

Death of a member: What trustees need to consider



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This fact sheet provides guidance to SMSF trustees on the process involved in handling the payment of death benefits on a member's death.

It does not cover the tax consequences of death benefit lump sums or pension payments to the beneficiary. Financial advice should be sought by the beneficiary, if required.

Who is responsible for the distribution of the death benefit?

The SMSF trustee(s) are responsible for the distribution of a member's death benefit.

Where the death of a member has resulted in the fund no longer having any trustee or trustee director, a death benefit can only be distributed after a new trustee or trustee director has been appointed. Generally, in this scenario, the fund's trust deed may appoint the deceased member's legal personal representative (LPR) as trustee or trustee director.

An SMSF that is unable to address the appointment of a trustee or directors must meet the definition of an SMSF within six months, otherwise penalties may apply.

How do the trustees identify the beneficiary?

The trust deed will determine how the death benefit can be paid. Most trust deeds allow members to direct the trustee as to how their death benefits are to be distributed. The SMSF trustee(s) will therefore need to determine if a valid nomination is in place.

The SMSF trustee(s) should review the trust deed of the fund for any special death benefit payment provisions or rules. For example, the trust deed may require that where a deceased member did not have a valid nomination in place, consent is obtained from the deceased member's LPR prior to distributing the death benefit. The LPR is usually the executor of the estate appointed under the deceased member's Will or by the court.

In terms of who can be nominated to receive a member's death benefit, the superannuation law restricts the payments only to those persons classified as superannuation dependants, these include:

- spouses (including de facto and same sex couples)
- children of any age
- people financially dependent on the deceased member at the time of death
- people in an interdependency relationship with the deceased member at the time of death, and

- the legal personal representative of the deceased.

Depending on the type of member benefit, it is possible to instruct the trustee to pay death benefits as a death benefit nomination or as a reversionary pensioner.

A **valid binding death benefit nomination** should generally:

- be in writing
- nominate eligible person(s);
- be signed and dated by the member in the presence of two witnesses, being age 18 or over and are not mentioned within the nomination
- containing a declaration signed and dated by the witnesses stating that the notice was signed by the member in their presence.

However, it is the SMSF trust deed that will prescribe the format, form and procedures for accepting a nomination.

Binding nomination

If the binding death benefit nomination is valid, the SMSF trustee(s) must pay the benefits according to the nomination.

Non-binding nomination

A non-binding nomination provides the SMSF trustees with the member's preferred outcome of who is to receive their benefits upon death, but the SMSF trustees are not bound to follow the nomination.

Lapsing versus non-lapsing nomination

A lapsing nomination is only valid for a specific duration (generally three years) and therefore needs to be reviewed and renewed periodically. A non-lapsing nomination is generally valid until a new nomination is received.

Trustee discretion or invalid nomination

If a direction has not been provided for the payment of death benefits, the remaining trustees generally have discretion to decide to whom and in what form the benefits are to be paid. In some cases, the deed may require the trustees to obtain consent from the LPR of the member, usually the executor of their estate.

Given the case of *Re Marsella* [2019] VSC 65 which dealt with the exercise of discretion by the SMSF trustees, it would be prudent to seek specialist advice prior to exercising discretion to ensure any such decision has been made in good faith with real and genuine consideration of all beneficiaries of the deceased member.

Reversionary pension nomination

Existing pensions may automatically revert to a nominated beneficiary following a member's death if the terms of the pension specify a reversionary beneficiary. Reversionary beneficiaries are usually limited, to the spouse of the deceased, but can also include a child, depending on circumstances.

In what form can the death benefit be paid?

The trustees will need to consider the death benefit instructions put in place by the member and the requirements of the trust deed in determining the payment form.

A death benefit can be paid in the following manner (or a combination of these):

- Lump sum
- Death benefit pension
- Reversionary pension

Payment of a death benefit as a lump sum is done by transferring either cash and/or assets out of the fund to the beneficiary. Once this has occurred, the death benefit has left the superannuation environment.

Where the death benefit is paid as a new pension, commencement documents must be prepared. If the nominated beneficiary is not currently a member, they will be required to become a member and trustee or trustee director. The death benefit will remain in the fund, subject to transfer balance cap considerations of the recipient. The minimum pension is calculated based on the pension commencement date and the age of the beneficiary.

Where the death benefit is paid as a reversionary pension, the existing pension of the deceased simply continues to the new beneficiary. New pension commencement documents are not required as no new pension is established and the original pension is considered to simply continue. The death benefit will remain in the fund, subject to transfer balance cap considerations of the recipient. The minimum pension in the year of death is calculated based on the age of the deceased.

Where the pension being paid is a non-reversionary pension there is no requirement to make any further pension payments as at the date of death. The remaining amount of the non-reversionary pension will be added to the amount of the deceased member's accumulation account. This amount will then be available for distribution to the member's dependants and/or LPR as determined by the member's death benefit nomination or the trust deed.

What documentation is required?

The table overleaf lists the documentation that may be required to be either provided, reviewed or prepared as part of the process of paying out a death benefit:

Document type	Purpose
Death certificate	Confirms the passing of the member
Trust deed	Outlines the responsibilities of the remaining trustees in relation to the payment of the benefit
Will / Letters of administration / Grant of probate	Identifies the member's LPR and is only required where the LPR is to be appointed as trustee or trustee director
Member benefit nominations	Confirms instructions from the deceased member via a death benefit nomination form or inclusion of a reversionary beneficiary as part of an existing pension agreement
Change of trustee / Director documentation	Updates the trustee structure if required as a result of the death of an existing trustee or trustee director
Trustee resolution / Minute	Documents the passing of the member, outlines how the beneficiary has been determined, to whom and in what form the benefit is paid

Summary of practical considerations and key steps

The death of a member can be an overwhelming process, the below provides a summary of some of the key steps for the remaining trustees to consider:

1. Review any direct debit arrangements in place such as regular pension payments. Once the member has passed away, they are no longer able to receive pension payments. Pension payments for reversionary pensions should be amended to the reversionary beneficiary's bank account;
2. Review the death benefit sections of the trust deed for any relevant considerations. Are there any specific provisions governing the payment of the death benefit? Review to ascertain if the current trustee is able to make a decision in relation to the payment of the death benefit. Note any pending deadline for the trusteeship of the fund needs to be amended to comply with the definition of an SMSF in SISA;
3. Check if the deceased member has a valid nomination in place. Don't assume that a death benefit nomination that is headed with the word "Binding" is such. It would be prudent to obtain specialist legal advice as to whether any such nomination is valid and binding;
4. Determine how the death benefit is to be paid and to whom. If there are no valid binding nominations, consider the process of determining all eligible beneficiaries of the deceased, their relationship with the deceased and their personal financial situation. Are there any non-binding nominations, including the member's Will, that provide an indication of the deceased's wishes? Consider obtaining specialist advice in light of the Re Marsella case concerning a trustee exercising their discretion in relation to the payment of death benefits, particularly where the trustee is also a beneficiary, in their own right;

5. Document the decision in relation to the payment of the death benefit in writing. Be careful not to simply use a pro-forma template as this may provide evidence that due consideration was not given to all potential beneficiaries. Ensure time has been given to such consideration of potential beneficiaries and their respective claim, allowing for obtaining specialist advice;
6. Organise payment of the death benefit, where the death benefit is paid as a reversionary pension, trustees may need to update the bank account details for the pension payments;
7. Consider if any changes need to be made to the trustee structure of the fund to comply with the definition of an SMSF. Where there is a change to the trusteeship of the fund, attend to change of title of fund assets. This may require changing the SMSF's bank account and related direct debits (for pension payments, settlement of share purchases) and credits (for investment income, settlement of share sales);
8. Consider if any changes need to be made to authorities in relation to existing fund investments, for example, signatory on bank account(s); internet access to bank account and share trading accounts;
9. Update the death benefit nominations of existing fund members where required. It would be prudent to seek a review of the surviving member's estate plan, including Will and death benefit nominations;
10. Ensure the fund auditor has access to the death certificate, any nominations the deceased member had in place, that the decision to distribute the death benefit has been made by authorised parties (the SMSF trustee) and that the ongoing trustee structure remains complying. Any specialist advice obtain in relation to the payment of the death benefit should also be made available.

Seek specialist independent advice

Payment of death benefits from a superannuation fund is a highly litigated area. As trustee attending to payment of the death benefit, ensure your decision can be defended if challenged. Seek advice from your SMSF's professional advisers and importantly, ensure to obtain specialist independent advice from appropriately qualified professionals who can demonstrate a specialist background in SMSFs.

Further information



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