

Binding death benefit nominations

Since 1999, the Superannuation Industry (Supervision) Act 1993 (Act) has allowed superannuation fund members to enter into binding arrangements for the payment of the member's benefits upon death of the member. These benefits are called "death benefits" and the nominations are commonly referred to as "binding death benefit nominations" or "binding nominations" (BDBN).

Prior to the changes to the SIS Act, nominations could be made by members but they were not binding on the trustee of the fund. The trustee was merely obliged to take such nominations into account when distributing benefits on the death of a member.

Are superannuation fund trustees required to offer members the option of making a BDBN?

No, there is no requirement for a superannuation fund (fund) to offer members the ability to make a BDBN.

Members of self managed superannuation funds (SMSFs) will be able to make a BDBN provided the trust deed of the particular fund allows it. If the trust deed does not specifically allow for a BDBN to be made, then the trust deed can be amended to include provisions which allow the trustee to accept and members to make a BDBN in respect of their benefits.

Requirements for BDBNs

To be valid, a BDBN must be in the form required by the Act and the Superannuation Industry (Supervision) Regulations (Regulations).

The Regulations require the trustee to give the member the information it reasonably believes the member will need to understand his or her rights in relation to making a BDBN.

The BDBN itself must—

- be in writing
- state the proportion of the benefit payable to each nominated beneficiary
- be signed and dated by the member in the presence of two witnesses over age 18 years neither of whom is a person nominated to receive a benefit in the BDBN
- contain a declaration, signed and dated by the witnesses stating the member signed the notice in their joint presence, and
- meet the particular requirements of the trust deed.

Please note that the Regulations state a BDBN will expire three years from the date it was first signed, or last confirmed or updated by the member. In the case of a SMSF, it is possible for BDBNs to operate for more or less than three years, depending on the provisions of the trust deed.

To whom can death benefits be paid?

The Regulations provide that a trustee must pay death benefits to a dependant or the legal personal representative (i.e., the estate) of a deceased member.

A dependant for the purposes of the Act includes a spouse, child, financial dependant or any other person in an interdependency relationship with the member. An 'interdependency relationship' will exist where the person has a close personal relationship and lives with the member and where both or either of them rely on the other for financial and domestic support.

Death benefits can be paid as a lump sum or, depending on the age of the dependant, as a pension or annuity.

Advantages and disadvantages

Below is a brief summary of some of the advantages and disadvantages of making a BDBN:

| Advantages | Disadvantages |
|---|---|
| It provides the member with certainty that death benefits will be paid in accordance with his/her wishes. | The member must ensure that the BDBN is reviewed regularly, particularly where the member's circumstances change. If a member dies without updating the BDBN to reflect their current circumstances, then the trustee is bound to follow the BDBN (if it is still valid) regardless if it is appropriate or not. |
| A BDBN limits the trustee's discretion as to payment of death benefits thus making the trustee's job easier and also significantly reducing the possibility of a successful dispute by a disgruntled beneficiary. | If the member loses capacity, then the BDBN cannot be revoked or amended by the member's attorney or legal personal representative. However an attorney appointed under a valid enduring power of attorney may be able to confirm the terms of a BDBN provided there is an express power in the enduring power of attorney authorising the attorney to do so. |

When is a BDBN useful?

Some practical scenarios where a member might choose to make a BDBN are:

1. A member has two children and only one of those children is a member and trustee of the SMSF. The member's intention is to treat both children equally. However, on the death of the member, the child as the sole surviving trustee of the SMSF elects to pay the benefits directly out of the fund for his or her own benefit. This situation could be avoided if the member makes a BDBN compelling the trustee to pay the death benefits in accordance with his or her wishes.
2. A member is divorced and has subsequently remarried, but has children from their previous marriage and wants some protection against a challenge to his or her Will by these children. In circumstances like these, it may be prudent for the member to make a BDBN to ensure the death benefits are paid directly to his or her current spouse. This will avoid the death benefits being paid to the deceased's legal personal representative, forming part of the estate and being subject to a potential family provision application.
3. A member has three children and one of those children is in a long term de facto relationship. The member, for asset protection reasons, has decided to make a Will with "bloodline" testamentary trusts. As part of the member's estate planning they make a BDBN to ensure their death benefits are paid to their estate. This means the superannuation death benefits will form part of the estate assets and be included in the testamentary trusts established for the member's children.

Obtain appropriate advice

With the growth in funds contributed to superannuation, it is important to consider carefully what will happen to those funds on the death of the member. Each member should obtain advice which takes into account his or her particular circumstances and estate planning objectives.

McMahon Clarke Legal specialises in estate planning and wealth management for private clients.
We work with you to develop an estate plan that takes into account your personal circumstances.

For more information contact a member of our private client team on 07 3831 8999 or info@mcmahonclarke.com