

InfoSheet:

Superannuation and Binding Death Benefit Nominations

What happens to superannuation benefits in the event of your death?

Superannuation benefits are often a substantial asset and tax free, or potentially tax free, under current taxation law.

Superannuation benefits are not a Will asset and are not distributed on your death through your Will. The trustee of your superannuation fund may have sole discretion as to how your superannuation benefits are distributed after you die.

Many funds allow you to make a Binding Death Benefit Nomination (BDBN) to ensure your superannuation benefits are paid to the person or persons you wish to benefit.

Did you know that:

- If you have not made a BDBN, the superannuation fund trustee may have absolute discretion as to who receives the proceeds of your superannuation and any death benefit upon your death.
- If you have made a valid BDBN on your superannuation policy and this nomination has not lapsed, then the trustee of your superannuation fund is obliged to pay out the proceeds of your superannuation and any death benefit to those persons nominated by way of your BDBN.
- A BDBN will be valid (if your superannuation fund allows you to make such a nomination) provided the BDBN has been fully completed, correctly signed, adequately witnessed by at least 2 independent adults, properly dated and renewed every 3 years.
- Under a BDBN you are only able to appoint people considered by the law as your “dependants” as beneficiaries of your superannuation.

- Most superannuation funds are subject to the *Superannuation Industry (Supervision) Act 1993* (“the SIS Act”) which states that a BDBN must be made within 3 years of death.
- Your financial advisor should review your BDBN annually for abundance of caution.
- Self managed superannuation funds are not usually subject to the requirement to renew the BDBN every 3 years, but it is still prudent to review them annually.

Some superannuation funds do not permit a BDBN but do permit a Non-Binding Death Benefit Nomination (N-BDBN). A N-BDBN allows you to nominate who you wish the benefit to be paid, however the trustee of your fund is not bound to follow those wishes and may still exercise discretion as to the persons who receive benefits and the amount of those benefits.

Important points in relation to a BDBN

- A BDBN must comply with the fund’s requirements and your lawyer may need to review the fund’s rules or its trust deed to ensure the form of a BDBN is valid.
- Even a relatively minor defect in completing the BDBN form may render the form invalid.
- For best practice, review your BDBN before the 3 year period expires. If you have a financial planner, ask that a regular review date be set at least every 18 months but staged to avoid missing the 3 year anniversary.

A contingent and conditional BDBN?

Most (but not all) funds allow BDBN's to be contingent (if your first nominee dies) and to include conditions (for example, the trustee can disregard the BDBN with the consent of your first nominee).

“BDBN's are quite separate and take precedence over the fund member's Will and are not automatically revoked when the fund member separates or divorces. A Will is however relevant if the BDBN requires all or part of the death benefits to be paid to the fund member's legal personal representative. Like Wills, BDBNs need to cover the possibility of a 1st or subsequent choice of nominee dying before the death benefit is able to be paid – reserve nominees should be included in the fund member's nomination. Some, but not all, trustees allow conditional BDBNs and some accept a lapsing BDBN that expressly permits an enduring power of attorney or legal personal representative to confirm or reconfirm the nomination.”
- Allan Swan, ATP STEP

In a husband/wife/partner (“spouse”) situation it is helpful to make a BDBN in favour of your spouse and to also make provision for the surviving spouse to have the power to vary the BDBN (conditional consent).

This may allow the surviving spouse to:

- take all or part of the benefit as superannuation;
- assign all or part of the superannuation to a tax dependant; and
- if the deceased spouse has a Testamentary Trust Will, to assign all or part of the benefit to a testamentary trust.

If the surviving spouse has his or her own substantial superannuation, or if the deceased's superannuation benefits are quite substantial, the surviving spouse could accrue the deceased's superannuation benefits in a testamentary trust for capital growth.

A BDBN should provide for a second tier of beneficiaries in the event that the first nominated beneficiary dies first or before payment of the benefits to the first-named beneficiary. Often your legal personal representative (executor) will be the second nominated beneficiary, allowing your superannuation funds to be distributed according to your Will.

You may need to negotiate with your fund to ensure your personal requirements are permitted and put in place legally in compliance with the fund's requirements.

Does your Testamentary Trust Will comply?

Kells Testamentary Trust Wills include a superannuation trust which permits any superannuation benefit to be paid pursuant to the BDBN to the trust or trusts set up under the Testamentary Trust Will. If there are tax dependants, superannuation can be paid to the tax-dependant's trust on a tax free basis and other estate assets used to equalise the gifts to the trusts of non-tax-dependant beneficiaries. All beneficiaries gain by this simple measure.

Are you aware that unless a superannuation benefit goes to a surviving spouse or tax dependant child (under 18, university student, etc), the superannuation payment may be taxable at various tax rates from 16.5% to 31.5%. This tax can be quite substantial.

In the event that you have a Testamentary Trust Will with a superannuation trust and if your assets other than superannuation are adequate, all superannuation can go to the tax dependant beneficiary thereby reducing that beneficiary's tax to nil and other beneficiaries will take other assets in lieu.

Taxation

Superannuation tax is payable if the beneficiary is not a tax dependant. A 'tax dependant' is defined under the Act as your spouse/partner, children under the age of 18 years and certain interdependent persons.

When superannuation benefits are distributed following death:

- insurance held under the super fund and some benefits, if taxable, are taxed at 31.5%
- employer contributions and salary sacrifice contributions are taxed at 16.5%
- non-concessional (personal) contributions made by an individual are received tax-free
- an individual is limited to the amount that can be paid to a superannuation fund as non-concessional contributions (currently \$450,000 over 3 years). Any contributions that exceed the non-concessional contributions cap are taxed at 46.5%.

Some hints

- Your accountant and financial planner can assist to claim an anti-detriment payment for your SMSF. This is an accounting procedure whereby a reserve is established as a provision to produce a tax deduction for the superannuation tax paid on death. This deduction is carried forward by the SMSF and reduces contributions tax on future taxable contributions made to the fund in future periods.
- If you are in a transition to pension stage in your superannuation fund, taxable benefits may be drawn down as a tax-free pension and reinvested by you as non-concessional funds. This reduces future superannuation taxation in respect of those re-contributions if the benefit ultimately passes to a non-tax dependant (e.g. adult child). This is a specialist non-legal area requiring expert accounting advice.

Case study

Mary and Jim have 3 children, one of whom is a tax dependant. Their assets include:

Jim's superannuation benefits	\$1.6 m
Mary's superannuation benefits	\$750,000
Combined non-joint assets	\$3.5m
Family home jointly owned	\$650,000

Jim should make a BDBN:

- in favour of Mary for 100% of the superannuation benefit;
- with a condition that Mary, by consent, can distribute the benefit to best suit her financial interests at the date of Jim's death; and
- with a further provision, because they have Testamentary Trust Wills prepared by Kells, that the benefit be paid to the estate after the death of both Jim and Mary.

This will ensure that on the death of both Jim and Mary, their estate assets will be divided equally among their children. As the superannuation benefit is less than 1/3rd of the total value of their assets, the superannuation benefit would pass to the only tax dependant child reducing any tax to nil dollars and not taxed at 16.5% or 31.5%.

At Kells we strongly recommend that our clients seek specialist superannuation taxation advice from someone with proven experience.

Kells can recommend an appropriate superannuation specialist to your accountant or financial planner if your accountant would like a second opinion.

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