

Estate Planning for your Superannuation

Upon death, superannuation benefits do not automatically come under the scope of your Will, unless you have specifically nominated your estate as the beneficiary. The Superannuation Industry (Supervision) Act - or SIS Act - requires that death benefits are paid only to a member's dependants or the member's legal personal representative (LPR).

Steps can be taken to ensure that your wishes are considered in the payment of your superannuation benefits to your preferred beneficiaries.

Dependants under SIS Legislation

The definition of a dependant for superannuation purposes differs slightly from the definition used by the Australian Taxation Office. Superannuation trustees are able to pay death benefits to dependants as follows:

- The member's spouse, including de facto and same sex but excluding a previous spouse(s)
- Any children of the member, including adopted, step, ex-nuptial and adult children
- Any other person with whom the person has an interdependency relationship

Many death benefit nominations made by members of superannuation are not binding on the superannuation fund trustee. This means that the trustee of the super fund may exercise a discretionary power to determine how the benefit is paid and to whom. These nominations are referred to as "Non Binding Nominations".

A "Binding Nomination" means the trustee is bound to pay the superannuation benefits in accordance with the instructions within the nomination, as long as the binding nomination is legal and binding at the time of death.

A death benefit will be binding on the trustees if:

- The nomination form includes the name of each person(s), or class(es) of person (e.g. spouse), and the allocation of the death benefit amongst nominees is clear;
- Each death benefit nominee is a legal personal representative or dependant of the member;
- The nomination form is dated and signed by the member in the presence of two adult witnesses, neither of whom is a nominee named in the notice; and
- The nomination form contains a declaration by the witnesses, stating that the member has signed and dated the nomination form in their presence; and
- The nomination is valid.

Upon death:

1. The beneficiary must still be dependant just prior to the member's death
2. The beneficiary must not have died prior to the member's death
3. The nomination must still be valid. So if lapsing, it has been signed within 3 years prior to death

If all the above conditions of a binding nomination are not met it will be treated as a non-binding nomination.

It is important to consider the role of both binding death benefit nominations and non-binding nominations in your estate plan.

Binding v Non-Binding

Generally binding nominations can provide greater certainty over the destination and proportion of death payments (and reduce the risk of legal challenge upon death) but tend to be more rigid compared to non-binding nominations.

The trustee of a superannuation fund is able to accept a 'binding death benefit nomination' from a member provided it is in the prescribed form and the trust deed allows for binding death benefit nominations to be made. This alleviates the superannuation trustee from using their discretion to determine who should receive the death benefit following the death of a member.

If a trustee exercises the non-binding option, the trustee can only pay the benefit to a non-dependant (eg a non-financially dependant relative) only if no LPR or SIS Act dependant can be found (SISR 6.22).

However, if the trustee accepts a binding nomination the member cannot nominate a person who is not his or her SIS Act dependant, even if he or she has no dependants or LPR. This means that the member cannot validly nominate a non-dependant as his or her beneficiary.

Binding death benefit nominations are of most benefit if the potential exists for a member's deceased estate to be subject to legal challenge.

They may also be appropriate in blended family situations (e.g., situations involving children from previous relationships, members in second marriages etc), or simply where a dependant cannot be trusted with lump sum benefits and the member wants to ensure that only an income stream can ever be received.

The non-binding nomination provides the trustee with discretion to pay out the death benefits to dependent beneficiaries after taking into account any changing circumstances. This could overcome potentially inequitable situations without the on-going administrative obligations of binding nominations.

In the case of self managed superannuation funds (SMSFs), SMSF trustees can choose whether or not to accept binding death nominations or non-binding nominations in favour of SIS dependants or the deceased's estate, subject to the governing rules of the fund's Trust Deed. Alternatively, the actual Trust Deed can be drafted in such a way as to include a member's specific nomination within the governing rules. It can be lapsing or non-lapsing

Tip: The SMSF Trust Deed can also be drafted so that a binding nomination is invalid upon divorce, separation where a non-dependant is nominated or where a nominated beneficiary pre-deceases the member or becomes a disqualified person (eg, bankrupt). The trust deed may also be drafted so that binding nominations are invalid on these specified events as well as upon subsequent marriage or remarriage.

Binding nominations are becoming the standard rather than the exception for most superannuation members. The greater degree of certainty it provides to members is, in most cases, worth the administration obligations. Payment of death benefits may also be dealt with more efficiently by superannuation trustees when a binding nomination is in place.

Regardless of the type of nomination you make you should regularly review it to ensure it reflects your current wishes.

RBS Morgans advisers are qualified to help you put in place an appropriate plan to help you achieve your financial goals.

For more information, contact your RBS Morgans adviser or for your nearest office visit www.rbsmorgans.com

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