

BINDING DEATH BENEFIT NOMINATION ESSENTIALS

Superannuation rules permit members of superannuation funds to make binding death benefit nominations (**BDBNs**), nominations that bind the trustee to pay a member's death benefits in accordance with their specific wishes.

In this article, we examine the features of BDBNs and consider the importance of getting them right.

What is a BDBN?

A BDBN is a notice given by a member of a super fund to the trustee, which *requires* a death benefit to be paid to the member's nominated *dependant(s)* and/or *legal personal representative* as specified in the notice.

If correctly prepared and executed, the trustee is bound to follow the instructions outlined in the BDBN.

Why have a BDBN prepared?

A BDBN provides you with certainty as to where your benefits will be paid when you die, because the trustee is bound to follow the instructions set out in a correctly prepared and executed BDBN.

Who can be nominated in a BDBN?

A deceased member's death benefits can generally only be paid to one or more of their *dependants* and/or their *legal personal representative*. Hence, the only people who can be nominated in a BDBN are one or more of a member's dependants and/or their legal personal representative.

A person's *dependants* include their *spouse*, any *child*, any person with whom they have an *interdependency relationship* and any person who is *financially dependent* on them. *Spouse* includes same-sex or de facto spouse and *child* includes adopted child, stepchild, ex-nuptial child and child of the person's spouse. Two persons have an *interdependency relationship* if they have a close personal relationship and either:

- they live together and one or each of them provides the other with financial and domestic support and personal care; or
- they do not satisfy the requirements outlined in the dot point above because either or both of them suffer from a physical, intellectual or psychiatric disability or they are temporarily living apart, but they still satisfy the requirement of having a close personal relationship.

A deceased person's *legal personal representative* means the executor of their Will or administrator of their estate.

How long can a BDBN remain in force?

If the trust deed for the super fund specifically states that BDBNs prepared under the terms of the deed can be non-lapsing, the BDBN will not expire simply due to the passage of time. However, if the trust deed for the fund does not have this specific provision, the BDBN may expire at the end of three years after the day it was first signed, or last confirmed or amended by the member.

Irrespective of the longevity of the BDBN in question, because members' circumstances change, it is recommended that those members with BDBNs be given the opportunity to confirm, amend or revoke their nomination regularly to ensure the people noted in the BDBN are still the member's intended beneficiaries.

Without a BDBN, or similar alternative in place (see the section – What are the alternatives to a BDBN), it is at the discretion of the trustee of the fund as to who receives your benefits when you die.

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Can all super fund members make a BDBN?

No. super fund members can only make BDBNs if the governing rules of their fund expressly permit them to do so.

While super fund trustees are under no obligation to offer members the opportunity to make BDBNs, if the governing rules do not currently permit members to make BDBNs and the trustee wants to give them that opportunity, the trustee can generally amend the governing rules to permit them to do so.

What level of detail can a BDBN contain?

Many pro-forma BDBNs offer members the opportunity to do no more than nominate one or more of their *dependants* and/or their *legal personal representative* and the proportion of the death benefit that will be paid to each of those persons, whereas they can do so much more. A more sophisticated BDBN can, for example:

- identify specific assets to be paid to particular beneficiaries;
- specify the manner in which the benefit will be paid, eg a lump sum (cash or *in specie*) or pension; and/or
- include alternative beneficiaries in case one of the primary beneficiaries pre-deceases the member.

The more sophisticated BDBNs can be drafted to provide for a range of eventualities, and in

fact can sometimes take on the appearance of a Will. Examples of more sophisticated BDBNs include:

- **Conditional BDBNs** - whereby the nominated recipients can instruct the trustee to ignore the BDBN on the condition that some or all of the benefits are paid to a specific beneficiary, such as a pension to an underage child, or a lump sum to a child who was in an interdependency relationship with the deceased;
- **Complex BDBNs** - which provide for subsequent beneficiaries, in stages, in the event of the initial beneficiaries either predeceasing the member or not being a dependant at the time of death of the member; and
- **Multi-layered BDBNs** - under which specific assets are 'gifted' to named beneficiaries, with the remainder of the deceased member's benefit applied for other beneficiaries, either in the form of pensions or lump sums, or both; or
- a combination of all of the above.

What are the technical requirements for a valid BDBN?

In general terms for a BDBN to be valid:

- the trustee of the super fund must give to the member information that the member needs to understand in relation

to their right to require the trustee to provide the benefits;

- the governing rules of the fund must permit a member to require the trustee to pay a death benefit to the member's nominated dependant(s) and/or legal personal representative;
- the person, or each of the persons, nominated must be a dependant (at the time of death of the member) or the legal personal representative of the member;

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If correctly prepared and executed, the trustee is bound to follow the instructions outlined in the BDBN.

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- the proportion of the benefit that will be paid to that person, or to each of those persons, must be certain or readily ascertainable from the notice;
- it must be in writing;
- it must be signed and dated by the member in the presence of

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two adult witnesses, neither of whom is mentioned in it; and

- it must contain a declaration, signed and dated by the witnesses, stating that it was signed by the member in their presence.

In addition to the above points, the trust deed for the fund may also impose further requirements in relation to the format of the BDBN.

What happens if a BDBN is invalid?

A BDBN may be invalid, either partially or in full, as a result of certain actions, including:

- the BDBN lapses after 3 years, because the trust deed did not expressly permit non-lapsing BDBNs
- the BDBN was not validly completed e.g. not in accordance with signing, witnessing or dating instructions; and
- one or more of the nominated beneficiaries is not alive or, if alive, is not a dependant of the deceased at the time of death.

As a result, any direction under the part of the BDBN which is invalid will fail, meaning that benefit will be distributed at the discretion of the remaining trustees or directors of the corporate trustee.

What are some of the disadvantages of a BDBN?

Disadvantages of a BDBN include:

- that the member must remember to review their BDBN regularly;
- the possibility that the member's circumstances change and they die:
 - with an inappropriate BDBN in place; or
 - without a valid BDBN in place;
- that the trustee will be bound to comply with a valid BDBN, whether it is still appropriate (including equitable and tax-effective) or not;
- if the member loses capacity, their legal personal representative may not be able to confirm, amend or revoke their nomination.

What are the alternatives to a BDBN?

A BDBN is one of a number of options available to members of a superannuation fund, when it comes to dealing with their benefits following their death. Other options include:

Trustee Discretion - the member leaves the decision to the surviving trustees or directors;

Non-Binding Death Benefit Nomination - the member provides an **indication** of the recipients they wish to receive the benefits on their death, but leave the final decision to the surviving trustees or directors;

Automatic Pension Reversion Nomination - provides for any pensions payable to the member to automatically pass to nominated recipients following the member's death. Applies only to pensions being paid at the time of death;

Death Benefit Rule - the member requests the trustee to accept written directions regarding the distribution of their benefits which, if the trustee accepts, becomes a rule written into the trust deed of the fund. That rule can then only be changed with the consent of the member (this is only available in some SMSFs); and

Death Benefit Guardian - a person appointed by the member to oversee the payment of the member's benefits following their death. The Death Benefit Guardian:

- is usually a person who is not a trustee of the fund, possibly a family friend or trusted adviser, who is aware of the member's wishes regarding disbursement of their benefits; who
- must approve the distribution of any benefits which are not subject to payment under a Binding Death Benefit Nomination, an Automatic Pension Reversion Nomination or a Death Benefit Rule.

Death Benefit Guardians are only available in SMSFs and are an exclusive feature of the Topdocs SMSF Trust Deed.

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When might a BDBN be appropriate?

Examples of situations in which a member might make a BDBN include the following:

- A member has two children, only one of whom is a trustee of his SMSF. He makes a BDBN because he wants each child to receive an equal share of any death benefit. Readers familiar with the New South Wales Supreme Court case of *Katz v Grossman* [2005] NSWSC 934 will likely appreciate that the making of a BDBN in circumstances similar to these may well have kept Mr Katz's children out of court.
- A member is married for the second time. She makes a BDBN because she wants her current husband to receive any death benefit. Were any death benefit to be paid to her legal personal representative, it would form part of her estate and her Will could be challenged or contested by the children of her first marriage.
- A member has three adult children, one of whom is experiencing marital difficulties for the second time, another of whom is a recovering alcoholic and the other of whom is facing the prospect of bankruptcy. He makes a BDBN because he wants any death benefit to be paid to his legal personal representative who will hold his estate in a series of testamentary trusts.

What are the tax ramifications relating to a BDBN?

When proper estate planning is undertaken at the time of planning the BDBN, and at regular reviews, the impact of tax on the distribution is generally one of the major considerations. The BDBN can permit the flow of money in a tax advantaged manner. For example, the BDBN can be established to provide for under age children who would receive the benefit free of tax, whilst the Will provides for older children, who would otherwise be taxed on receipt of superannuation death benefits.

Conversely, a failure of the planning (i.e. invalid BDBN) could see the benefits being distributed amongst all children, exposing some to a tax impact which could have been avoided.

Will a BDBN override reversionary pension documentation?

Generally it will not, though the answer may differ depending on the precise wording of the trust deed, the pension paperwork and the BDBN in question. Clearly, inconsistency between pension paperwork and a BDBN should be avoided!

The Topdocs SMSF Trust Deed specifically provides an order of application, thereby avoiding any such inconsistencies. Under the terms of the Topdocs deed, a reversionary pension nomination will take precedence over a BDBN.

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