

AVOIDING MISTAKES WITH SUPER NOMINATION OF BENEFICIARY FORMS

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It is generally well understood by financial advisers that a client is unable to include directions in their will in relation to the distribution of death benefits by a superannuation fund trustee. Instead, clients may nominate a beneficiary or legal personal representative (LPR) to receive their superannuation benefits in the event of their death. Unfortunately, many superannuation fund members are not aware of this limitation – or opportunity.

For a superannuation fund trustee to accept a member's nomination of beneficiary, the member must nominate either a beneficiary who meets the definition of dependant in the Superannuation Industry (Supervision) Act 1993 (SIS), or their LPR, who may then distribute the proceeds in accordance with the will.

SIS dependants include the member's spouse (including de facto and same sex partners), child (of any age), financial dependant, and any person with whom the person has an interdependency relationship. The LPR will either be the executor of an estate with a valid will, or the administrator of an estate where there is no will.

Superannuation death benefit dependants

A superannuation death benefit can be paid directly to 'SIS dependants' of the member, thereby allowing the distribution of the benefit to avoid the estate – a helpful strategy when there is risk of a challenge to your client's will, or no will at all.

The death benefit can also be directed to the member's LPR to deal with on behalf of the estate. Directing benefits to the LPR may be appropriate if there is a will, depending on your client's estate plans. This strategy may be beneficial for example if testamentary trusts are part of the plan, or where there are no SIS dependants to whom your client wishes to direct the benefits.

Your client may nominate an individual both as their LPR and as a dependant beneficiary in their own right, being careful to indicate in which capacity the individual is acting. Your client's will should line up accordingly.

Methods of nominating a beneficiary

Your client can direct or influence a fund trustee as to how they want their death benefits distributed by completing a non-binding, binding, or non-lapsing binding nomination of beneficiary form, a reversionary pension nomination, or in the case of an SMSF, executing a trust deed amendment. Note that not all funds will provide all options to their members, and completion of these forms is best done by clients in conjunction with both you as their financial adviser and an estate planning lawyer, particularly in the first instance.

Non-binding nominations

Where a non-binding nomination is used, the trustee of the superannuation fund has discretion to pay the benefit to one or more SIS dependants, or to the deceased's estate. That is, the decision on who to pay and in what proportion rests with the trustee.

The trustee will make their decision in accordance with the sole purpose of superannuation (broadly, to fund for a member's retirement or to support a member's dependants in the event a member dies prior to retirement), after taking into account all of the matters it considers to be reasonable. These matters may or may not include the member's non-binding nomination, their will or any other evidence provided to the trustee – including that of claim staking dependants.

In contrast, a binding nomination which is valid at death must be followed by the trustee.

Binding nominations

A valid binding death benefit nomination provides certainty for your client by requiring the superannuation fund trustee to pay the superannuation death benefit directly to their nominated beneficiary/s or their LPR.

A binding nomination is only valid if all of the following conditions are satisfied:

- it is in writing
- the proportion of the benefit to be paid to each beneficiary is readily ascertainable
- it is signed and dated by the member in the presence of two witnesses who:
 - are not a nominated beneficiary on the form, and
 - are at least 18 years of age
- it is within three years of the first nomination, last confirmation or amendment – unless the trust deed/governing rules fix a shorter expiry period
- the nomination has not been revoked by the member, and
- the beneficiary is the LPR or a SIS dependant, at the time of nomination and at the date of death.

A member may revoke a nomination at any time, in writing.

The nomination can be accepted by the trustee if:

- each death benefit nominee is a SIS dependant, or LPR of the member
- the proportion to be paid to each nominee is certain or readily ascertainable, and
- the notice is in the approved format.

Note that while a trustee must clarify information provided in a nomination of beneficiary form, if it is not sufficiently clear to allow the trustee to pay the benefit, (as soon as practicable after receiving the form), this does not mean that the trustee, on receipt, will assess the validity of each individual as a SIS dependant or LPR as indicated by your client. Often a nomination will only become evident as invalid once assessed following the death of the relevant member.

A particular nominated beneficiary may no longer be a dependant at the time of a member's death. In this case, the governing rules of the relevant fund will determine if the entire nomination fails or if only the nomination of the non-dependant fails.

The governing rules and SIS requirements will determine if the benefit must be paid as a lump sum or if the trustee will offer a beneficiary the ability to receive the benefit as a pension or a combination of both.

Non-lapsing binding nominations

Some super funds offer non-lapsing binding nominations which can apply indefinitely (do not require updating every three years). Keeping these up to date is imperative as the nomination may remain valid despite changes in client circumstance such as separation. On the other hand the nomination (or at least part of it) will be invalid to the extent that any nominated beneficiary is no longer a SIS dependant at the time of death.

Reversionary pensions

When a client commences a superannuation pension they may have the option to either nominate a beneficiary or to have a reversionary pensioner. A surviving reversionary pensioner will automatically continue to receive pension income payments (at least initially) upon the client's death. However the reversionary pensioner may still opt to commute the income stream to a lump sum, subject to the trust deed and particular pension rules.

A reversionary pensioner is generally nominated at the commencement of an income stream and can only be removed in certain circumstances subject to the governing rules – generally the pension would need to be commuted and rolled over to a new income stream.

Due to the complexities of relevant legislation, most funds will restrict reversionary pensioners to individuals that are both SIS Act and Tax Act dependants, i.e. current spouse (including same sex or de facto), or dependant child that is under age 25 or permanently disabled.

No nomination

If no nomination is made, the death benefit will be paid in accordance with the superannuation fund rules, resulting in either the trustee exercising its discretion or automatic payment to the LPR, which again may be problematic either way.

Nominations of beneficiary are fund specific

Superannuation beneficiary nominations, whether binding or non-binding, are fund specific and aren't duplicated whenever money is rolled over within the super system.

So, if a client has more than one fund, then a separate nomination form needs to be submitted to each respective fund.

One instance in which this is often missed is when the client is utilising an enduring partial rollover facility to transfer an amount from their accumulation fund to an insurance only super fund, to pay for their life cover in super. In this case the source, or originating, super fund needs a valid nomination of beneficiary form to lock in a beneficiary for the accumulated super benefit in that fund, and the recipient fund that is housing the insurance policy also needs a valid binding nomination form – this time to lock in the beneficiary/s for the life insurance proceeds that will be paid out as a superannuation death benefit if a claim is paid.

In the absence of a valid binding nomination at the time of death, the trustees of the respective funds will exercise discretion to determine the super dependants and ultimate

beneficiaries of the super death benefit as described above. That could lead to two different outcomes, conflict amongst potential recipients and the risk that the capital may end up in the wrong hands.

Finally, remember to regularly review even non-lapsing binding nominations, especially around major life events. For example, a binding nomination in favour of a married spouse is still valid if death were to occur whilst the clients were separated – it is only upon divorce that any prevailing nomination becomes invalid.

If you would like any more information contact your Client Development Manager, or for technical queries, contact the AIA TECE team at tece@aia.com.