

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* (“*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 and some accept a lapsing BDBN that expressly permits a financial attorney or other LPR to confirm or re-confirm the nomination.

In the absence of a valid BDBN, the fund trustee usually has discretion under the *SIS Regulations* in paying the member’s death benefits, ie to one or more of the dependants of the deceased (who are still living at the time of the decision as to payment) or wholly or partly to the deceased 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*, without needing to satisfy the particular provisions of section 59 such as the 3 year lapsing provisions, ie:

- SMSFs are not bound by section 59; 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, to 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.

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 in *ATO SMSF Determination SMSFD 2008/3*, the terms of the BDBNs for SMSFs (and whether they can be non-lapsing, contingent [or cascading] and conditional as well as unconditional) are not prescribed by legislation and can be set out in the governing fund Deed. The fund 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 a financial 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 fund Deed to follow either:

- The rules set out in the fund 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 into the fund member’s deceased estate.)

Conditional BDBNs

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

An example of the overriding of a BDBN is

All of the child nominees agreeing that one of the children (ie the one that is a death benefits dependant) takes all or a greater share of super – the adjustment clause in Will then compensates the other children

Conditional BDBNs

BDBNs made to the trustees of an SMSF 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 SMSF trustee if the trustee (within a specified time period, eg 3 or 6 months) obtains the consent of each or all of the 2 or more immediate or reserve child nominees. This means that if each of the children that are the nominees prefer that not all of them receive any or a part of the superannuation death benefits and are instead compensated by the adjustment clause in the deceased fund member's Will. (Most BDBNs in favour of a spouse are non-conditional, other than the contingency of survivorship.)

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 can be advantageous if the fund member dies in pension phase and the nominee is a death benefits dependant.

Inclusion of BDBN Provisions in SMSF Deeds – Practical Difficulties

There is no requirement for a BDBN to be in a document separate from the governing deed of a SMSF. It is quite possible for the BDBN to be included as part of the deed itself, although this would mean that a member initiating, revoking or changing a BDBN would need to have the trust deed amended. Depending on the terms of the trust deed, this may present practical difficulties where there are 2 or fund members and the other members do not give their consent to the amendment.

Where the BDBN is made via a separate document, no amendment to the governing deed should be needed (assuming the deed is sufficiently current to cater for an appropriate BDBN) and the consent of other fund members should not be an issue.

BDBNs – Further Reading

**Australian Master
Estate Planning Guide
– Chapter 16**

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

**The latest version of this Pocket Summary is at
www.mooreslegal.com.au/services/estateplanning/pocketsummaries**

Further Reading

- *Australian Master Estate Planning Guide* – Allan Swan, to be published (in both a Standard and Premium Edition) by CCH in 2012.
- *Estate Planning Documents* – Allan Swan, Moores Legal (includes many of the Pocket Summary series).
- *You Can't Take It With You* – Andrew Simpson, Wrightbooks.
- *Tax Issues in Family Law Property Settlements* – Peter Szabo, Moores Legal.

Australia-wide Seminar, Workshop & other Presentations – Allan Swan

EPSTTAP Introductory: • Estate Planning – The A-Z (includes all pages of this Pocket Summary) • SMSFs – The A-Z (all) • Trusts – The A-Z.

EPSTTAP Advanced: • Estate Planning – Case Studies • Estate Planning Masterclass (4-5) • Superannuation – Death Benefits & Binding Nominations (all) • Testamentary Trusts – Drafting the 6 Major Types • Trusts & Deceased Estates – Income & Capital Distributions • AMEPG Chapter Workshops.

Allan's local Moores Legal client, community & discussion group topics are:

- Estate Planning – Protecting & Enhancing Wealth • Estate Planning – Vulnerable Family Members • Family Trusts – Income & Capital Overview • Farm Succession – Avoiding Tax Pitfalls & Anticipating Disputes • Providing an Estate Planning Service for Clients • SMSFs – Instalment Warrants, Pensions & Binding Death Benefit Nominations • Tax & Business Structures Overview • Update – Estate Planning, Superannuation, Trusts, Tax & Asset Protection.

To book Allan for any of these topics, contact Lilian Bruère on 03 9843 2153. All Pocket Summaries are copyright and are for general information purposes only and should not be relied on as (or in substitution for) legal or other professional advice.