of the company is a member of the fund. If the trustees of the fund are individuals then each individual trustee is a member of the fund.

For single member funds the requirements are as follows:

If there is a corporate trustee, the member must be the sole director of the company or one of only two directors. If there are two directors and the fund member is an employee of the other director, the fund member and the other director must be relatives.

If there is no corporate trustee the fund must have two individuals as trustees. If the fund member is an employee of the other trustee, the fund member and the other trustee must be relatives.¹⁶

Why is it so important to consider who will control the SMSF when you die?

A member of an SMSF needs to consider who will control their SMSF if they die. This is because the person in control of the SMSF may (subject to any binding

¹³ The Hon. Kelly O’Dwyer MP, ‘Address to the SMSF Expo, Melbourne’ (Media Release, 27 April 2018).

¹⁴ *Munro v Munro* [2015] QSC 61; (2015) 306 FLR 93; *Re Narumon Pty Ltd* [2018] QSC 185, [35]-[45].

¹⁵ SIS Act s 59; SIS Regulations s 6.17A.

¹⁶ Further information can be found at <https://www.ato.gov.au/super/self-managed-super-funds/setting-up/choose-individual-trustees-or-a-corporate-trustee/>.

death benefit nomination) have the ability to deal with the deceased member's death benefits as they see fit. In the absence of a binding nomination, the person left in control of the SMSF may decline to follow the deceased's non-binding nomination and/or decide to pay the death benefits to themselves directly (as was the case in *Katz v Grossman* [2005] NSWSC 934 and *Ioppolo & Hesford v Conti* [2013] WASC 389).

When acting for clients with an SMSF, it is important to:

(i) Ensure the estate plan transfers control of the SMSF (and the power to pay death benefits) to the people the client wishes;

(ii) Consider whether the testator's will should adjust the share a beneficiary will get under the will if he/she has received a direct payment of superannuation death benefits; and

(iii) Consider whether a binding death benefit nomination should be made.

When might it be desirable to consider amendment to SMSF trust deed?

As virtually every SMSF deed will be different it is not possible to come up with an exhaustive list of potential amendments to an SMSF trust deed. It may, however, be desirable to consider amending the SMSF trust deed if, for example, it:

- does not allow for binding death benefit nominations;
- specifies that binding death benefit nominations lapse after three years;
- (depending on the extent to which a member, properly advised, wishes their attorney to make, extend, alter or revoke binding death benefit nominations), prohibits an attorney doing so, or is silent as to whether an attorney may do so; or
- does not provide a mechanism for the appointment of a member's attorney or financial manager to the role of trustee if a member who is an individual trustee loses capacity.