



Is your super fund money at risk?

In today's modern era, estate planning is more than just preparing a Will. A Will can help in the distribution of your assets, however, many assets will not be owned by you personally. Instead, assets such as your superannuation will be owned by a separate legal entity - your super fund. It is important to understand that your Will **does not** govern what happens to your superannuation funds. This wealth sits outside of your estate and thus your executor has no power to govern what happens to your wealth unless it is paid into your estate.

Why doesn't your superannuation fall into your estate?

The superannuation contributions you make throughout your lifetime are made to a fund. This fund is set up and is governed by a trust deed as well as the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*. It is in the trust deed where you are nominated as a beneficiary. You will receive the benefit of your contributions when you meet certain criteria as set out in the trust deed, such as reaching a certain age. Thus, you don't directly hold the contributions made to the fund rather you have an interest in the trust and your right, as a beneficiary, is stipulated within the trust deed of the fund.

Why is it important to have a binding death benefit nomination?

As your superannuation sits outside of your estate, it is important to have in place a binding death benefit nomination (**BDBN**) to distribute your funds to your intended beneficiary. The keyword is **binding**, so as to provide certainty. Except in limited circumstances, if there is no BDBN then the trustee of the fund generally has the discretion on how it should be distributed. In the event where you don't have BDBN, a Will won't be sufficient enough to deal with your interest in a superannuation fund unless the trustee of the fund, in its discretion, determines to pay your superannuation contribution to your estate.

Why is it important to review your trust deed (for self-managed super funds) every 2 - 3 years?

Ideally, a BDBN should be non-lapsing, however, some older trust deeds do not allow for this and so after 3 years they lapse or expire. The danger in this is:

1. if you make a nomination now; and
2. you forget to renew the nomination after 2 or 3 years; and
3. you lose your mental capacity such as developing Alzheimer's disease,

then your nomination will not be binding and the trustee has discretion on where your funds should be distributed. This may also lead to various parties (dependants) potentially making claims on your contributions. The category of dependants, as defined in the SIS Act, includes your spouse, any child you have, and any person with whom you have an interdependency relationship with. This can include step children or de-facto partners.

If you have in place a non-lapsing BDBN you are always able to revoke it and replace it until you lose your capacity.

Accordingly, there are two main reasons you should have your trust deed reviewed:

1. to vary your deed to guarantee you are able to put in place a non-lapsing BDBN; and
2. to ensure you have a BDBN in place, preferably non-lapsing, to avoid disputes and to avoid a trustee determining where your contributions are distributed.

Does this really happen?

We have recently had a number of matters come through where these issues have arisen.

One particular matter is where a husband and wife have been married for over 50 years and they both have children from previous marriages. In 2004, the husband became a member of a self-managed super fund and made a nomination leaving the benefit of his contributions to his wife. Further, in his Will and in the amendments to his Will he expressed the same wishes providing that the contributions should go to his wife in the first instance.

As mentioned before, nominations will usually lapse after 3 years unless they are non-lapsing. A lot of older deeds for super funds, however, do not allow for non-lapsing nominations unless they have been varied more recently. Thus, the nomination made by the husband had expired. Around the same time, the husband developed Alzheimer's disease losing his mental capacity, which meant he could not re-new his nomination as it would be considered invalid. This would leave the distribution of the super contributions to the discretion of the trustee of the super fund.

The issue raised with this is, the husband's son from his first marriage, is the trustee of the super fund. As there are family dynamics, a possible outcome is that the son, as the trustee, will use his discretion and pay the full amount to himself as a dependant. This would mean his wife will not receive any benefit of the contributions her husband made throughout his lifetime.

In order to learn from this and avoid the same risk for your superannuation contributions, note the following points:

1. you should have your super fund deed reviewed to see whether non-lapsing binding death benefit nominations are possible;
2. if a non-lapsing death benefit nomination is not possible, you should consider whether variations to the super fund deed can be made to allow for it; and
3. you should put in place a non-lapsing binding death benefit nomination immediately.

If you require any further information about Estate Planning, including reviewing your super fund deed, please contact Murfett Legal by telephone on +61 8 9388 3100, via our website at www.murfett.com.au or email one of the following directors:

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