

Superannuation and your Will

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It can come as a surprise to many to learn that superannuation does not form part of your estate when you die; it is not automatically covered by your Will. Unless you make a binding nomination as to who you want your superannuation to go to on your death, the trustee of your super fund may be able to distribute your balance and any insurance benefit entirely at their discretion.

In this blog, we look at ways you can make sure your superannuation will be distributed in accordance with your wishes, and the circumstances in which you can make a claim on a deceased person's superannuation.

Can superannuation be left in a Will?

Often, a large sum is payable from a superannuation fund when a person dies. This would include the super fund balance and any life insurance benefit the deceased person may have had through their superannuation fund.

However, death benefits from superannuation funds do not automatically form part of the deceased's estate. They are also not automatically distributed according to the deceased's Will or necessarily in accordance with any non-binding nomination they have made to the superannuation fund trustee.

If you do not have a valid Binding Death Benefit Nomination at the date of your death, then the trustee of the superannuation fund may have the discretion to determine how your death benefits are paid. Their decision may not be the one you would have chosen.

Unless the trustee of the superannuation fund decides to pay your death benefits to your estate (for your executor to distribute in accordance with your Will), the funds do not form part of your estate.

Binding and non-binding death benefit nominations

What is a binding death benefit nomination?

A binding death benefit nomination is a written direction made by you to the trustee of the superannuation fund. It sets out who is to receive your benefit (and how much each person is to receive) in the event of your death.

As long as the binding death benefit nomination is valid, the trustee is bound to follow it.

A binding death benefit nomination is valid if:

- it is in writing;
- it is signed and dated by the member in the presence of two witnesses (who are older than 18 years of age) and who are not mentioned in the nomination;
- it contains a declaration signed and dated by the witnesses stating that the notice was signed by the member in their presence;
- it nominates an eligible person and the share of the benefit they should receive; and
- the shares allocated add up to 100% of the total superannuation interest.

Valid binding death benefit nominations are generally valid for a maximum of three years and lapse if they are not renewed. Sometimes when a binding death benefit nomination lapses, it becomes a non-binding death benefit nomination.

Most super funds will send a notification when your binding death benefit nomination is about to expire. This is the time you should review your nomination and complete the necessary paperwork to invoke a renewed binding death benefit nomination. This is also a good time to review your Will. You can learn more about this in our blog, “When should I review or update my Will?”

What is a non-binding death benefit nomination?

A non-binding death benefit nomination is a written request about how you wish some (or all) of your superannuation death benefit to be distributed in the event of your death. It does not comply with the formalities associated with a binding nomination.

However, as is suggested by its name, it is not binding on the trustee. This means that ultimately, although the trustee will consider your nomination, they are not bound to follow it. The trustee has the final say as to who receives your death benefit (and in what proportions) and may choose instead to distribute the death benefits to a different person than that who has been nominated.

You can contact your superannuation fund to find out how to make a binding or non-binding nomination or to ensure you have one in place.

Superannuation death benefit claims

If you were a nominated beneficiary of the deceased, were dependant on the deceased, or were otherwise in a close personal relationship, you are likely to have a claim for the deceased's superannuation death benefit.

Usually, only the following people can make a claim for the deceased's superannuation death benefit:

- the member's spouse (either married or de facto);
- the member's children (including adopted and step-children);
- any person who was in a relationship of interdependency (for example, siblings living together);
- any person who was financially dependent on the deceased; and
- the executor or administrator of the estate.

If you believe you are the beneficiary (or likely beneficiary) of a deceased person's super or are the executor/trustee of a person's estate, you can contact their superannuation provider to let them know the person has died and ask them to release the person's super.

Steps to claim a superannuation death benefit

The following steps can be taken to make a superannuation death benefit claim:

1. Contact the deceased's superannuation provider and let them know the person has died and ask them to release the person's super;
2. The superannuation fund may ask you some further questions to determine your alibility to make a claim;
3. If and when your claim is determined to be 'eligible', you may be asked to complete some forms and provide some documents in support of your claim;
4. The trustee will then assess your claim based on these forms and documents, to determine whether the death benefit is payable to you;
5. The trustee will decide whether or not the death benefit is payable. All people who made a claim are notified of the outcome; and
6. You, and anyone else who made a claim will usually have 28 days to object to the decision. Once all objections are dealt with, the deceased's superannuation death benefit is paid.

Problems when death benefits are not taken into account in estate planning

If you do not take your death benefits into consideration when doing your estate planning, your death benefits can essentially remain ‘up for grabs’ for those eligible to make a claim to them. This means that someone may receive your superannuation even if that’s not what you intended or you believe someone else was more deserving of it.

Consider this scenario

- You have made a non-binding death benefit nomination;
- Your trustee decides to pay your superannuation to your estate, and decides to distribute your interest in accordance with your Will;
- An eligible person makes a family provision claim, contesting your Will and is successful with this claim;
- That person will now receive a percentage or all of your superannuation.

Had you made a **binding** death benefit nomination, and the nomination had not lapsed, then no such claim could be made.

There is not usually a cost associated with making a binding death benefit nomination. It is more the case of finding out what requirements your superannuation trustee needs you to meet for a nomination to be binding, and complying with them. It is time well spent to ensure that your superannuation goes to the people you want it to.

How a Wills and Estates lawyer can help

We can help you if your loved ones superannuation has been paid to someone unexepected after their death.

Contacting Smith Family Law

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This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.