

Superannuation

Death benefits and binding death benefit nominations

Key points

- When you die, your superannuation does not automatically form part of your estate and may not be distributed in accordance with your Will
- If you do not make a binding death benefit nomination, then the trustee of the fund will decide what happens with your superannuation when you die
- If you want to make sure your superannuation is distributed to a person of your choosing following your death, you should make a binding death benefit nomination

Superannuation is now a major asset for most Australians, so it is essential that your superannuation is dealt with properly as part of your estate planning strategy. If they are not consistent, a great superannuation strategy and an equally great estate plan can lead to some unintended and often undesirable consequences.

Who can receive my superannuation after my death?

1. Many people assume that their superannuation will be dealt with under their Will, but this is not necessarily the case.
2. On your death, the trustee of your superannuation fund must pay out your balance from the fund (death benefit). The *Superannuation Industry (Supervision) Act 1993* (SIS Act) gives the trustee of a fund a number of choices. Unless you have a binding death benefit nomination or reversionary pension in place, the trustee will make the decision.
3. Death benefits can be paid:
 - (a) as a lump sum or a pension
 - (b) to your legal personal representative (executor) or your dependants.
4. If the benefit is paid to your legal personal representative, it will be distributed in accordance with your Will.
5. Your dependants include:
 - (a) a spouse (includes de facto spouse and same sex spouse)
 - (b) children of any age
 - (c) any person with whom you have an interdependency relationship (you live together and have a close, personal relationship and a degree of dependence)
 - (d) financial dependants.
6. It is essential to check the trust deed for the superannuation fund as it could limit the range of people the trustee can pay to or exclude the legal personal representative.
7. Death benefits can be paid as pensions to some beneficiaries.

What are the tax consequences?

8. Whether there is any tax payable on your death benefit depends on who receives the benefit.
9. A lump sum death benefit:
 - (a) if paid to a tax law dependant, will be tax free
 - (b) if made to a non-tax law dependant, will be taxed based on the different components in the fund (generally at 15% plus Medicare levy on the taxable component).
10. If the death benefit is paid to your legal personal representative, the benefit will be tax free to the extent that a tax law dependant receives the amount under your Will.

11. Tax law dependants include:
 - (a) spouses
 - (b) children under the age of 18
 - (c) a person who was in an interdependency relationship or financially dependent on you just before your death.
12. If a death benefit is paid as a pension, it will be tax free if the deceased or the recipient are over 60. Otherwise it will be taxed as a normal pension.
13. If there is life insurance in the fund, the rate of tax if it goes to a non-tax-law dependant is generally 30% plus Medicare levy (with an allowance for future service).

Can I decide who will get my superannuation after my death?

14. For most superannuation funds, it is possible for you to sign a binding death benefit nomination that specifies how any superannuation benefit will be paid on your death. This takes away the trustee's discretion.
15. With self-managed superannuation funds, it is important to check the terms of the trust deed to ensure they allow a binding death benefit nomination, and then to follow the rules precisely. This is something that should be done by an experienced estate planning lawyer.
16. Binding death benefit nominations need to be considered as part of an estate plan and should not be done as a matter of course. The trustee cannot ignore a valid binding death benefit nomination.
17. As the payment of a superannuation death benefit is one of the only decisions that can be made with the benefit of hindsight, it is sometimes better to maintain as much flexibility as possible. This could allow the trustee to pay the superannuation in the most tax effective way at the time.
18. For self-managed superannuation funds, it is vital to ensure that the right person is making the decision, so it is important to consider who becomes the trustee after your death.
19. Binding death benefit nominations can be very effective:
 - (a) if there is a risk of a dispute over your superannuation
 - (b) where there is a risk that the person who might be making the payment decision will not follow your wishes
 - (c) to keep the superannuation outside of your estate if there is a concern about a Will challenge.
20. Binding death benefit nominations can be dangerous, including where they force the benefit to be paid to:
 - (a) individuals rather than testamentary trusts set up in your Will
 - (b) your estate, where a challenge is likely to the Will or your estate is insolvent
 - (c) someone involved in bankruptcy or family law proceedings.

What about reversionary pensions?

21. A reversionary pension is one that continues to another beneficiary (usually your spouse) automatically on your death.
22. If the documents are properly set up and the trust deed for your superannuation fund allows for a reversionary pension, there is no death benefit decision for the trustee to make. The pension will automatically continue to the beneficiary.
23. It is vital to check that all reversionary pensions and binding death benefit nomination documents are properly in place and comply with the terms of your trust deed. We will ask for all of these documents when we are assisting with your estate planning.

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