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# Introduction

Where a member dies without effective documentation, the distribution of death benefits is at the discretion of the remaining trustees. Recent court cases have drawn even greater attention to the importance of getting SMSF estate planning documentation right. When considered in light of an ageing Australia, the value of assets invested in SMSFs and recent court cases, having the correct SMSF documentation and process is essential to minimise the risk of litigation from disappointed beneficiaries to allow a safe passage of death benefits to intended beneficiaries.

This Go-to-Guide will aim to highlight the key issues in SMSF estate planning. However, it is no substitute for specialised legal and SMSF advice which are crucial in implementing a safeguarded and effective SMSF estate plan.

What constitutes legal advice and who can give legal advice is beyond the scope of this Go-To Guide. As best practice, we encourage seeking advice from a specialist SMSF lawyer to ensure that documentation is appropriately drafted and executed. Non licensed legal advice can attract severe penalties as well as open advisers to the possibility of legal liability should a dispute arise.

## Estate planning overview

Simply, estate planning is ensuring members have control over where their assets will go after they pass away. Therefore, it is important in the creation of an estate plan that each of the documents in an SMSF document chain, link up correctly. Any weak link has the potential to destroy the entire estate plan.

Under general trust law, a trustee has a wide, absolute and unfettered discretion to determine who, within the operation of the law, will receive a member's death benefit and how much each beneficiary will receive. However, this needs to be balanced with the trustee’s fiduciary responsibilities to ensure that a trustee of an SMSF acts in good faith, responsibly and reasonably. Typically, there needs to be a fair bit of evidence of bad behaviour from a trustee before a Court will intervene in how an SMSF has been administered.

A member can remove the trustee’s discretion to give greater control in deciding how their superannuation death benefits will be cashed. This may be relevant where:

* The member has a blended family and wants to ensure all family members benefit from their superannuation upon their death;
* It is anticipated that there will be conflict amongst the possible beneficiaries;
* Conflict amongst the remaining trustees of the SMSF upon the member’s death is a possibility;
* There is a risk that those controlling the SMSF post the member’s death may not cash the deceased member’s benefits in accordance with their preferences.

Although removing trustee discretion can provide certainty it can also give rise to inflexibility on the death of the member so careful consideration should be given to the different options available. Subject to the specific terms of the SMSF trust deed, trustee discretion is generally removed if:

* the member has a valid and current binding death benefit nomination (BDBN) in place and the SMSF’s trust deed allows for such nominations.
* the SMSF trust deed specifies how death benefits will be distributed, e.g. all death benefits must be paid to the deceased person's estate; or
* the member has nominated a reversionary beneficiary to whom the pension will automatically revert to, upon their death.

Control by the member should also be considered in the context of an enduring power of attorney (EPOA) which in essence is the substitute decision maker, in the event that the member is legally incapacitated.

In all instances where a member opts to remove trustee discretion in relation to the payment of their superannuation death benefits careful consideration of the SMSF trust deed is required to ensure it does not impose restrictions above and beyond the operation of the relevant superannuation and taxation laws. It is also paramount to ensure that a member regularly reviews their estate plans to ensure that the measures put in place remain relevant and appropriate.

So what should form part of a comprehensive SMSF estate plan? At a minimum it should contain:

* An up-to-date Will
* An up-to-date EPOA
* An up-to-date SMSF trust deed, including prior variations
* An up-to-date death benefit nomination (if applicable)
* Up-to-date pension documentation (if applicable)
* All trustee documentation, including details of directors and any changes
* A review of the ownership state of all types of wealth

## Cases Summaries

Although it may be considered that there are limited grounds for beneficiaries to challenge, recent court cases have made it clear that trustee discretion is not as absolute as it has been traditionally. Recent cases have also taught us that where SMSF documentation is in any way not executed in accordance with the underlying trust deed, it may expose the current estate plan of members as being null and void.

What has also become more apparent is the increased inclination for death benefit ‘challengers’ to look beyond traditional estate assets and seek ways to challenge SMSF trust deeds. Superannuation is not only becoming our largest asset but particularly SMSFs have greater scope for errors and mismatches of information in their documentation than traditional wills and estate plans.

### Hill v Zuda[[1]](#footnote-2) (2022)

Zuda Pty Ltd was the trustee of The Holly Superannuation Fund (an SMSF). On the death of Mr Sodhy, a BDBN clause in the SMSF’s trust deed required the trustee to distribute his balance to the surviving member, which in this case was his de-facto partner (Ms Murray). The deceased’s only daughter challenged Mr Sodhy’s BDBN on the basis that it did not comply with the specific rules for BDBNs in the superannuation laws.

The High Court decided that the specific BDBN provisions found in s59 of the SIS Act and SIS Reg 6.17A, do not apply to SMSFs.

This means that the rules for a valid BDBN in an SMSF are imposed by the SMSF trust deed and that the requirements of SIS Reg 6.17A do not have to be complied with. Therefore, unless imposed by the trust deed, a valid BDBN in an SMSF does not lapse after three years, nor does it need two independent witnesses.

*Issue: Restrictive governing rules and the importance of a valid BDBN*

### Benz v Armstrong[[2]](#footnote-3) (2022)

In this case, the NSW Supreme Court confirmed that superannuation death benefits subject to a valid BDBN could be clawed back and brought into an estate under the notional estate provisions.

Dr Benz passed away in April 2019 leaving his second wife, Erlita, and six children to his first marriage. Erlita was the executor/ trustee of his estate.

Dr Benz’s super balance, which was valued at nearly $13 million, was to pass to Erlita via a valid BDBN executed in May 2016 and the residual Estate was to be distributed amongst the kids in accordance with his will dated September 2012. However, there was only approximately $200,000 left in the residual Estate to divide.

The Court had to consider whether it could access the notional estate, a significant portion of which was in super. Specifically, the court considered whether the in-specie transfer of shares to Erlita to satisfy the superannuation death benefit payments, were a notional asset of his estate. The court considered whether there was a failure by Dr Benz to revoke the BDBN prior to his death and put in place a new one in favour of the executor of his estate.

The court awarded $3.7m be paid to the three children under family provision orders, after it was concluded that Dr Benz’s super did form part of his notional estate and is available for distribution. Although notional estates are unique in NSW, it is important to get specialist legal advice to ensure a client’s testamentary wishes can be fulfilled.

*Issue: Importance of a valid BDBN*

### Perry v Nicholson[[3]](#footnote-4) (2017)

In this case the original trustee and later trustee fought about who made the death benefit payment decision.

Ms Perry, the deceased’s adult child challenged her father’s BDBN which provided that his death benefit would be paid to his de facto spouse, Ms Nicholson. Ms Perry argued that the BDBN was invalid due to technical imperfections in a change of trustee two years prior to the BDBN and that she was still the rightful trustee.

The Court upheld the effectiveness of the change of trustee even though the documents prepared by the accountant did not strictly comply with the requirements in the trust deed.

Had the Court applied the stricter approach from previous cases, the change of trustee may well have been invalid, which could have then resulted in the BDBN being ineffective.

*Issue: Imperfect trustee documentation*

### Cantor Management v Booth[[4]](#footnote-5) (2017)

In this case the trustee and Executor argued about whether a BDBN had been ‘given to’ the trustee as required by the trust deed.

Malcom Cantor, deceased, was the sole member of the SMSF. The deceased’s brother, Christopher Cantor, was the sole director of the corporate trustee (he acted under an EPOA as it is believed Malcom lived outside of Australia frequently).

Malcom’s last made nomination prior to his death was in favour of his Legal Personal Representative (LPR). He had appointed his cousin Dr Booth, as the Executor of his estate (and therefore the LRP).

The registered office of the trustee was an accountancy firm where the BDBNs were executed, witnessed and retained. Christopher was not aware of this.

The Court examined the governing rules of the Fund and accepted the proposition that the rules of the Fund did require the 2012 BDBN to be ‘given to’ the corporate trustee to be effective.

However, the Court held that this requirement was satisfied in this case by leaving the 2012 BDBN document at the accountancy firm — the registered office of the corporate trustee.

*Issue: Restrictive governing rules*

### Donovon v Donovon*[[5]](#footnote-6)* (2009)

In this case, the deceased, Ronald Donovan, was the sole member of an SMSF with a corporate trustee. The trust deed allowed both non-binding and BDBNs. Prior to death Ronald made a nomination requesting payment to his LPR.

Ronald’s nomination did not indicate whether the nomination intended to be binding on the trustee and the Court concluded that it was not binding with the death benefit payment ultimately made in favour of the surviving spouse.

Therefore, clarity of intention that a nomination is to be binding becomes imperative.

The Court determined that the trust deed was drafted to broadly import the requirements of the SIS Act and SIS Regulations, particularly, Reg 6.17A.

These requirements include:

* Must be in writing,
* Must be signed and dated by the member in the presence of two witnesses who are
  + Over the age of 18
  + Not nominated to receive a benefit in the notice
* Must contain a declaration signed and dated by the witnesses stating that the notice was signed by the member in their presence
* Will lapse after three years.

The fact that the nomination didn’t meet some of these requirements added further weight to the conclusion that the nomination was not binding.

The key outcome from Donovan is that the courts may construe certain SMSF deeds to incorporate requirements of SIS Reg 6.17A, despite the fact that there is an exception for SMSFs from these requirements generally.

*Issue: Importance of the form and wording in a BDBN*

### Ioppollo v Conti[[6]](#footnote-7) (2015)

In this case the children challenged whether the trustee (their father) could pay their entire mother’s death benefit to himself, and whether they were appointed as trustees on her death.

The SMSF’s trust deed provided that unless there was a BDBN, death benefits were to be paid at the trustee’s absolute discretion. The children’s mother died without leaving behind a BDBN. However, her Will expressed that her entitlements in the SMSF were to be paid to her children and specifically stated that no SMSF death benefit be paid to her husband.

Upon the mother’s death, the father was left as the sole trustee, with apparent power to appoint a new trustee. As sole director of the new trustee, he paid all the death benefits to himself.

Two of the children were Executors of the mother’s estate.

The children argued that the deed required the mother’s legal personal representative to be appointed as trustee of the SMSF because the deed stated that the fund must remain an SMSF. This argument failed. It was the deed that was most important here.

The children also argued that because the mother directed all benefits to be paid to her children, the father had not acted in good faith in paying himself. This argument was also lost as it has traditionally been hard to make this case successfully and because the father took advice and considered the daughters.

**However**, note Marsella v Wareham (No 2) [2019] VSC 65[[7]](#footnote-8) where the trustee was found to exercise trustee discretion in bad faith by not considering their duties to consider other beneficiaries and ignoring their own conflict of interest.

*Issue: Trustee discretion and control*

### Munro v Munro[[8]](#footnote-9) (2015)

In this case the wife and children disputed whether the wording of a BDBN meant it could be ignored.

Mr Munro filled out a BDBN which nominated the ‘Trustee of Deceased Estate’ as his beneficiary. When Mr Munro died, his wife and daughters were the Executors of the estate. His wife appointed her daughter as a trustee of the SMSF.

The wife considered the BDBN invalid as it did not comply with the superannuation governing laws and proposed to pay the benefits all to herself.

The Court found that Reg 6.17A did not have to be complied with, so the BDBN needed to follow the requirements in the trust deed. It found ‘Trustee of Deceased Estate’ did not mean the LPR (Executor of the estate).

Because the nomination was not to the Executor of the estate, or a ‘nominated dependant’ the court found that the document prepared in 2009 did not comply with the trust deed of the SMSF and so was not binding on the trustee.

*Issue: Restrictive governing rules*

<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2015/61.html>

### Narumon[[9]](#footnote-10) (2018)

In this case the court considered powers of attorneys and BDBNs.

Mr Giles was the sole member and director of his SMSF. He had appointed his wife and sister as enduring powers of attorney for financial and personal/health matters. Before losing capacity in November 2013, Mr Giles made a number of BDBNs with the most recent being in 2013. The BDBN would lapse in June 2016 and had 5% of the benefits to be paid to a non-superannuation dependent.

Confirming the view in Mullins regarding 6.17A, the inclusion in the trust deed for the Fund of the three year expiration provision meant that his wife and sister felt they had to take steps as Mr Giles’ Attorneys to ‘extend’ his BDBN once it had expired on June 2016.

At the same time and with the intent to cure what was a defective nomination, they made a further fresh nomination which they signed on behalf of Mr Giles leaving 50% of his accumulation balance to each of Mrs Giles and his son Nicholas.

The Court found in this case that as the Deed made reference to a BDBN that “may be in a certain form”, it did not require any strict compliance with a particular form and so the form of nomination was of itself not invalid.

In relation to the payment of a portion of the death benefit to a non SIS dependent the Court took a practical and purposive approach and did not find the whole nomination invalid. It decided that only that part of the nomination being paid to a non SIS dependent (i.e. Mrs Keenan) was invalid (5%).

What the Court ultimately found was that the Attorneys could extend the existing BDBN for a further 3 years but could not make a fresh binding nomination because it was a financial matter and not testamentary. There was no conflict in extending the BDBN even though the Attorneys were beneficiaries because it was incidental. This was evidenced by a history of BDBNs in the spouse’s favour.

The case also highlighted that when amending an SMSF trust deed that it is important to review the chain of SMSF deeds. Although a variation might be effective under the latest version of the deed, if prior deeds are defective then the latest deed could also be defective.

*Issue: Defective nominations and deed updates*

# Superannuation Death Benefits

There are nil cashing restrictions on the death of a member.

The death of a member is a compulsory cashing requirement requiring a member's benefit to be cashed as soon as practicable.

The SIS Regs set out who is a ‘dependant’ to whom the super death benefit can be paid and prescribe how the benefit must be cashed. Careful consideration of the SMSF trust deed is required to ensure it does not impose further restrictions.

The Tax Act then determines how the superannuation death benefit will be taxed, with concessional tax treatment only afforded to ‘death benefit dependants’ as defined under the ITAA 1997.

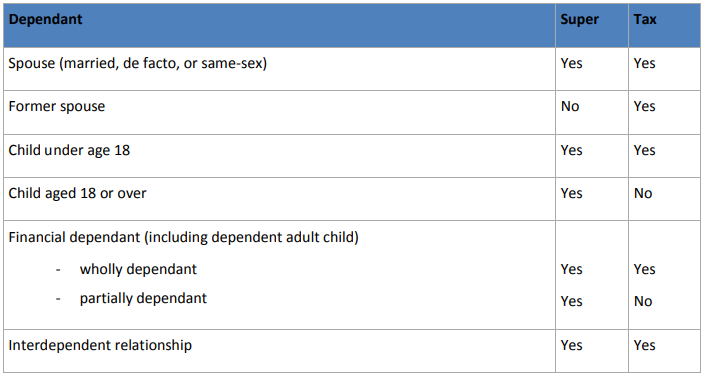
For more information on all the matters discussed in this section, please refer to our [Go-To Guide on superannuation death benefits.](https://www.smsfassociation.com/go-guide-superannuation-death-benefits/)

## Who can receive a Death Benefit

Subject to the underlying trust deed which may be more restrictive about who a death benefit can be paid to, generally a SMSF trustee can pay a superannuation death benefit to one or both of the following:

* the member's legal personal representative (LPR), or
* one or more of the member's dependants.

The following table simply outlines the difference in the definition of ‘dependant’ for superannuation and tax purposes.



Who is a superannuation dependant is extremely important because misinterpreting this definition may mean that SMSF documentation is ineffective. Furthermore, correct documentation is essential to ensure that beneficiaries can be clearly determined.

Where benefits are paid to the LPR and dealt with in a Will it is often considered best practice to wait for probate or letters of administration first, before cashing the deceased member’s benefits. Once paid to one’s estate there is no restriction on who can receive the death benefit. In fact, the member’s Will can leave the death benefit to a person even if they are not a dependant although the tax payable in respect of the death benefit is affected.

Where, after making reasonable enquiries, the trustee has not been able to find a LPR or a dependant, the SIS Regs allow the trustee to pay a death benefit to any other person. This could include a non-dependent but must be an individual and cannot be an entity.

## Cashing Superannuation Benefits

When a member dies, the trustee of an SMSF is required to ‘cash’ the deceased member’s remaining superannuation entitlements (i.e. death benefits) as soon as practicable after the member’s date of death.  This is a compulsory cashing[[10]](#footnote-11) requirement and although the term ‘as soon as practicable’ is not defined, the ATO generally expects payment to be within six months of death unless the trustee can demonstrate valid reasons for the delay. For example, the trustee may be unable to identify eligible beneficiaries or is seeking legal advice in relation to the validity of a death nomination. It is less likely that the ATO will accept market downturn conditions as a valid reason for delaying the sale of assets to fund the payment of death benefits.

‘Cashed’ includes paying the deceased member’s benefits as either a lump sum, as a pension or as a combination. One limited exception is where the deceased member’s benefits are rolled over as soon as practicable for immediate 'cashing' by the new superannuation fund.

The principal underpinning the cashing rules remains unchanged, however from 1 July 2017, the regulations will only be satisfied if a death benefit pension satisfies the definition of a retirement phase[[11]](#footnote-12) superannuation income stream.

The term cashed is not defined in the super law but refer to [Technically Speaking: Superannuation death benefit cashing rules](https://www.smsfassociation.com/technically-speaking-superannuation-death-benefit-cashing-rules/) for more on the ATO’s interpretation which essentially requires a member’s superannuation death benefits to be paid out of the super system. *“That is, they are not rolled over, transferred or left within accumulation phase”* para 58 ATO LCR 2017/3.

## Transfer Balance Cap (TBC) Implications

From 1 July 2017, the introduction of the TBC impacts on the amount of capital that an individual can use to support an income stream in retirement phase. The TBC also applies to death benefit pensions although different rules apply to modify the TBC for a child beneficiary and for a reversionary beneficiary.

Where a member dies, their Transfer Balance Account (TBA) dies with them. In essence, a deceased member’s TBA is not inherited by a dependant, not even a surviving spouse. Where the recipient of a death benefit pension exceeds their TBC, they will be required to receive a lump sum death benefit. This in turn, limits the amount of money that can now be retained within the superannuation environment upon the death of a member. Ultimately, more money will be leaving superannuation than ever before.

This represents a significant shift in relation to superannuation death benefits and estate planning, making it paramount to review all succession plans involving superannuation benefits.

Certain considerations may now include:

* How effective binding nominations and reversionary pensions are for the surviving spouse
  + Outdated estate planning documentation may lock out other alternatives such as child pensions or testamentary trusts
  + Money may need to be removed from the superannuation system for the surviving spouse due to the TBC and outdated documentation may force it to unintentionally bypass the deceased estate
  + Outdated documentation may not deal with a deceased accumulation interests as intended due to the introduction of the TBC
    - Documentation such as BDBNs may need to address an individual’s accumulation and pension interest separately
    - Reversionary pension documentation cannot address a deceased individual’s accumulation interest
* The use of testamentary trusts for significant amounts of money forced out of the superannuation system which an individual may not want to invest in their personal capacity.

You can read more about superannuation death benefits and the TBC (specifically how they are reported and TBC management) in our [Go-to Guide on superannuation death benefits](https://www.smsfassociation.com/go-guide-superannuation-death-benefits/).

# Fund Control

Critical to ensuring a member’s wishes are implemented on their death is the ‘control’ of the SMSF.

The law does not dictate how control of an SMSF is passed on but reference to the SMSF documentation provides the appropriate guidance. For example, the law does not dictate that where a member dies (or member loses capacity), one’s LPR automatically becomes trustee/director.

[Ioppolo’s](#_Ioppollo_v_Conti) case is evidence that although the appointment of an Executor as trustee would have been permitted, it was not **required** by the SIS Act.

## The SMSF Trust Deed

With regards to estate planning and SMSFs, preparation of the funds trust deed is most likely the most important task. The task of preparing the deed requires careful and detailed planning as to its contents as these will form the rules that govern the SMSF. For estate planning purposes, the deed will determine who will have control of the fund following the death of a member as well as how death benefits can be paid.

The preparation of the trust deed and governing rules should be undertaken by an appropriately experienced legal practitioner.

Commonly, issues with a trust deed revolve around them being silent on matters, being restrictive and imposing additional and unnecessary requirements on the payment of a superannuation death benefit. Therefore, it may be prudent that your trust deed provides the trustee a wider discretion to determine how death benefits are paid, subject to other pension documentation.

In many cases, the trust deed has greater bearing on the process of death benefit payments than the legislative provisions in the SIS Act. Therefore, it is important the trust deed is reviewed regularly.

Of increasing importance is ensuring trust deed variations match up with the relevant details from previous deeds and updates. When undertaking a deed amendment it is also important to retain all original copies of prior deeds to ensure there is a complete document trail. All deeds should be safeguarded to ensure they are not lost as a lost deed creates a myriad of problems starting with the most fundamental which is that a trustee will have difficulty proving that they are abiding by the terms of the trust.

Some trust deed issues to consider:

* Each deed is correctly executed and dated (e.g. generally to be executed by an individual, a deed is required to be signed, sealed and delivered)
* If a change in law surrounding SMSFs requires you to update your deed
* A change in client circumstances warrants an amendment or review
* Trust Deeds which are incompatible with the 2017 superannuation reforms
* Clear rules as to how BDBNs, reversionary pensions and other SMSF documentation are affected (e.g. lapsing or non-lapsing BDNSs)
* The trust deed refers to the application of the SIS Act when this is not necessary
* The trust deed was not varied in accordance with the variation power
* An individual required to consent to a variation or change or trustee has not done so
* Documents in the entire estate plan are missing

Many of these issues are applicable across a range of SMSF documentation. It is important to recognise that what may seem simple common sense errors, can have significant impacts on large amounts of superannuation monies.

See [Hill v Zuda](#_Hill_v_Zuda)

See [Munro v Munro](#_Munro_v_Munro)

See [Cantor Management Services Pty Ltd v Booth](#_Cantor_Management_v)

### Trustee Discretion

Trustee discretion or lack of discretion in relation to the payment of superannuation death benefits is a crucial aspect.

Typically, most SMSF trust deeds adopt the default position that the trustee has a discretion regarding to whom and how death benefits will be paid. However, because of the fiduciary duties of a trustee to beneficiaries, it is possible for a disappointed beneficiary to challenge what has traditionally been a trustee’s absolute and unfettered discretion.

There are generally limited grounds for a court to interfere with the trustee’s discretion. The case of Karger v Paul[[12]](#footnote-13) sets the principals applicable in Australia where it was held that a trustee’s absolute and unfettered discretion will not be examined or reviewed by the courts where the trustee has evidence that the *“….. discretion is exercised in good faith, upon real and genuine circumstances and in accordance with the purposes, for which the discretion was conferred”.*

However, in [Marsella](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2019/65.html)’s case[[13]](#footnote-14) the trustee was found to be acting ‘’grotesquely unreasonable’’ in conflict of her trustee duties and in bad faith. The trustee believed that the fund Deed afforded them absolute and unfettered discretion to make payment to herself without reasons. However, the Court found that the trustees failed to exercise their discretion with real and genuine consideration of the interests of the fund’s beneficiaries. In other words, the trustee cannot just pay themselves without going through a due and proper process.

The decision on how much discretion to leave remaining trustees comes down to a variety of personal circumstances. For example, when there is a higher risk of a deceased wishes not being implemented by the controller of the SMSF, it may be appropriate to remove any discretion. However, this must be balanced with the loss of flexibility when a death payment decision is locked in.

## Removal and Appointment Powers

Control of SMSFs comes down to the process involved with replacing trustees and the trustee structure of the SMSF. The process for appointing a new trustee/director must be followed to ensure that the control of the SMSF is not put in jeopardy.

Reference to the trust deed will determine the method for the removal and replacement of an individual trustee. For example, in a two member SMSF, typically the surviving member/trustee (which is usually the spouse), would need to consent to have the LPR appointed as a trustee. This may be an issue where the interests of the surviving member and the LPR are not aligned. See [Ioppollo’s](#_Ioppollo_v_Conti) case.

One potential way to avoid this issue is to consider alternative clauses which allow each member the right to appoint a trustee and following the death of a member their LPR has the right to appoint themselves as trustee.

For a corporate trustee, the relevant rules will be set out in the constitution of the company. The powers in a trust deed typically only refer to the ability to appoint and/or remove the corporate trustee itself and not the directors of the corporate trustee.

The appointment and removal of a director is critical to the decision making powers of a corporate trustee and therefore the control of the SMSF. Generally, to appoint or remove a director requires a majority of voting shares. Although the SIS Act does not prescribe who must own the shares in a corporate trustee, the distribution of voting rights amongst the shareholders needs to be carefully considered as part of a member’s overall estate plans where there is a corporate trustee.

### Individual trustees V Corporate trustee

On the death of an individual trustee, the deceased will cease automatically to be a trustee and control will rest with the remaining individual trustees. From an administrative perspective, adding or removing a new member/trustee gives rise to extra costs and paperwork as any remaining assets (after paying out the death benefits) would need to be re-registered in the new trustees’ names.

On the death of a director of the corporate trustee, a corporate trustee can offer more flexibility as the trustee does not need to change. Therefore, in the event of the death (or incapacity) of a member, control of an SMSF and its assets by a corporate trustee can provide more succession planning certainty.

A corporate trustee also offers administrative efficiency as members are added or removed from the SMSF because the corporate trustee itself does not change, only the underlying directorship of the company changes. This means that the assets of the SMSF are still held in the same name - that is, the name of the company - so there is no need to change the name in which the assets of the SMSF are held.

Please note that where an SMSF with a corporate trustee restructures to have individual trustees, it is vital that the trust deed be reviewed & updated if required, to ensure that the primary purpose of the fund is the provision of old age pensions. This ‘pensions power’ is a requirement of ss19(3) of the SIS Act for any regulated super fund that does not have a constitutional corporation as trustee.

The SMSF Association believes it is best practice that SMSFs adopt a corporate trustee structure. When considering estate planning, the benefits of a corporate trustee are particularly apparent.

There are also numerous other benefits of a corporate trustee. A comparison between individual trustees and corporate trustees can be found in our [Go-to Guide on the establishment of an SMSF.](https://www.smsfassociation.com/go-to-guide-establishment-of-an-smsf/)

## Definition of an SMSF

One of the key rules of SMSFs in s17A of the SIS Act provides that to meet the definition of an SMSF members have to be trustees/directors and trustees/directors generally have to be members.

The SIS Act recognises that on the death of a member, there will almost always require a change in the trustee arrangements for the fund and s17A(3) provides for some exceptions to the definition of an SMSF. For example, an SMSF will not fail the basic conditions in s17A by reason that a member of the fund has died and the legal personal representative of the member is a trustee of the fund or director of a body corporate that is trustee of the fund, in place of the member, during the period:

1. Beginning when the member of the fund died; and
2. Ending when the death benefits commence to be payable in respect of the member of the fund.

This exception is often relied on by SMSF trustees as most trust deeds allow a deceased member to continue to be a member until all their benefits are cashed and they no longer have any entitlements.

The SIS Act also recognises that following the death of a member the remaining trustees may require some time to restructure the SMSF to meet the basic rules. Subsection 17A(4) of the SIS Act provides for a ‘grace’ period which is generally six months before the fund ceases to be an SMSF.

Where the LPR is already a trustee of the SMSF, no change is required until six months after the death benefits commence to be paid, at which time changes may not even be required unless it’s a sole member fund with an individual trustee. Similarly, where the survivor chooses to wind up the fund and transfer his/her balance to an APRA regulated fund within the six month window the need for a change in trustee may be avoided.

It is important to note that this six month period expressly does not apply to where an SMSF fails the definition due to the addition of a new member. Therefore, to avoid breaching this provision, a new member must first be appointed as trustee/director. This is not always possible. For example, a pension that automatically reverts to a non-member, means that the reversionary beneficiary automatically becomes a member on the date of death of the original pensioner.

### Legal Personal Representative (LPR)

The term “legal personal representative” for the purposes of ss17A(3) of the SIS Act is defined in s10 of the SIS Act as:

“…. the executor of the Will or administrator of the estate of a Deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person”

Where the deceased’s Executor is multiple individuals the ATO confirms in para 15 of SMSF 2010/2 that all or one or some combination of these individuals could be appointed as trustee(s)/director(s).

Once appointed, the Executor is a trustee like any other trustee. In the absence of any special provisions to the contrary they will participate in decisions far beyond just dealing with the death benefit. They will share responsibility for the fund’s investment strategy, appointment of suppliers, insurance just like any other trustee/director.

Given the power afforded to one’s LPR, it is very important to ensure that the deceased is comfortable that control of the SMSF is in the hands of someone they trust. This highlights the importance of a member’s Will as it determines who becomes the Executor of the deceased individual’s estate which in turn is the LPR that can step into the shoes of the deceased member as trustee of the SMSF.

If the member does not have a LPR that can be appointed to the fund, the fund must either roll out the member’s benefits to an APRA-regulated fund or an APRA approved trustee is appointed. Both these options would not be the intention under a well formulated estate plan.

SMSFR 2010/2 states that anyone contemplating becoming a trustee, or a director of a corporate trustee, of an SMSF (whether pursuant to an EPOA or otherwise) would do well to note that once appointed in place of the member, they assume the duties, responsibilities and obligations of a trustee or director in their personal capacity and not as an agent for someone else.

Further, they may be subject to civil and criminal penalties for any breaches of their duties under the SIS Act or other legislation and as a director of a corporate trustee, they may also be subject to civil and criminal penalties for breaches of the Corporations Act.

### Enduring Powers of Attorney (EPOA)

As part of a comprehensive estate plan, it is also important to consider an EPOA. If a member loses capacity in an SMSF without an EPOA, it can cause significant problems for the continued running of the SMSF as they are no longer able to be a trustee or director of their SMSF. This puts the compliance status of the fund at risk.

An EPOA is a legal instrument that allows an individual named in the EPOA to represent another for the purposes stated in the EPOA. With regards to SMSFs, this is typically to allow the EPOA to make certain decisions on behalf the member. This may include the cashing of a member’s superannuation death benefits or the sale of certain assets.

As mentioned above, SIS legislation generally requires all trustees and directors to be members of their SMSF and vice versa. An exception to this rule allows a member’s LPR to be appointed as a trustee/director in place of the member within six months of the member failing to be a trustee or director. A person’s LPR includes a member’s Attorney appointed under an EPOA to ensure that the fund continues to satisfy the definition of an SMSF.

Similarly to one’s Executor, an Attorney under an EPOA (i.e. LPR) does not automatically become a trustee should the person who made the EPOA lose capacity.

Generally, an EPOA will allow the Attorney to exercise the rights attached to membership of the SMSF which will typically enable the Attorney to be appointed as an individual trustee of the SMSF following review of the appointment powers in the underlying trust deed.

Where there is a corporate trustee, an EPOA typically allows the Attorney to exercise voting rights attached to the shares held by the member in the trustee company. As discussed earlier, this will usually enable the Attorney to be appointed as a director of the trustee company. The constitution of the trustee company and the SMSF trust deed also need to be reviewed to ensure due process is followed to appoint the Attorney as a director.

The relationship between the EPOA individual and the individual giving the EPOA is one of a fiduciary nature. This means the EPOA cannot personally benefit from their position unless it is specifically allowed.

[Narumon](#_Narumon__(2018))’s case confirmed that the EPOA had the power to make, renew or extend a BDBN on behalf of a member. The court decided the EPOAs decision to extend a BDBN was a financial matter and did not involve a conflicted transaction. This highlights the significance of the EPOA role with regards to estate planning.

Please note that each Australian state and territory has its own legislation when it comes to powers of attorney and therefore it is important they are created correctly under each jurisdiction. An EPOA can have wide ranging powers which may affect an incapacitated individual’s wishes. This is a complex legal area and beyond the scope of this Guide.

## Change of Trustee Documentation

There are some fundamental steps that must be executed to ensure that the correct paperwork is in place to support any changes to a trustee/director. Section 104 of the SIS Act also requires that records relating to any changes to an SMSF trustee be retained for at least 10 years with an administrative penalty of 10 penalty units on each trustee applicable.

To ensure the correct paperwork is executed, it is best practice to undertake the following process, at a minimum:

1. Review the trust deed of the fund and the constitution of the company (if there is a corporate trustee)
2. Organise relevant legal documentation. All legal documents must be prepared in line with the requirements of the SMSF deed in order to be valid and may include:
   * A resolution of Trustees and/or Retirement or Appointment of Trustee Deed
     + Check with relevant jurisdiction for any stamp duty implications
   * A resolution confirming consent by the Members
   * Consent to act as Trustee for each new trustee/director
   * Trustee Declaration for each new trustee/director (NAT 71089)
     + Must be signed within 21 days of becoming a trustee/director
     + Must retain for the life of the SMSF and 10 years after the SMSF winds up
3. Inform the ATO of the change. Trustees have an obligation under SIS Reg 11.07AA to notify the ATO in writing, within 28 days of changes in the fund’s trustees or members.
   * ATO Change of Details for Superannuation Entities (NAT 3036).
   * It is important to note that the SMSF annual return cannot be used to notify the ATO about a change in the structure of an SMSF
4. Inform ASIC where a change is made to a corporate trustee
   * Company detail changes must be made online. (Paper form 484 no longer available)
   * Must notify ASIC within 28 days of the relevant change
   * Must also notify ASIC of changes to shareholding in corporate trustee
5. Update the legal title of fund investments once change of individual trustee is finalised

# Member Control

Subject to the underlying trust deed, a member can remove trustee discretion and take steps to control the payment of their death benefits. In this section we discuss the two most common ways that a member can take control of the payment of their death benefit from an SMSF. These include, albeit not limited to, executing a BDBN (lapsing or non lapsing) or nominating a reversionary beneficiary of a pension.

It is important to highlight that superannuation death benefits do not automatically form part of the deceased member’s estate and therefore can only be dealt with in accordance with the Will when paid to the LPR. Below, we discuss the need for a well executed Will to ensure that superannuation death benefits that form part of one’s estate, are paid where they are intended.

## Binding Death Benefit Nominations (BDBNs)

In an SMSF where a member can control who has effective control of the trust and ultimately the discretion to pay death benefits, a BDBN may not need to be binding and can simply nominate a member’s preferred beneficiary. This option however does not provide the certainty that some members require.

A trustee’s discretion to deal with a member’s death benefits can be overridden by a BDBN made by the deceased member in accordance with the governing rules of an SMSF.

A BDBN provides binding instructions nominating who should receive a deceased member’s superannuation interest. As the name suggests, a BDBN is binding on the trustee, whoever they may be. To not provide a deceased’s benefits in accordance with their BDBN would be a breach of the trustee’s duties.

[SMSFD 2008/3](https://www.ato.gov.au/law/view/document?DocID=SFD/SMSFD20083/NAT/ATO/00001&PiT=99991231235958) confirms that the superannuation legislative provisions in s59 and reg 6.17A have no bearing on the binding nomination process in SMSFs. Even though the Commissioner’s view in SMSFD 2008/3 is not binding, Zuda’s case provides High Court authority confirming that SIS Reg 6.17A and s59 of the SIS Act, does not apply to an SMSF.

Consequently, the validity of a BDBN relating to a member’s benefits in an SMSF will be governed by the trust deed of the SMSF. Therefore, the process specified in the trust deed must be followed precisely. Where it is not, the nomination will most likely not be binding on the trustee and it is likely, given the prevalence of estate litigation, to find this the subject of a challenge.

Binding nominations for SMSFs are also able to encompass a wide range of flexibility in their drafting to cover a multitude of scenarios. For example, a trustee is able to accept conditional nominations and specify the form in which a death benefit is paid. A BDBN can also be ‘cascading’ which is often used to refer to a nomination which allows for a substitute beneficiary should the first beneficiary be unable to receive the benefit.

As SIS reg 6.17A does not apply to an SMSF, where the SMSF’s governing rules allow a BDBN can last indefinitely. They do not need to lapse every three years unlike other superannuation funds. However, as a rule of thumb it is important to regularly review BDBNs and either confirm or amend a member’s BDBN to ensure it is always current. This also mitigates the risk that a member may lose capacity and be unable to amend a BDBN (Refer to [enduring powers of attorney](#_Enduring_Powers_of) for more information on loss of capacity).

When drafting or reviewing a BDBN, it is important for a member to:

* Be clear in who is nominated, what they will receive and the amount
* Be clear over which interest the BDBN is covering
* Nominate if the death benefit is paid as lump sum or pension, or combination
* Ensure the BDBN is signed and dated
* Review BDBNs if personal circumstances change
* Review BDBNs in light of changes to relevant legislation

Below we look at the most common issues which present possible grounds to challenge a BDBN from a disappointed beneficiary.

### Eligible beneficiaries

First and foremost, a BDBN will only be effective if the nominated person is eligible to receive the death benefit under the SMSF trust deed and the superannuation law.

Typically, a member’s benefit can only be paid to a member’s LPR or one or more of the deceased member’s dependants as defined in s10 of the SIS Act.

Further the SIS Regs limit the form in which death benefits may be cashed. [Munro’s](#_Munro_v_Munro) case is a good example of where the court held that the nomination was not binding because the nominated beneficiary did not comply with the SIS Regs or trust deed.

For more on who is eligible to receive a death benefit and the form of that benefit please read our [Go-To Guide: Superannuation death benefits.](https://www.smsfassociation.com/go-guide-superannuation-death-benefits/)

### Approved forms

A common issue to consider is whether the trust deed specifies that the BDBN must be made in an ‘approved form’ or that the BDBN must be made in a form ‘approved’ by the trustee.

Therefore, members must be certain that their BDBN is in the form set out in the trust deed or that the trustee has approved the form. If this does not occur, the BDBN is open to challenges as being invalid.

In this circumstance check the trust deed and consider appropriate amendments.

Where a trust deed incorporates the requirements of s59 and SIS Reg 6.17A, a BDBN will need to comply with these requirements otherwise it is at risk of being invalid. It is critical that a trust deed be reviewed before a BDBN is made as SMSF trust deeds that contain provisions which require a BDBN to comply with the requirements of the SIS Act or SIS Regulations can be extremely problematic.

[Donovan’s case](#_Donovon_v_Donovon) is a good example of when a BDBN failed because the form did not satisfy the statutory requirements which were imposed by the trust deed and the wording in the BDBN was not definitive enough in order for it to be binding on the trustee. This case highlights the importance of making sure that a BDBN is clear, unambiguous and in the format required by the SMSF’s trust deed.

### Trustee service and acknowledgment requirements

Other common issues to consider are scenarios where a valid BDBN requires the trustee to acknowledge the nomination or the trust deed requires the BDBN to be given to the trustee. When there is a separation between parties these requirements can cause significant problems.

In [Perry’s case](#_Perry_v_Nicholson), a requirement in the SMSF trust deed that BDBNs must be given to the trustee was motivation behind a challenge on the superannuation assets. The daughter of the deceased member submitted that she was still trustee of the fund and had not been validly removed despite documentation which purposed to change the trustee. She also submitted that the BDBN was invalid as it had not been provided to her, as trustee of the SMSF.

Ultimately, the court held that the trustee change was valid but the case illustrates that service and notification requirements provide further opportunities for challenge.

[Cantor’s case](#_Cantor_Management_v) reinforced the importance of understanding what service requirements are required by a trust deed in order to ensure a BDBN is valid. In this case, the deed required that a valid BDBN be given to the corporate trustee. The court held that this requirement was met, even though the BDBN was left at the registered office of the trustee company and had not been brought to the attention of one of the directors.

### Cessation of a BDBN

Where the trust deed includes the SIS Act and SIS Reg BDBN requirements, then the criteria in reg 6.17A will need to be followed to validly revoke a BDBN. This includes the legislative requirement under SIS Reg 6.17A which will see a BDBN lapse after 3 years.

Alternatively, a member can typically revoke a BDBN by following the process set out in the trust deed or by providing written notice to the trustee any time prior to their death. For example, executing a new BDBN will generally revoke an existing BDBN and should be accompanied by the appropriate trustee resolutions to confirm a member’s new BDBN.

Where the trust deed allows a BDBN to apply indefinitely, conditions can be incorporated to ensure that the BDBN will cease to have effect on the occurrence of a particular event. For example, a BDBN may be prepared so that it becomes void in the event that the member commences a new relationship or divorces or a named beneficiary in the BDBN becomes bankrupt.

Where a BDBN lapses a SMSF trustee needs to be careful not to act in accordance with an invalid BDBN. However, a trustee acting in good faith, responsibly and reasonably can exercise their discretion to take the non binding nomination into consideration when paying the deceased’s death benefit in accordance with the governing rules of the fund.

## Reversionary Pensions

When a member starts a pension prior to their death, the member has the option to nominate a reversionary beneficiary. A reversionary pension is a pension that continues to a beneficiary on the death of the original pensioner. When commenced correctly, a reversionary pension is automatic and removes all discretion from the remaining trustees of the SMSF.

For more guidance on the Commissioner’s view on what is or isn’t a reversionary death benefit pension, please refer to [LCR 2017/3](https://www.ato.gov.au/law/view/document?DocID=COG/LCG20173/NAT/ATO/00001) and [TR 2013/5](https://www.ato.gov.au/law/view/document?docid=TXR/TR20135/NAT/ATO/00001). We’d like to draw particular attention to para 15 of TR 2013/5 which confirms that “a BDBN, by itself, does not make a superannuation income stream reversionary. If the governing rules or the agreement/standards under which the superannuation income stream is provided does not expressly provide for reversion, then a binding death benefit nomination cannot alter this.”

From a practical perspective, a reversionary pension means that the beneficiary is immediately entitled to receive the pension and does not need to wait for a trustee to make any decision with respect to a deceased member’s death benefit. In essence, they become the member entitled to all the rights relating to that pension. If they are not already a member of the SMSF, they will need to be admitted as a member and trustee.

It is important to highlight that the flexibility of a reversionary pension as an estate planning tool is only available if the reversionary beneficiary is a dependant of the member and an ‘entitled recipient’ per SIS Reg 6.21(2A). For example, the estate of the deceased member is unable to receive a superannuation pension as is an adult child of the deceased member.

Reversionary terms are normally decided on commencement of a pension. In order to add a reversionary to an existing pension, one option is for the SMSF trustee to commute and restart the pension with reversionary terms. Alternatively, the ATO appear to accept that it is possible for a pension to be made reversionary after it has commenced although it may be prudent to ensure that this is incorporated into the trust deed.

Things to consider:

* Only one reversionary beneficiary can be nominated to receive the reversionary pension.
  + Can be problematic when the deceased has multiple intended beneficiaries.
* Reversionary pensions must be made for each pension. Cannot be holistic.
* Reversionary pensions will be lost on the commutation of the pension.
  + Typically, needs to be created on the start of the subsequent new pension.

#### Life insurance

For those SMSF members who hold a life insurance policy in their SMSF, an automatically reversionary pension may be worthwhile if the following conditions are satisfied:

* the SMSF member is likely to receive a sizeable insurance payout upon their death;
* the relevant insurance policy premium is paid from the member’s pension account; and
* the relevant pension account that serviced the insurance premiums is comprised of a high proportion of tax-free component.

Broadly, in these circumstances, when a life insurance payment is allocated to a member’s pension account, the payment will take on the same proportion of the underlying taxable and tax-free components as the member’s pension interest.

For more information on the treatment of insurance proceeds received on the death of a member please refer to our [Go-To Guide: Superannuation Death Benefits.](https://www.smsfassociation.com/go-guide-superannuation-death-benefits/)

#### Transfer Balance Cap (TBC) Implications

Irrespective of whether or not a pension is reversionary does not alter the fact that the pension will need to be assessed against the recipient’s TBC. What differs is that with a reversionary pension, the recipient has a 12-month delay after the date of death, before the value of the pension as at the time of death, is assessed for TBC purposes.

The reason for the 12 month delay is to give the reversionary beneficiary sufficient time to adjust their superannuation affairs before consequences, such as a breach of their TBC, takes effect.

The ATO has advised that these amounts still need to be reported via the TBAR (Transfer Balance Account Report) based on an SMSF’s reporting obligations (NAT 74923). However, the credit will not be included in the member’s Transfer Balance Account (TBA) until 12 months later.

For a detailed breakdown on the impact of a reversionary pension on a beneficiary’s TBC please refer to our [Go-To Guide: Superannuation Death Benefits.](https://www.smsfassociation.com/go-guide-superannuation-death-benefits/)

### Binding Death Benefit Nomination vs Reversionary Pension

A common question is if both a reversionary pension and an inconsistent BDBN are in place when a member dies – which must the trustee follow?

There are no provisions in the SIS Act or the SIS Regs that are relevant to determining the nomination to which an SMSF trustee should give precedence where there is a valid reversionary nomination and a valid BDBN in force at the time of the member’s death.

Based on the ATO’s view in LCR 2017/3 and TR 2013/5, the trustee has no power or discretion to pay to anyone other than the reversionary beneficiary where there is a genuine reversionary pension — i.e. one which under the terms and conditions established at the commencement of the pension reverts to a nominated (or determinable) beneficiary. Therefore, where executed properly, a reversionary beneficiary should prevail over a BDBN.

Where however, a trustee may exercise its discretion as to which beneficiary is paid the deceased member’s benefits and/or the form in which the benefits are payable, then a BDBN could be more relevant.

Ultimately, the SMSF trust deed will play an important role in determining the answer to the question.

As highlighted throughout this Go-to-Guide, inconsistent documentation provides grounds for disputes which can result in lengthy and costly legal battles. For example, we often see pension documentation that is inconsistent with the fund’s governing rules which puts in doubt the validity of a reversionary pension.

For example, in [Narumon](#_Narumon__(2018))’s case there was a dispute on the fact the original pension documents had gone missing and could not be located. This raised the possibility that a death benefit nomination would overrule the pension documentation. It was only because the pension was a complying lifetime pension with lots of secondary type evidence (i.e actuarials, pension valuation factors etc) that it was possible for the court to find that it was reversionary. For an account based pension where this secondary evidence doesn’t exist, it is critical to have the original pension documentation in place, especially to confirm whether or not a pension is reversionary.

We strongly encourage trustees to examine closely pension documentation to ensure that there are no inconsistencies with a member’s BDBN as well as their broader estate plans.

For example, in scenarios, where the governing rules or pension documentation expressly remove all power or discretion to determine a benefit, the trust deed may be the overruling document. The alternative argument suggests that a BDBN overrides any conflicting reversionary nomination as it constitutes a fetter on a trustee’s discretionary power.

It therefore is important the trust deed be reviewed for this issue. Specialist legal advice can help determine if the deed should preference the BDBN or a reversionary pension in the case of a dispute. Specialist advice may even consider whether the deed should allow for a ‘paramount document’ which provides for a document or agreement that is made as a special rule of the fund that takes precedence and priority over any other document.

## Member’s Will

As mentioned previously, superannuation death benefits do not form part of the deceased estate unless the trustee’s discretion is exercised in favour of the estate or the estate is the recipient under a BDBN.

When the estate is determined to deal with a superannuation death benefit, there is no restriction on who the Will can provide the benefit to.

Therefore, it is important that a comprehensive Will deals with superannuation death benefits even if the member’s estate is not intended to receive any. This is because it is possible that a superannuation death benefit forms part of the estate through a poorly structured estate plan or control falling into the wrong hands. Additionally, if a superannuation death benefit does reside with the estate, it can be paid to a wider range of individuals.

It is important to ensure that when the Executor of the estate is responsible for superannuation death benefits that control has been adequately considered. This means adequate planning and documentation to ensure that if control falls to the estate, superannuation death benefits are paid where they are intended.

*Some considerations*

* Equalisation clauses
  + This ensures that the Will considers superannuation and equalises the total amount received by beneficiaries from all assets rather than providing a windfall to any beneficiary who receives a majority of superannuation benefit
* Dependant clauses
  + Additionally, it is important to understand the tax outcomes depending on who receives the superannuation death benefit from a Will.
  + These clauses allow Executors to allocate specific superannuation benefits to specific beneficiaries to minimise any tax payable by certain dependants.
* Conflict clauses
  + Given recent cases which go to the issue of conflict where an Executor or administrator of the estate also received superannuation death benefits it is worthwhile considering conflict clauses in a Will.
  + These clauses expressly allow an Executor to pay and also receive superannuation benefits personally.

## Conflicts on Death

Another prominent issue to consider is the conflict when the recipient of a superannuation death benefit is also an Executor of one’s deceased estate.

Considering around 70% of SMSFs are two member funds and couples typically appoint their spouse as Executor of their estate means many surviving spouses are in a position where they may have a potential conflict in relation to their duties as an SMSF trustee and Executor.

Conflict difficulties are able to be avoided with appropriate conflict authorisations or SMSF estate planning documentation such as BDBNs or reversionary pensions which remove trustee discretion.

When personal conflicts and relationship breakdowns arise which impact on the impartialness of the duties of a trustee this provides further difficulties. It is important that at least all conflicts are recognised and managed when a trustee is executing deceased benefits as best as possible.

In McIntosh v Mcintosh [2014] QSC 99 a mother of a deceased son’s estate was appointed as the administrator. While administrator she applied to three of her son’s superannuation funds to receive his death benefits in her personal capacity. If these funds had been paid to the estate they would have been distributed equally between herself and her former husband.

The Court found there was a clear conflict of duty in the actions of the mother who as administrator of the estate, had a duty to apply for payment of the superannuation benefits to the estate instead of preferencing her own interests and bypassing the estate. This is despite the fact the mother was a nominated beneficiary in respect of each of the superannuation funds by non-binding nominations. However, if BDBNs had been in place, no conflict would have arisen.

This case highlights the fiduciary duties of being an Executor are a sacred duty and therefore proper SMSF estate planning must ensure these conflicts are managed.

# Conclusion

This Go-to-Guide is by no means an exhaustive list of the issues and considerations that deal with the estate plans of a member of an SMSF. However, hopefully it provides a useful starting point in building and reviewing a client’s estate plan.

With an ageing population and as SMSF trustees age it is extremely crucial that the wishes of SMSF members are safeguarded and appropriately implemented. One thing for sure is that with the continued complexity and varying documentation in the SMSF industry, large superannuation assets will continue to be an option for challenge from aggrieved individuals.

# SMSF estate planning checklist

**Some steps that specialist advisers working together need to consider to ensure they are working in the best interests of a client:**

Locate the most current version of the SMSF’s trust deed

* + Review prior trust deed amendments to ensure the deed is properly executed and valid

Appoint the Legal Personal Representative (LPR)

* + Ascertain who the Executor of the Estate is to determine the member’s LPR
  + Review the removal and appointment powers in the Deed
  + If a corporate trustee, review the company constitution for Director appointment
  + If a corporate trustee, the LPR must ensure they have a director identification number
  + The LPR must accept and consent to the appointment
  + The LPR must sign a Trustee Declaration (NAT 71089)
  + Complete ATO and ASIC (corporate trustee only) reporting requirements

Ascertain the member’s wishes upon their death before ‘cashing’ the deceased member’s benefits

* + Review any nominations including a reversionary pension. Determine if it is binding or not.
  + Ensure the nominated beneficiary is a ‘Dependant’ for SIS purposes
  + Ensure the form of the death benefit is permissible under the SIS Act
  + Ensure tax is withheld from any lump sum in accordance with the Tax Act
  + Ensure minimum pension payments continue to be met for a reversionary pension

Other issues for consideration

* + Assess Transfer Balance Cap implications & reporting requirements
  + Determine if there are any insurance proceeds to claim
  + Potential Capital Gains Tax (CGT) if assets need to be sold to pay a lump sum death benefit
  + Review LPR removal powers – LPR must be removed as trustee of an SMSF when the death benefit commences to be paid
  + Change of trustee - Fund has 6 months following removal of LPR to meet definition of SMSF

**Subsequent client discussions with the appropriate specialist advisor will be determined based on findings in relation to the above.**

# White Label Document

## Superannuation death benefits – review succession plans

Regardless of the size of your superannuation benefits, it is vital that you sort out your estate plans to ensure that you have a well prepared estate plan so that the right assets go to the right beneficiaries. You need to make sure that you get holistic estate planning advice and have arrangements in place to review your estate plans regularly. Estate plans are not to be set and forgotten.

First and foremost it is important to understand that the payment of your superannuation death benefits are covered by the rules of your SMSF trust deed and do not automatically form part of your Estate for distribution in accordance with the terms of your Will. As trustee of your SMSF, you will need to make sure that you have read and understood your SMSF’s trust deed and that you comply with it at all times.

On your death, one option is to rely on the SMSF trustee’s wide discretion to determine who, within the operation of the law, will receive your death benefit and how much each beneficiary will receive.

The alternative is to remove the trustee’s discretion which gives you greater control in deciding how your superannuation death benefits will be cashed. This may be relevant if:

* You want certainty over your estate plan;
* You have a blended family and want all family members to benefit from your superannuation on your death;
* It is anticipated that there will be conflict amongst your potential beneficiaries;
* It is a possibility that there may be conflict amongst the remaining trustees of your SMSF upon your death;
* There is a risk that those controlling the SMSF post your death may not cash your death benefits in accordance with your preferences.

Subject to the specific terms of your SMSF trust deed, ways in which you could consider removal of trustee discretion include:

* Having a valid and current binding death benefit nomination (BDBN) in place;
* Specifying in your SMSF trust deed how death benefits will be distributed; or
* Nominating a reversionary beneficiary to whom your pension will automatically revert to on your death.

To ensure that your death benefits are cashed in accordance with your wishes, it is critical to ensure that your estate plans are comprehensive and that you understand the ownership and control of your assets on your death. It is also important that any superannuation death benefit advice you receive is consistent and complimentary to your overall estate plans and is not in isolation to the other.

At a minimum, we recommend that trustees have their SMSF trust deed reviewed to ensure maximum flexibility when dealing with death benefit payments. It is also recommended this be done alongside a review of any BDBN(s) to ensure that they too are valid and provide certainty in how death benefits will be dealt with upon your death.

When considered in light of an ageing Australia, the value of assets invested in SMSFs and recent court cases, having the correct SMSF documentation and process is essential to minimise the risk of litigation from disappointed beneficiaries to allow a safe passage of death benefits to your intended beneficiaries.

So what should form part of a comprehensive SMSF estate plan? At a minimum it should contain:

* An up-to-date Will
* An up-to-date enduring power of attorney
* An up-to-date SMSF trust deed, including prior variations
* An up-to-date death benefit nomination (if applicable)
* Up-to-date pension documentation (if applicable)
* All trustee documentation, including details of directors and any trustee changes

**How can we help?**

If you would like to discuss any aspect of your estate plans, please feel free to give me a call to arrange a time to meet so that we can discuss your particular requirements in more detail.

Alternatively, you can refer to the SMSF Association’s trustee education platform, [SMSF Connect](https://smsfconnect.com/), for more information.

1. [*Hill v Zuda Pty Ltd as trustee for The Holly Superannuation Fund* [2022] HCA 21](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/21.html) [↑](#footnote-ref-2)
2. [*Benz v Armstrong* (2022) NSWSC 534](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/534.html?context=1;query=benz;mask_path=au/cases/nsw/NSWSC) [↑](#footnote-ref-3)
3. [*Perry v Nicholson* [2017] QSC 163](https://www.queenslandjudgments.com.au/case/id/301008) [↑](#footnote-ref-4)
4. [*Cantor Management Services Pty Ltd v Booth* [2017] SASCFC 122](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASCFC/2017/122.html?context=1;query=Cantor%20Management%20Services%20Pty%20Ltd;mask_path=) [↑](#footnote-ref-5)
5. [*Donovan v Donovan* (2017) QSC 163](https://www.queenslandjudgments.com.au/case/id/65457) [↑](#footnote-ref-6)
6. [Ioppolo v Conti*[2013] WASC 389*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASCA/2015/45.html?context=1;query=Ioppolo%20&%20Hesford%20V%20Conti%20;mask_path=) [↑](#footnote-ref-7)
7. [*Marsella v Wareham (No 2)* [2019] VSC 65](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2019/65.html) [↑](#footnote-ref-8)
8. [*Munro v Munro*[2015] QSC 61](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2015/61.html?context=1;query=munro%20v%20munro;mask_path=) [↑](#footnote-ref-9)
9. [*Narumon Pty Ltd* (2018) QSC 185](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2018/185.html?context=1;query=narumon;mask_path=) [↑](#footnote-ref-10)
10. Regulation 6.21 of the *Superannuation Industry (Supervision) Regulations 1994* (SISR) [↑](#footnote-ref-11)
11. Section 307-80 ITAA 1997 by reference to regulation 995-1.01 of the ITAR 1997 [↑](#footnote-ref-12)
12. *Karger v Paul* (1984) VR 161, 163 [↑](#footnote-ref-13)
13. *Marsella v Wareham* (No 2) [2019] VSC 65 [↑](#footnote-ref-14)