

SUPERANNUATION & DEATH BENEFITS

For many people, superannuation and the associated death benefit, if any, will be the most significant financial resource that they have.

A public fund is usually administered by a large national financial/trustee institution. Alternatively, superannuation interests may be held through a self-managed superannuation fund (“SMSF”). These funds are growing more and more popular, particularly with small to medium business proprietors.

For estate planning purposes, your interest in a superannuation fund before you retire is not an asset directly under your control.

Payment of death benefits upon your death

As a member of a superannuation fund, there are a number of options open to you when dealing with your interest in the fund as at the date of your death.

Non-Binding Death Benefit Nomination – Is a guideline only for the trustee in terms of who to pay a death benefit to. The trustee isn’t obligated to follow your instruction. This may allow some flexibility, however, unintended distributions may occur.

Some advantages and disadvantages include –

- Allowing some flexibility and the trustee’s discretion;
- Provides trustees with guidelines as to how the member wanted their benefit paid and to whom, but they still have room to move and to consider other circumstances and factors;
- As they aren’t binding on the trustee, the trustee could use their discretion inappropriately;
- Unintended distributions that are not wanted by the deceased member may occur;

Binding Death Benefit Nomination – Where valid, this results in the trustee being obligated to follow the instructions in the nomination. It states who benefits are to be paid to and in what proportion. They provide certainty and peace of mind that your benefits will be paid as you intend.

The nomination needs to be in writing with all the beneficiaries nominated being dependants on you just before your death. Alternatively you may nominate your legal personal representative (executor of your Will).

These nominations can be used to defeat family inheritance claims by ensuring the death benefit bypasses your estate.

Some industry funds do not offer this option to members. Most recently established SMSF will offer a binding death nomination, although older ones may not. However, an amendment to the deed can be effected allowing this to occur.

The advantages and disadvantages of a binding death benefit nomination include –

- They provide certainty and peace of mind for the member that their benefits will be paid as they intend.
- Needs to be valid and current and completed in strict accordance with the Trust Fund Deed.
- By law you can only nominate an eligible dependant or your executor. An eligible dependant is your spouse (including de facto), child (including adopted, adult, step), someone with whom you have an interdependent relationship.
- May not be ideal outcome for beneficiary due to tax and asset protection factors of the beneficiary.
- Some flexibility is lost as to estate/tax planning at death.
- Public funds will have lapsing Binding Death Benefit Nominations which lapse after 3 years.
- Can use to direct payment to your estate thus enabling your superannuation death benefit to be dealt with pursuant to your Will. This will allow for non-dependants to benefit if you wish.
- May be useful when dealing with blended families.

Reversionary Pensions – Pension payments continue to your dependent beneficiaries. By putting this in place, upon death, the income payments will continue to be made to your beneficiary. The only people who can become a reversionary beneficiary are a spouse or former spouse, a child aged less than 18 years or any person where an interdependency relationship (defined by law) existed just prior to death.

A member can establish a reversionary beneficiary when they commence an income stream from the fund. By putting in place a reversion at the commencement of an income stream, it means that upon their death the income payments will continue to be made to the specified beneficiary (provided they are able to be a reversionary beneficiary under the relevant superannuation and tax laws).

Superannuation Complaints Tribunal (SCT)

The SCT is an independent tribunal to deal with complaints regarding superannuation funds. If a beneficiary feels that they have not been adequately provided for or missed out on a superannuation death benefit, they can apply to the SCT for them to review the trustee's decision. This wouldn't be available if a BDBN was in place or the trust deed provided for the payment of a death benefit. After review, the SCT has the power to either overturn or confirm the trustee's decision with respect to that benefit.

The SCT does not have jurisdiction over SMSFs.

An application to the SCT for the review of a trustee decision must be lodged within 28 days of the trustee's decision.

Conclusion

The most appropriate means to instruct the trustee of the fund will depend upon your particular situations. Individual circumstances must be considered. It is difficult to predict all circumstances that will apply at death and appropriate legal advice from Welden & Coluccio Lawyers should be considered at an early stage.

There will be significant tax considerations with any death benefit payment where such payment is made to non-dependants (including adult children). You must obtain tax advice regarding this.

You should contact Welden & Coluccio Lawyers to advise you on the appointment of a financial attorney or your obligations if you have been appointed.



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