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Selwyn Black leads the Business Lawyers Group at Carroll & O'Dea Lawyers. Selwyn has particular expertise in the establishment, sale and/or purchase and restructuring of companies, trusts and businesses. His practice includes advising businesses and individuals on resolving a wide variety of challenges, and on steps to pre-empt legal problems.

WHO GETS THE SUPERANNUATION DEATH BENEFIT?

The distribution of superannuation death benefits

Selwyn Black

A considerable proportion of our wealth now sits in superannuation. It is estimated that at the age of retirement (age 60-64) the average Australian will have over \$200,000 in their superannuation fund (ASFA, 2017).

Therefore, the question of who gets the superannuation on death (ie. death benefits) is an important topic to consider for two main reasons:

- for estate planning
- to make, defend and resolve claims regarding superannuation.

Who controls the distribution of death benefits?

Superannuation fund account holder

An individual superannuation fund member can best manage the future distribution of their super fund balance (and influence future disputes) through nominating beneficiaries via particular superannuation funds.

The nomination process can vary between superannuation funds—some may have binding nominations and/or non-binding nominations. For valid binding nominations, the distributions will generally be set. For a valid non-binding nomination, while it will generally have first priority, the superannuation fund will in some trust deeds still have discretion. Therefore, the manner in which the super fund exercises its discretion may cause disappointments.

Overall, individuals planning their estate should ensure that their nominations are duly executed and regularly updated, to ensure they remain current and effective.

When planning their estates, individuals should also nominate where they wish the death benefits to go, through a valid will. This is important as it is not unusual for super funds to pay the benefits to executor or administrator under the last will. Also the fund may take into account the preferences expressed in a will.

The superannuation fund

The superannuation fund may have considerable discretion in dealing with the death benefits in the absence of a binding nomination.

This varies considerably based on the particular method in the fund's trust deed, for example:

- some trust deeds require that the super fund must pay the death benefit first to a legal personal representative (LPR), and only absent an LPR can the death benefit be paid to dependants or any other person; and
- others grant the super fund wide discretion to allocate the death benefit between an LPR and the dependants or any other person.

This process is variable and may cause disappointments or disputes among the surviving members.

Who are legal personal representatives?

A legal personal representative (LPR) can include, according to the context:

- the executor of a will
- administrator of the deceased estate
- trustee of the estate of a person under a legal disability; and
- a person who holds an enduring power of attorney granted by a person.

Dependants, commonly include (at the time of death):

- the deceased's spouse
- the deceased's child
- individuals with an interdependency relationship with the deceased.

Resolving disputes

What can you do if you disagree with the death benefit distribution?

There are increasing disputes over the ownership and distribution of the superannuation balance on death. The Australian Financial Complaints Authority (AFCA) received 200 death benefit distribution complaints in its first six months of operation. Competing claims often arise between surviving family members, de facto partners, and persons who lived in a mutually supportive household.

What are the routes to resolution?

The starting point is to make a suitable claim on the superannuation fund trustee. If claimants are not satisfied with the decision that a super fund has made, the next step will be to urgently request that the trustee review the decision.

Super fund: internal review

It is important to review the rules of the specific superannuation fund for the review procedure and requirements.

Often, claimants may have to present supporting documents demonstrating why they should be paid the death benefits or a greater proportion of the death benefits. They should request a review as soon as possible after being notified of a decision; as such requests are time-limited.

Complaints to the Australian Financial Complaints Authority

Claimants can lodge a complaint with the Australian Financial Complaints Authority (AFCA), which has taken over the role of the previous disputes resolution body (the Superannuation Complaints Tribunal).

AFCA will use a combination of dispute resolution strategies (both formal and informal) to help resolve the complaint, such as facilitated negotiations, conciliation, and AFCA determination.

If AFCA is making a determination on a complaint, AFCA will consider specific circumstances by considering the specific trust fund rules, the purpose of death benefits, the range of financial reliance on the deceased just before death and the deceased's wishes, which can include non-binding nominations and wills.

Court intervention

- Appealing an AFCA determination—if an individual is not satisfied with the AFCA determination, they can appeal the decision to the Federal Court within 28 days of receiving a copy of the determination.
- Probate or Letter of Administration and Family Provision

- Grant or re-seal of probate: will and named executor.
- Letter of Administration: no will.

Strictly, the grant of probate or letters of administration only enables the person or persons appointed to deal for or give a receipt for property in the state where the grant is made, to receive funds from the superannuation fund on behalf of the estate.

For this purpose it is necessary to check which state the superannuation trustee is based in, since a grant or re-seal of probate or letters of administration may be required in that jurisdiction.

Obtaining a grant or re-seal of probate or letters of administration in the relevant jurisdiction may be important for superannuation, where there is no binding nomination or where the super fund trustee decides to pay the superannuation to the LPR. Note, however, that becoming executor or administrator can create conflicts of interest if (for example) it is desired to use that position to exercise discretion under a superannuation fund deed.

A family provision court claim should be carefully considered if other review mechanisms do not succeed or are not applicable, and you are not suitably provided for in the will having regard to special tests and criteria applicable in the state where the superannuation is held.

That location may be significant because the laws of that jurisdiction, including those allowing for family provision claims by other family members, de facto spouses and dependants, may then apply and allow the other persons (despite the terms of any will or the statutory order of payments where there is no will, for that jurisdiction),



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to make a 'family provision' claim.

This will be particularly significant if the superannuation trustee pays the death benefit to the LPR so that it becomes part of the estate.

There will also be circumstances where such claims can be made on the superannuation if it is part of 'notional property' for the purposes of the family provision laws.

There are time limits, with some limited grounds for extensions with court approval, for making a family provision claim, so legal advice should be sought promptly.

As with any other areas, there are specific rules and procedures applicable to different circumstances. **FS**

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