

Binding Death Benefit Nominations

What is a Death Benefit?

A death benefit is the total benefit that a member holds in a superannuation fund that is payable on their death. It includes contributions made by the member, the member's portion of the investments of the fund and any life insurance proceeds paid to the fund in respect of the member.

What is a Binding Nomination?

The operation of a superannuation fund is governed by superannuation law and rules contained in a deed (Fund Deed) executed by the trustee of the fund and agreed to by the fund's members. The trustee of the fund is bound to act in accordance with the requirements of the Fund Deed in administering the fund.

Most Fund Deeds give the trustee discretion, subject to certain rules, to decide who to pay your death benefit to and in what proportions. However, usually Fund Deeds then enable you to override the trustee's discretion by giving a binding direction to the trustee in a document called a Binding Death Benefit Nomination (BDBN).

Are there any limitations with BDBNs?

Yes. If you decide to give a binding direction by completing a BDBN, it is important for you to note that you can only direct the trustee to pay your death benefit either to your estate or to those classified as "dependants" under superannuation law.

Who are considered dependants?

Dependants are:

- your spouse;
- another person who, in the opinion of the trustee, lives with you on a genuine domestic basis in a relationship as a couple;

- any child of yours, including step-children, adopted and ex-nuptial children;
- a child of your spouse; and
- any other person who is financially dependent on you at the relevant time or with who you had an interdependency relationship.

There is some complexity about who will be considered a spouse, domestic partner, financial dependent or someone who you had an interdependency relationship with. For example, grandchildren will not generally be considered to be dependants of a person unless the grandparent is financially supporting them.

If there is any doubt about those who will qualify in your case, you should raise this with your legal adviser.

What are the technical requirements?

BDBNs are subject to the requirements of superannuation law and the particular Fund Deed for your fund. The requirements vary considerably depending on the fund but generally require the BDBN to be in writing, signed by the member in front of two independent witnesses over the age of 18 and then served on the trustee of the fund.

The BDBN must stipulate a percentage to be given to each nominee. In most cases you are not able to direct that particular assets are to be given to particular dependants, however, some Fund Deeds purport to allow those type of directions. There are strategies to overcome this issue but it requires careful consideration and appropriate legal advice.

Continue over leaf

What if the BDBN is not valid?

A BDBN that directs your benefit to be paid to a person who is not a dependant, or to an entity that is not your estate, will fail. If the technical requirements of a BDBN are not complied with, the BDBN will also fail.

If your BDBN or nomination fails, then the trustee of the fund will again have discretion with who to pay your death benefit to. If the person who controls your super fund after your death is a dependant, that person could choose to pay your death benefit to themselves and exclude other people who you would have liked to benefit. There is very limited legal recourse for those not included and so care must be taken.

What should I do?

Getting good legal advice is important.

Many super funds and their advisers deal with BDBNs like “off the shelf” documents. They are definitely not and the consequences of a BDBN failing can be dire.

Detailed consideration should be given as to who will control your super fund following your death because if you do not have in place a valid BDBN or if your BDBN fails, then the controller of the fund will decide who will receive your death benefit - and it may not be who you would have chosen.

Mellor Olsson has experienced practitioners who provide advice to suit your individual circumstances.

To find out more about our
services and experience visit
www.molawyers.com.au

Adelaide
Pirie House, Level 6, 89 Pirie Street
Adelaide SA 5000
P 08 8414 3400

Port Lincoln
11 Mortlock Terrace
Port Lincoln SA 5606
P 08 8682 3133

Clare
165 Main North Road
Clare SA 5453
P 08 8842 1833

By appointment only
Barossa Valley, Bordertown,
Kadina, Keith, McLaren Vale
P 1300 414 414