

Estate planning and your superannuation death benefits

There is a lot that can be written about the entitlements of a deceased member of a superannuation fund (**death benefits**) but one of the most commonly misunderstood issues is the interaction between the member's will and those death benefits.

The following 4 questions, directed at self managed superannuation funds (**SMSF**), may help clarify this.

1. Are death benefits personal assets of the member?

The answer to this question is that unlike an interest in a family home, no. Therefore, without something more than a provision under the member's will saying "I give my death benefits equally to X and Y", there is no certainty at all that X and Y will inherit them equally.

The question remains as to whether those benefits will actually form part of the estate of a deceased member.

2. How can a member control who gets their death benefits?

When a member dies, our superannuation laws (**SIS Act**) require that their death benefits be paid to their SIS dependents (spouse, children, financial dependent, interdependent) **or** their legal personal representative (the executor of their estate), but not necessarily in accordance with the intentions of the deceased member.

If a member wants to control the outcome as to whom their death benefits are paid to and in what proportion, assuming that the trust deed permits it, they will need to complete:

- either a binding death benefit nomination in accordance with the formal requirements of section 59(1A) and regulation 6.17A of the SIS Act; or
- a less formal but equally binding nomination to the trustee permitted by section 59(1) of the SIS Act.

The ATO in SMSFD 2008/3 supports the view that a member of an SMSF can make a binding non lapsing but revocable death benefit nomination but only if the trust deed is appropriately drafted.

Our preference is for a nomination permitted by a section 59(1) nomination, as it does not need to comply with any statutory formality and it does not need to be renewed every 3 years (ie it is non lapsing but revocable).

In each case the trust deed must permit a nomination and it can only be in favour of a SIS Act dependent or the member's estate.

If the death benefit is paid to the member's estate, the will of the deceased member can then determine who receives them, including a non SIS Act dependent.

If the death benefits are intended for a non SIS Act dependent, they first need to be paid to the estate of the deceased member and their distribution then controlled by a provision in the will.

If no consideration is given to this issue, it is quite possible that the trustee of the fund could pay the death benefits to:

- an unintended SIS dependent of the deceased member (either in whole or in part) as in the case of *Katz v Grossman* [2005] NSWSC 934 (16 September 2005); or
- the estate of the member, where if no specific provision is made under the will for the payment of the benefits, they will form part of the residue of the estate and be distributed accordingly.

In summary, the answer to the question of how does a member control who gets their death benefits is:

- look at the SMSF trust deed to see what provision it makes for a section 59(1A) nomination or a nomination permitted by a section 59(1);
- if no provision is made, depending on the desired outcome, the SMSF trust deed may need to be updated;

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- if the benefits are to pass to a non SIS dependent and the SMSF trust deed permits for either a section 59(1A) nomination or a nomination permitted by section 59(1) or both, a nomination will first need to be made that the death benefits be paid to the estate where the will can provide what happens next;
- if the benefits are to pass to a SIS dependent and the SMSF deed either permits for a section 59(1A) nomination or a nomination permitted by section 59(1) or both, a nomination can be completed directly in favour of the SIS dependant and the benefits do not need to form part of the estate at all.

3. What role does a member's will play in controlling who gets their death benefits?

If a section 59(1A) nomination is made, the member's will only plays a role if the nomination is made in favour of the member's estate.

If a nomination permitted by a section 59(1) is permitted under the SMSF trust deed, the member's will could play 2 roles:

- the first is to make the nomination (but only if the trust deed specifically allows for that to happen including that it can be done via the member's will); and
- the second is to determine who gets those benefits if they are paid to the estate of the deceased member.

Once in the estate, the benefits will be paid as provided under the will. If no specific provision is made, they will form part of the residue and be distributed accordingly.

4. What should you do when using a nomination?

In using a nomination, make sure that:

- your SMSF trust deed permits them;
- you comply with the terms of the trust deed and the superannuation law in making it;
- it aligns with what you want to do in passing your wealth on your death, including under your will;
- you consider using a provision in the will that ensures after tax equality between those who do and don't receive death benefits (including for tax reasons); and
- you constantly review it for its currency.

Not ready to make a nomination? - Consider a guardianship provision for the SMSF trust deed!

Some SMSF fund members may not be ready to make a death benefit nomination but may still feel that something is needed to protect against their death benefits not being paid as they would want.

If that happens and the SMSF trust deed permits, a person with the power to veto the payment of a death benefit can be appointed by the member.

That person would of course have to have the complete trust of the member.

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