



## SUPERANNUATION – WHO GETS YOURS WHEN YOU DIE ?

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If anything in this Article raises a question or concern for your personal circumstances then call us or email us immediately at [derek@munrothompson.com.au](mailto:derek@munrothompson.com.au) or [peter@munrothompson.com.au](mailto:peter@munrothompson.com.au)

### A Trustees Discretion

Generally, the Trustee of a Superannuation Fund has an absolute discretion as to who, out of a limited range of people, should receive what part of your Superannuation Death Benefit.

That limited range includes a spouse (including former spouses), children, persons with relevant dependency and your estate.

When an Application to commence a superannuation account is completed, an Applicant is often asked to nominate a preferred beneficiary. This is not usually more than a one line entry in the Application. This simple form of nomination does not bind the Trustee.

A direction in a Will (regardless of how specific) does not bind the Trustee either.

### Can the Trustee's Decision be challenged?

A Trustee's decisions (except those of a Trustee of a Self Managed Superannuation Fund - SMSF) can be reviewed by the Superannuation Complaints Tribunal (SCT). Unfortunately, this process can be long, difficult and uncertain.

The decisions of the Trustee of a SMSF may be subject to review by the Supreme Court. Unfortunately this process is also long, difficult and uncertain.

### How can you have any control?

Sometimes the Trustee's absolute discretion cannot be avoided. Sometimes the Rules for the Fund might even specifically direct what happens to a death benefit, in which case neither you nor the Trustee have a say in the decision.

However, you can have some control over the Trustee's decision and the most common method for doing so is by using a Binding Death Benefit Nomination (BDBN) if the Rules for the Fund allow for BDBNs.

A BDBN properly made, will bind the Trustees who must then pay the death benefit as directed in the BDBN.

The type of BDBN available depends on:

1. The type of Superannuation Fund;
2. The terms of the Trust Deed or Rules for the Fund;
3. The *Superannuation Industry (Supervision) Act 1993* and any other relevant legislation; and
4. The particular Trustee's preferences or protocols, in the case of non SMSFs.

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### **If it is available then should a Binding Death Benefit Nomination be made?**

The answer will very much depend on a person's circumstances.

A BDBN is often made because of the certainty that the BDBN gives.

However there is a downside to that certainty that needs to be carefully considered.

That downside is that circumstances may change between the making of the BDBN and death (or incapacity). This change in circumstances might make the BDBN entirely inappropriate, especially from a tax perspective.

Further, in the case of a SMSF, the control held over the identity of the Trustee often gives rise to other planning opportunities.

These opportunities include the possibility of achieving far better results from a tax perspective when distributing the death benefit.

Consequently in the case of a SMSF there is often a tension between the certainty given by BDBNs and the flexibility available to the Trustee if there is no BDBN.

That tension is often resolved in favour of not making a BDBN.

In that case, very careful attention needs to be given to carefully crafting control of the Trustee.

### **What to consider**

In summary, some of the important considerations when deciding what should happen to your Superannuation Death Benefit are:-

1. Is a BDBN available?
2. If not, then does the Trustee have the usual absolute discretion or do the Trust Deed or Rules provide specifically how the death benefit is to be paid?
3. If a BDBN is available then:-
  - (1) What type is available?
  - (2) Will the Trustee only accept nominations that are worded in a particular manner?
4. Additionally, in the case of a SMSF:-
  - (1) Is sufficient control over the identity of the Trustee possible into the future?
  - (2) Does the benefit of flexibility for the Trustee outweigh the certainty of a BDBN?
5. What are the pre-requisites for a valid BDBN both in respect of:-
  - (1) How the member makes the BDBN;
  - (2) The Trustee's obligations before the BDBN is made; and
  - (3) The Trustee's obligations after the BDBN is received.

In every case, before making a BDBN you must take :-

- (1) legal advice particularly about succession implications, proper drafting and compliance; and
- (2) financial advice particularly about tax implications.