



What happens to my Superannuation when I die?

Many people do not realise that superannuation is an asset which does not automatically form part of your estate when you die.

Superannuation is likely to make up a substantial part of a person's assets. This is particularly so because many superannuation funds include a life insurance component that is added to the persons contributions balance when the person dies.

Your superannuation fund will likely be an industry fund, a retail fund, an employer created fund or a self-managed superannuation fund (SMSF). Irrespective of the type of superannuation fund, your superannuation is held for you in a trust by the Trustee of your superannuation fund and is governed by the rules of that fund set out in the Trust Deed and by Superannuation laws, being the Superannuation Industry Supervisory Act (SIS Act).

A person's superannuation benefit must be paid from their superannuation fund when that person dies. The SIS Act only permits the superannuation benefits to be paid either to the person's dependants, or to their legal personal representative (ie their estate). Subject to this overriding requirement, generally the Trustee of the superannuation fund has a discretion to decide which of these should receive the person's death benefit, and how it should be paid. This involves a 2 step process by the trustee:

Step 1: The Trustee must identify the person's dependants and also the Executor of the person's Will or, if the person died without a Will, the Administrator of the person's estate.

"Dependants" for the purposes of the SIS Act are limited to:

- (a) the deceased's spouse;
- (b) the deceased's children (including adopted children, step children and ex-nuptial children);
- (c) people who are, at the date of the deceased's death, actually financially dependent on the deceased and in an interdependency relationship with the deceased.

Step 2: The Trustee must then determine, having regard to all relevant facts and circumstances, who amongst the identified dependants and the legal personal representative will receive the death benefit, and in what proportion, and in what manner.

Can I control the Trustee's discretion?

Yes you can by making a Death Benefit Nomination. This is only possible if the Trust Deed for your superannuation fund makes provision for it, but most do. A Death Benefit Nomination is a notice you give to the Trustee of your superannuation fund requesting the payment of your death benefits to either your estate, or to one or more of your specified dependants.



There are usually 2 types of nominations:-

1. a Binding Nomination which binds the trustee to comply with it.
2. a Non-Binding Nomination which is merely an expression of your wishes which the Trustee can exercise its discretion whether to follow or not.

Your Death Benefit Nomination will be binding if the following conditions are met:

1. The rules of your superannuation fund must permit it.
2. The persons your nominate must be your dependants or your estate, and the allocation you make between them must be clear.
3. It must be in writing, signed and dated by you in the presence of two witnesses aged over 18, neither of who's nominated to receive your benefit.
4. No more than 3 years has passed since you made the nomination. This usually does not apply to SMSF's.

It is important to remember that if you fail to comply with these conditions (for example; if you nominate a person who is not a dependant, if you sign it incorrectly or more than 3 years lapses) your nomination becomes non-binding and the Trustee of your superannuation fund can exercise its discretion to decide who gets your benefits and your intentions may not be followed.

There are situations when you may want your death benefit to be paid to your estate, such as the person you want to receive your death benefit is not a 'dependant', or you want the benefit to form part of a testamentary trust for asset protection, tax planning or other control purposes. In these cases, you should make a binding nomination in favour of your legal personal representative.

What to do now?

To ensure you have binding nomination arrangements in place for your superannuation, you should:

- Check your fund allows binding nominations;
- Check the persons you wish to nominate are eligible dependants;
- If you plan to nominate your legal personal representative, make sure your Will is up to date and contains appropriate provisions.
- Complete, date and sign a binding nomination form in the presence of two witnesses who are not beneficiaries and send the form to your fund.
- If your nomination is lapsing, make sure you review and renew it before it expires.

Conclusion

If you or someone you know would like advice regarding your Will or regarding an Estate, please contact [Lisa Delalis](mailto:Lisa.Delalis@batemanbattersby.com.au) on 02 4731 5899 or email us at willsestates@batemanbattersby.com.au.