

Binding Death Benefit Nominations

Most Super Funds

Most SMSFs

No Trustee Discretion Super Funds

3 Year Lapsing

Not all funds permit BDBNs

Non-lapsing & Revocable

Most (but not all) funds allow BDBNs to cover **contingencies**, eg death of 1st choice nominee, & include **conditions**, eg trustee can disregard BDBN with consent of all nominees

Binding Death Benefit Nominations (“BDBNs”)

One of the distinct features of the Australian superannuation régime is the power given to superannuation fund members (if the governing superannuation fund Deed permits) to provide the trustee of the fund with a nomination as to the payment of death benefits that the trustee usually has to follow. The member’s power to execute a nomination that is (in most cases) binding on the trustee of the superannuation fund is given to the member by the provisions of the *Superannuation Industry (Supervision) Act 1993* (“the *SIS Act*”), eg section 59 for externally managed funds.

As with indicative (or non-binding) death benefit nominations, BDBNs can be made in favour of one or more of the fund member’s “dependants”, as defined for:

- Lump sum death benefits purposes – by subsection 10(1) of the *SIS Act*; and
- Income stream death benefits purposes – by subregulation 6.21(2A) of the *Superannuation Industry (Supervision) Regulations 1994* (“the *SIS Regulations*”).

BDBNs are quite separate from (and take precedence over) the fund member’s Will and are not automatically revoked when the fund member separates or divorces. A Will is, however, relevant if the BDBN requires all or part of the death benefits to be paid to the fund member’s legal personal representative (“LPR”). Like Wills, BDBNs need to cover the possibility of a 1st or subsequent choice of nominee dying before the death benefit is able to be paid – reserve nominees should be included in the fund member’s nomination. Some, but not all, trustees allow conditional BDBNs (see later slide) and some accept a lapsing BDBN that expressly permits an enduring power of attorney or other LPR to confirm or re-confirm the nomination.

In the absence of a valid BDBN, the fund trustee, subject to the fund Deed, has the discretion to pay the member’s death benefits pursuant to section 62 of the *SIS Act* (ie to one of more dependants of the deceased or wholly or partly to the fund member’s LPR).

BDBNs

BDBN Pluses

- ✓ Surviving trustees or executors can't make self interested decision against member's wishes (SMSFs only)
- ✓ No appeal against BDBNs to the Superannuation Complaints Tribunal (externally managed super funds only)

BDBN Minuses

- ⊕ Constraints on choice of nominees, eg 2nd choice nominees not permitted (some funds only)
- ⊕ Status of tax free death benefits dependants may change eg cease to be a financial dependant or become interdependent

BDBN Pluses – SMSFs

A BDBN can meet the requirements of the *SIS Act*, but not the particular provisions of section 59 such as the 3 year lapsing provisions, eg:

- SMSFs are not bound by section 59 (see *SMSFD 2008/D1*); and
- If the Deed sets out how death benefits are to be paid and removes the trustee's discretion as to the payment of death benefits, eg as per a valid BDBN or failing that to the fund member's legal personal representative, ie the Fund member's estate.

SMSFs are of particular concern when decisions as to death benefits are being made. Unlike most externally managed funds, the decision making process for the payment of death benefits from an SMSF is rarely made by a neutral party.

In *Katz v Grossman* [2005] NSWSC 934, Linda Grossman (the daughter of the deceased fund member) was able, in her capacity as the sole surviving trustee of her father's SMSF, pay her father's death benefits all to herself prior to the appointment of her father's LPRs as replacement co-trustees for her father. Notwithstanding the father's wishes, her brother Daniel Katz received none of his father's superannuation death benefits. The Court in *Katz v Grossman* found that the trustee had a duty to administer the fund in accordance with the governing *SIS Act* and trust Deed, but did not impose an additional duty on the trustee to act in an equitable manner.

Other examples of the SMSF member's intended dependants missing out include surviving spouses who have been nominated (via non-binding indicative death benefit nominations). These spouses missed out on receiving death benefits because one or more of their children or stepchildren were appointed as executor (or reserve executor in lieu of the surviving spouse) and those children or stepchildren used that power to pay the death benefits to themselves, notwithstanding the late member's wishes.

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Summary

Asset Protection,
Trusts,
Super, Tax &
Estate Planning

3 Year Lapsing BDBNs

- Not offered by all externally managed super funds
- Consequences must have been explained to member
- Must meet every prescribed requirement – *see notes*
- Lapse 3 years after signing (*or last written confirmation*)
- Should cover contingencies, eg 1st choice dependant dies
- Both BDBN (if permitted) & Financial EPA should include an express power to confirm

Trustee has duty to follow up invalid BDBNs – Reg 6.17B

Subregulation 6.17A(4) – “Trustee must follow election”

“Subject to regulation 6.17B, ... [and subregulation (2)] ... the trustee must pay a benefit in respect of the member, on or after the death of the member, to the person or persons mentioned in a notice given to the trustee by the member if :

- (a) the person, or each of the persons, mentioned in the notice is the LPR or a dependant of the member; and
- (b) the proportion of benefit that will be paid to that person, or each of those persons, is certain or readily ascertainable from the notice; and
- (c) the notice is in accordance with subregulation (6); and
- (d) the notice is in effect.”

Subregulation 6.17A(6) – “Form of notice”

“For paragraphs (4)(c) and 5(b), [*ie both original and further notices*] the notice:

- (a) must be in writing; and
- (b) must be signed, and dated, by the member in the presence of 2 witnesses, being persons:
 - (i) each of whom has turned 18 years; and
 - (ii) neither of whom is a person mentioned in the notice; and
- (c) must contain a declaration signed, and dated, by the witnesses stating that the notice was signed by the member in their presence.”

[Subregulation (5) sets out how a notice can be confirmed, amended or revoked (in each case, only in writing) and subregulation (7) imposes the 3 year time limit that applies before the nomination, if not confirmed, lapses. Regulation 6.17B requires that the trustee check that any binding death benefit nomination it receives is valid.]

Non-lapsing & Revocable BDBNs

Can be offered by SMSFs
(if Deed permits) & no
trustee discretion funds

- ❖ Last until death (unless revoked)
- ❖ Can be conditional
- ❖ Should cover contingencies, eg if 1st choice also dies

Important to ensure that a BDBN cannot be overridden, eg by a later amendment to the SMSF Deed without the express personal consent (ie not via an attorney or administrator) of the fund member

BDBNs – Self Managed Superannuation Funds (“SMSFs”)

SMSFs are of particular concern when decisions as to death benefits are being made. Unlike most externally managed superannuation funds, the decision making process for the payment of death benefits from an SMSF is rarely made by a neutral party.

Under subsection 59(1) of the *SIS Act*, members of SMSFs are (if permitted by the terms of the governing trust Deed) able to direct the trustee as to the payment of death benefits. As has been highlighted by the ATO in *SMSFD/2008/D1*, the terms of the BDBNs for SMSFs (and whether they can be non-lapsing and conditional as well as unconditional) are not prescribed by legislation and are usually set out in the governing superannuation fund Deed. It is even possible for the BDBN to be incorporated within the terms of the SMSF Deed itself, ie sometimes referred to as an “SMSF Will”. The Deed may require updating to:

- Permit appropriate forms of BDBNs such as the ability to make the BDBNs non-lapsing and conditional BDBNs; and/or
- Prevent a subsequent amendment to the SMSF Deed from overriding an existing BDBN without the express personal consent of the fund member, ie the consent is not given via an enduring or other power of attorney or an administrator..

No Trustee Discretion BDBNs

Some superannuation funds do not give the trustee the power to exercise its discretion in respect of the payment of death benefits. Instead the trustee is bound by the trust Deed to follow either:

- The rules set out in the trust Deed as to how the death benefits are to be paid; or
- The terms of a valid BDBN prepared by the member (in the event that no valid BDBN is in place, default rules apply, eg the death benefits must be paid to the members estate.

Conditional BDBNs

Binding on the trustee unless BDBN nominee(s) consents to exercise of the trustee's discretion

Examples of overriding of BDBN include

- ❖ Surviving spouse nominee wanting to commence a pension for child
- ❖ All of the child nominees agreeing that one of the children (ie a death benefits dependant) takes all or a greater share of super – adjustment clause in Will to compensate the other children

Conditional BDBNs

BDBNs made to the trustees of a self managed superannuation fund ("SMSF") or no trustee discretion funds can, if permitted by the governing trust Deed, be drafted to include conditions (or can be free of any conditions. For example, a BDBN can be drafted so that it is not binding on the trustee if the trustee obtains the consent of:

- The sole immediate or reserve nominee, eg in circumstances where a nominated surviving spouse wishes to ensure that a death benefits pension or annuity for a:
 - Young child or for each of the young children (thereby generating, in addition to a 15% income tax offset, excepted income under Division 6AA of *ITAA 1936*; or
 - Child of any age with a disability that prevents the child working in gainful employment;

is established with all or part of the death benefits; or

- Each or all of the 2 or more immediate or reserve nominees, eg each of the children prefer that not all of them receive any or part of the superannuation death benefits and are instead compensated by the adjustment clause in the deceased fund member's Will.

Form of Benefit – All Funds

If a dependant (rather than the fund member's LPR) is nominated, the type of benefit (ie lump sum or income stream) paid can also be specified (if the governing fund Deed and trustee so permit). This may be useful for members of defined benefit funds who want to set up a non-commutable income stream for a vulnerable beneficiary.

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Summary

Asset Protection,
Trusts,
Super, Tax &
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BDBNs – Further Reading

**Australian Master Estate
Planning & Succession
Guide – Chapter 26**

**You Can't Take It
With You –
Chapter 15**

**The latest version of this Pocket Summary is at
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Further Reading

- The 1st edition of the **Australian Master Estate Planning and Succession Guide** by Allan Swan is scheduled to be published by **CCH** in 2011.
- The 1st edition of **You Can't Take It With You** by Andrew Simpson was published by **Wrightbooks** in 2009.
- The 5th edition of **Tax Issues in Family Law Property Settlements** – The Difference Between Hacking and Carving by Peter Szabo was published by **MOORESLEGAL** in 2008.

About the Author of the Pocket Summaries – Allan Swan

In addition to his main role as a principal of the **MOORESLEGAL** estate planning team (working in the areas of **Asset Protection, Trusts, Superannuation, Tax and Estate Planning**) Allan is also the principal of **APTSTEP**, a provider of training and materials. Allan's current presentation topics are:

- Asset Protection Planning (includes page 1 of this Pocket Summary)
- Blended Families (1)
- Business Structures Overview
- Estate Planning – Key Cases and Rulings
- Estate Planning – Practical Case Studies for 2010
- Estate Planning – Tax and Strategic Issues (all)
- Funding Estate Planning
- Ruling from the Grave (all)
- SMSFs – Planning Issues (all)
- Superannuation Death Benefits (all)
- Superannuation Overview (all)
- Testamentary Trusts
- Trusts – Income and Capital Distributions
- Trusts – The A-Z.

Contact Allan 03 9843 2153 for further information regarding on the content of the topics, the fees charged and to schedule a presentation, workshop or seminar.