

# Superannuation: Your Biggest Asset

**Superannuation is a major asset for many Australians. For self-funded retirees, superannuation is often the second largest asset after the main residence.**

For younger Australians, automatic insurance cover in retail and industry superannuation funds means that you have substantial life insurance (far in excess of your contributions) in superannuation.

Since a Will does not automatically deal with your superannuation assets, it is essential to consider and plan for what will happen to your superannuation assets upon your death, at the same time as making your Will.

“Superannuation” means the benefits payable from your superannuation fund on your death, including the funds held in your superannuation account and any life insurance or death benefit connected to your superannuation.

## Does my Will deal with my Superannuation?

A Will deals with all assets owned by you at the date of your death. There are a number of assets that do not form part of your Estate and do not pass according to your Will, including:

- ✓ Jointly owned assets
- ✓ Superannuation
- ✓ Life insurance
- ✓ Assets owned by trusts
- ✓ Assets owned by companies

So the Will is not the full picture - each of the above should also be given careful consideration to ensure your overall estate plan is effective.

## Who can receive my Superannuation upon my death?

Superannuation laws provide that your Superannuation can only be paid to:

- ✓ The legal personal representative of your Estate (this usually means the executor appointed in the Will); or
- ✓ A “dependant” of the deceased.

## Dependants are defined as:

- ✓ A spouse of the deceased - including married spouses, current de facto spouses and spouses of the same sex;
- ✓ A child of the deceased - including step-children, ex-nuptial children and adopted children; or
- ✓ Any person with whom the deceased person has an “interdependency relationship” – in basic terms this means two people living together in a close personal relationship where one or both relies on the other for domestic and financial support.

These classes can be somewhat broader than people expect. For example, if you have a ‘spouse’, then your ‘child’ includes your spouse’s children, which effectively includes your spouse’s step children. However, your spouse’s children will only remain your ‘child’ for Superannuation purposes while their parent remains your ‘spouse’.

The fact that a person is categorised as your ‘child’ because of the definitions is not impacted at all by the nature of your relationship with them. There are also situations in which there can be more than one ‘spouse’ under these definitions.

These issues are highly relevant for blended families.

The particular trust deed which established the superannuation fund to which you belong may further restrict the range of people who can receive your Superannuation.

In summary, your Superannuation will be paid either directly from the superannuation fund to your immediate family/dependants or to your Estate to be dealt with according to your Will.

### Should my Superannuation be paid direct to my family members or to my Estate?

The decision on whether your Superannuation should be paid directly to family members or to your Estate is an important and complex one. You should obtain specialised advice on your particular circumstances to make the right decision.

#### Some of the issues which impact this decision include:

1. Are the people whom I wish to receive my Superannuation within the categories of people who can receive it under superannuation laws?
2. Is my estate likely to be at risk of a claim either by a disappointed beneficiary or creditors?
3. Is it important for me to be able to include gift-over or substitute beneficiaries to receive my Superannuation if my first named beneficiary has passed away before me?
4. Do the people I would like to receive my Superannuation have high income and would the mechanism of a discretionary trust in the Will be a more beneficial way for them to receive my Superannuation?
5. Do the people I would like to receive my Superannuation have any vulnerability (for example, a physical or mental disability, bankruptcy, financial irresponsibility, or risk of marital separation), such that a protective or discretionary trust in the Will may be a more beneficial way for them to receive my Superannuation?
6. If the person I wish to receive my Superannuation is a spouse, is it preferable to have it paid directly to them so that they can elect to receive it as a pension instead of a lump sum?

### How can I have certainty about who receives my Superannuation after I die?

The superannuation laws state who can receive your Superannuation (as outlined above), but within those categories provide the Trustee with an absolute discretion. This means that the Trustee will decide whether to pay your Superannuation to a spouse, child/ren, interdependent people or your Estate (or amongst them in various proportions).

There are some situations where there is a real risk that the Trustee may pay the Superannuation to someone you do not want to receive it (for example, a spouse from whom you have separated but not divorced, a current spouse's child from a previous relationship or an adult child who is a bankrupt).

If you wish to have certainty about who will receive your Superannuation you can complete a binding death benefit nomination (BDBN). A BDBN is binding on the Trustee, which means that (so long as it is valid) the Trustee must follow it.

It is also possible to make non-binding death benefit nominations, which generally do not lapse. 'Non-binding' means that the Trustee is not bound to follow it – the Trustee will take it into account but ultimately the Trustee will still decide who receives your Superannuation.

### Making a Valid BDBN

There has been an increase in litigation regarding the validity of BDBN's. Given the value of Superannuation, making a valid BDBN can be as important as making a valid Will.

#### *First step – always check the terms of the Trust Deed*

Since every superannuation fund has its own rules about how Superannuation is dealt with on death and how to make a BDBN it is important to check the terms of the Trust Deed which established the fund, whether it is an industry or retail fund or a Self-Managed Superannuation Fund (SMSF).

#### *For retail funds – comply with the Superannuation laws*

**Superannuation laws include a number of technical requirements for a BDBN to be effective for industry and retail superannuation funds, including:**

- ✓ The proportion payable to each beneficiary must be certain and readily ascertainable;
- ✓ The nomination must be in writing and signed by the member in the presence of two independent witnesses;
- ✓ The Trustee must advise the member each year that the member has made a BDBN, who the beneficiaries are and when the BDBN lapses.

Importantly, BDBN's for retail and industry funds are only valid for three (3) years after which time they will lapse.

#### *For SMSF's – follow the terms of the Trust Deed to the tea!*

**The technical requirements in the Superannuation laws do not apply to SMSF's but the following should be considered:**

- ✓ The terms of the Trust Deed are paramount and must be carefully and strictly followed;
- ✓ The Trust Deed may permit non-lapsing BDBN's;
- ✓ Does the Deed seek to import the requirements of the superannuation laws?
- ✓ Does the Deed impose extra requirements (for example, that the BDBN be in a particular form, or that the trustee must acknowledge receipt of the BDBN for it to be effective)?
- ✓ Does the BDBN apply subject to any reversionary pensions or will it override them?

### **Dealing with Superannuation Death Benefits in a Will**

If superannuation is paid to the Estate (either under a BDBN or by the exercise of a Trustee's discretion) it is important to consider its effect on the gifts in your Will.

In a Will you can gift assets to any person you choose and are not limited to the classes of people eligible to receive Superannuation directly.

In a Will you may decide that your Superannuation should form part of a testamentary trust.

The Will can also be used to appoint the person who will control a SMSF on your death. This is important particularly if you have not completed a BDBN and the Trustee of the SMSF will decide who receives your Superannuation.

### **Is there any tax on my Superannuation Death Benefits?**

There can be varying tax consequences depending on who receives your Superannuation following your death.

The taxation of Superannuation is a complex area and advice from an accountant or tax adviser should be obtained.

### **Conflicts and Superannuation**

A challenging circumstance can arise if the Executor of a Will also wishes to make a claim on your Superannuation personally. This involves a conflict of interest between the interests of the person as Executor of the Estate and their personal interests.

If there is a BDBN in place in favour of the Executor, there will not be a problem. But if there is no BDBN the Executor is under a duty to claim the Superannuation for the Estate, which may result in a very different outcome.

### **Superannuation is an integral part of Estate Planning**

This Guide has provided you with some idea of the breadth of issues that must be considered in relation to Superannuation when you plan to make even a simple Will.

We appreciate that Superannuation is a confusing area. We recommend you obtain professional advice which is specific to your circumstances in relation to your Superannuation and Estate Planning.

Please **[contact us](#)** for expert advice on your superannuation assets as part of your estate plan.

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