

# Who Gets Your Superannuation When You Die?

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Many of our clients are surprised when they learn that their superannuation does not form part of their estate. The person or people who will receive your superannuation death benefits are not determined by your Will. Rather, it is in the discretion of the trustee of your superannuation fund to determine who will receive your superannuation death benefits and whether the benefits are paid in a lump sum or by some other means such as by way of an allocated pension.

The trustee of your super fund will normally choose from a range of your taxation dependants (e.g. spouse, former spouse, dependent children etc). Most superannuation trust deeds define a dependant as the deceased member's spouse (including a de facto spouse), children (including step children, ex-nuptial children and adopted children) and any other person who was wholly or partially dependant on the deceased member at the date of death.

A number of superannuation funds permit their members to make binding death benefit nominations. If a valid binding death benefit nomination is in force at the time of death, the trustee of the superannuation fund no longer has discretion about who to pay the superannuation entitlements to, but is bound by the nomination. However, it should be noted that many public, industry and government funds do not permit binding death benefit nominations.

If, for example, you are in a second marriage and wish to avoid a possible claim by your previous spouse, you should consider becoming a member of a superannuation fund that permits binding nominations.

The legal requirements for a binding death benefit nomination include:

1. the document must be signed and dated in the presence of two witnesses. A witness can be any person who is over the age of 18 years and who is not a nominated beneficiary; and
2. all binding death benefit nominations last for a maximum of 3 years. Therefore, you must update your binding nomination at least every 3 years.

Sometimes it might be necessary to up-date your binding nomination before the 3 year time limit expires, for example, if your personal circumstances have changed. Failure to document the change of nominated beneficiary of a superannuation death benefit will leave the trustee of the fund with no alternative but to pay the benefit to an unintended beneficiary. Further, if a binding nomination is not up-dated, it may lead to adverse tax consequences. For example, if payment has to be made under a binding nomination to a person who is no longer a "tax dependant", tax of up to 35.1% may be attracted on the payment.

When dealing with your superannuation, you should be aware of two critical estate planning issues, namely:

1. who gets your superannuation when you die; and
2. whether the payment of your superannuation death benefit attracts tax, and if so, at what rate. You should also note that the definition of “dependant” under tax legislation does not always correspond with the definition of dependant under superannuation legislation. For example, a child over 18 years may be considered dependant under superannuation legislation but not under tax legislation.

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