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# Clark & Jacobs

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## What Happens To My Super When I Die?

There are actually two issues to think about here – firstly, what happens to the money you have in superannuation when you die and secondly, what happens to the fund itself?

Both are relevant in a self managed superannuation fund because as a general rule, each participant is both a member (who has a balance to be dealt with) and a trustee (who will now cease to act). This article considers the first question and looks at how super benefits may be dealt with – Who receives them? How are they paid? What control does the deceased have over the outcome?

Perhaps the most important point to make at the outset is that superannuation is not automatically covered by the deceased member's will, regardless of whether or not the fund is a self managed fund. This is because a superannuation fund is a trust and hence no-one actually "owns" their superannuation outright. Rather, we all have rights and interests in our superannuation that will result in a benefit of some kind being paid on death. Unless the deceased has taken specific action beforehand (and we will discuss what that might be later in this article), the trustee of the fund is actually responsible for deciding who receives the benefit. Under these circumstances, it will only be covered by a will if the trustee makes a conscious decision to pay the benefit to the deceased's estate.

## Who can receive death benefits?

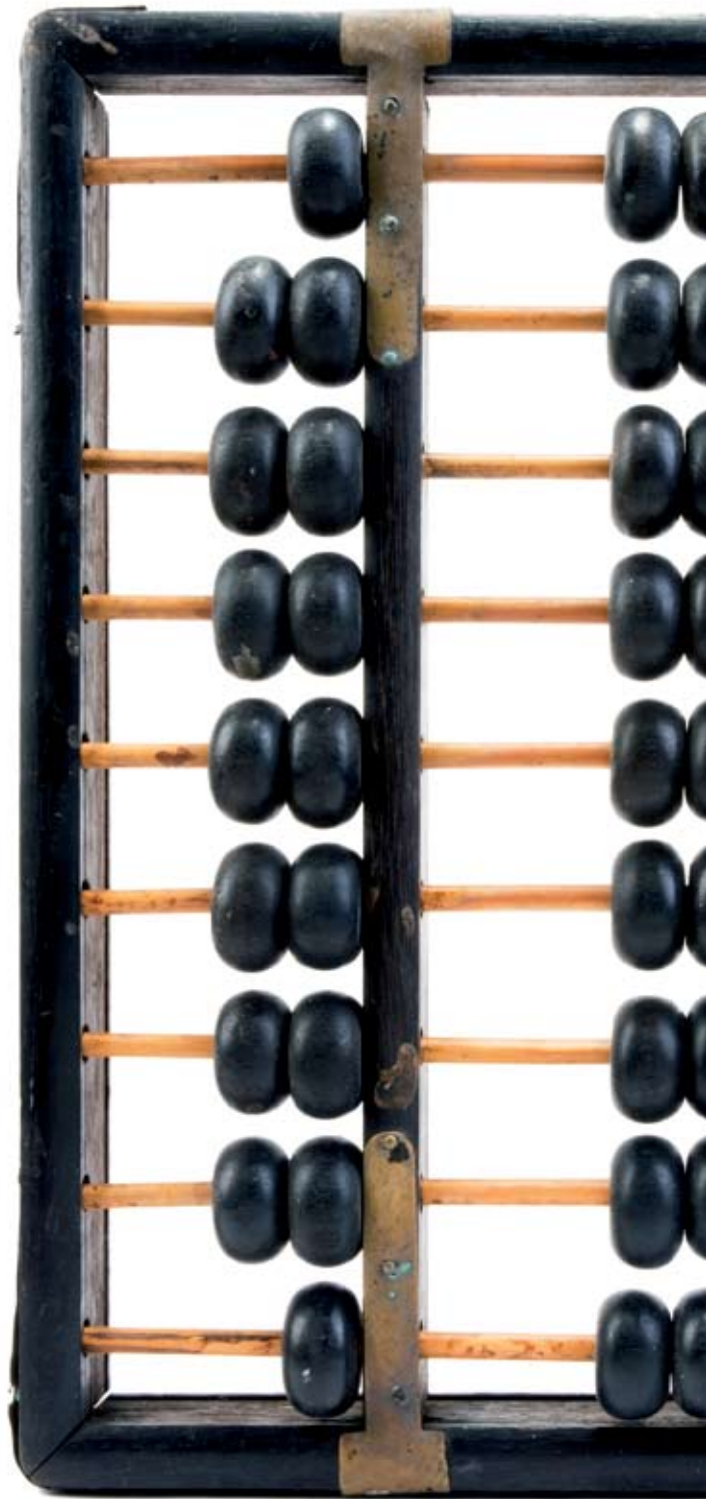
As a general rule, there are two possibilities. Superannuation can be paid to either:

- a “dependant”; or
- the estate. (Technically, it could be paid to someone else – say a sibling – but only if no estate is formed and the deceased had no dependants. This is not particularly common for self managed fund members.)

A “dependant” has a particular meaning for this purpose. It is not just minor children and people who were (say) financially dependent on the deceased. It also includes:

- The deceased’s spouse (including de facto and same sex spouses) – regardless of whether or not the spouse is considered in any way dependent on the deceased;
- adult, financially independent children<sup>1</sup> - both the deceased’s children and the children of his or her spouse at the time of death; and
- anyone with whom the deceased was in an “interdependency relationship”. This is another term with a specific meaning. It generally includes (say) someone the deceased lived with (other than a spouse or child), with whom they had a close personal relationship and where one or both of them provided the other with financial support, domestic support and personal care.

Note that a particular benefit can be divided between several different beneficiaries or even between some specific beneficiaries and the estate.



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1. Although adult, financially independent children are subject to tax on any benefit they receive at different rates to other “dependants”.

2. plus medicare if applicable. Note that medicare is not paid when a benefit is paid via the estate.

## How are death benefits paid?

There are some legal restrictions that apply in all cases:

- generally, adult children must receive their benefits as lump sums rather than pensions. There are some exceptions for children that are profoundly disabled (who can receive a pension from their parent's superannuation regardless of their age) or those who are between 18 and 25 and financially dependent on their deceased parent (although their pensions must stop at 25 and the balance must be paid out at that time);
- all other "dependants" can receive the deceased's superannuation as a lump sum or pension;
- where a payment is made as a lump sum, the fund can give the beneficiary (including the estate) assets in lieu of cash. Pensions, on the other hand, must be paid in cash;
- the benefit has to actually be paid out (or used to start a pension) – it can't simply be left to grow in the superannuation fund, nor can it generally be "rolled over" (moved to another superannuation fund);
- lump sum death benefits from self managed funds are generally tax free if they are paid to any dependant other than a financially independent adult child. Tax applies if a lump sum is paid to an adult financially independent child. Different parts of the benefit will be taxed at different rates and these range from 0% (typically applicable for any part of the benefit that arose from the deceased's personal contributions for which no tax deduction was claimed), 15% (generally for most of the benefit) and 30% (generally only applicable for part of the benefit if the deceased was under 65 and the fund provides life insurance). The same tax treatment applies regardless of whether the beneficiary receives this directly or via the estate; and
- tax might also be paid on any death benefit received as a pension. While special offsets are available, the pension will generally only be completely tax free if either the deceased or the beneficiary is over 60.



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However, there are other issues to check, for example:

- some superannuation fund trust deeds don't accommodate paying pensions on death – they only allow lump sum benefits;
- some trust deeds require all benefits to be paid in cash; and
- sometimes the deceased will have made particular arrangements (discussed below) which will result in the trustee being required to pay the benefit in a specific way – even though the law allows greater flexibility.

So what are some of the steps a superannuation member could take to ensure that his or her death benefit is dealt with in accordance with his or her wishes?

## A binding death benefit nomination

This is a document that actually instructs the trustee on who should receive the deceased's death benefit. Providing the document is properly drafted, the trustee has no option but to comply with it. The precise drafting requirements will depend on the fund's trust deed. For example, some deeds simply adopt the rules used for large funds (even though these don't actually apply to self managed funds). They will have requirements such as: the nomination can only last for three years, it must be signed and witnessed in a particular way, etc, or they might refer to the legislative provisions which set out these requirements for large funds.

Other deeds will impose their own requirements (eg proscribe the use of a particular form) while others (perhaps the most common) simply require that any document which is clearly identified as binding on the trustee in relation to death benefits will be treated as such.

A binding death benefit nomination has quite specific powers. It can sometimes be confused with a "non binding" nomination or an "expression of wishes" – these are actually quite different. These documents are really simply a guide to the trustee as to what the deceased would like to happen with his or her death benefit but do not bind the trustee. In other words, they have no practical effect or definitive legal status, they simply give the trustee some insight into the deceased's wishes – which the trustee can choose to follow or ignore.

Making a binding death benefit nomination is a big decision – it is akin to writing a will for one's superannuation. The trustee of the deceased's fund must follow these instructions after death even if it is clear that the outcome is not what the deceased would have wanted or where following the binding instruction will result in a poor tax outcome for the family group.

For example, a binding nomination might leave the deceased's superannuation to a spouse from whom he or she had separated (but not divorced).

Alternatively, a binding death benefit nomination might stipulate that the deceased's superannuation is to be shared between his wife and daughter. Perhaps at the time the nomination was made, the child was a minor and hence both could receive the death benefit tax free. At the time of death, however, the daughter was over 18 and financially independent – resulting in a significant tax impost on her share of the benefit.

In both these cases, trustee would have no option but to comply with the nomination. It is therefore extremely important that binding nominations are not made lightly and, once made, are regularly reviewed even if they do not need to be formally replaced.



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## A reversionary pension

Often, superannuation members start “superannuation income streams” (pensions) during their lifetime. When they do so, they have an opportunity at the outset to nominate someone (generally a spouse) to continue receiving the pension after the original member’s death. This is known as a “reversionary” pension and the person who will receive the pension after the member dies is known as the “reversionary pensioner”.

When a properly constructed reversionary pension is in place, the original member’s death does not give rise to any “benefit” – instead, that particular pension balance simply transitions seamlessly to the reversionary pensioner<sup>3</sup>. This has two practical implications:

- there is no means by which the balance of that pension could be paid to the deceased’s estate (as “ownership” immediately passed to the reversionary pensioner on death); and
- if the deceased also had (say) a binding death benefit nomination that favoured another beneficiary, the binding nomination would have no impact on the balance remaining in the reversionary pension – effectively there is no death benefit to bind.

A death benefit will arise when the reversionary pensioner dies – at which point whatever remains will generally pass to his or her dependants or estate.

Note that a reversionary pension may be constructed with particular terms and conditions (eg rules that prohibit the reversionary pensioner from drawing more than a particular amount each year, transferring the benefit to another fund or bequeathing the balance to anyone but specific beneficiaries). These will, however, be subject to the usual superannuation law requirements. Conditions which forced the reversionary pensioner to leave (say) any balance remaining on his or her death to someone other than a dependant or his / her estate would not be effective.

## A superannuation will

This is not a specific document – rather it is a generic name used when a fund’s trust deed sets out quite particular rules about the payment of a member’s death. In effect, it results in the creation of a section that looks more like a will than a superannuation trust deed within the trust document itself. This approach can be useful for (say) blended families where the deceased wishes to be quite specific about who receives his or her superannuation and in what form. A superannuation will might specify, for example:

- different benefit amounts to a range of beneficiaries;
- pensions for some and lump sums for others; or
- specific assets to be paid (in lieu of cash) to particular beneficiaries.

While these could also be stipulated in a binding death benefit nomination (assuming that doing so did not conflict with any specific requirements or forms set out in the trust deed), the scope and complexity of the arrangements may warrant formal incorporation into the trust deed itself (ie, a superannuation will).

As identified at the outset, the “default” position is that the trustee of the superannuation fund decides who will receive a particular member’s death benefit. This flexibility can be tempered, however, by the use of binding death benefit nominations, reversionary pensions and superannuation wills. Each of these provide a means for constraining the trustee and ensuring that the deceased’s wishes are fulfilled.

Regardless of the process, however, all methods are subject to the same rules and restrictions governing who can receive a superannuation death benefit (generally just dependants and the estate) and the form in which it can be paid.

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