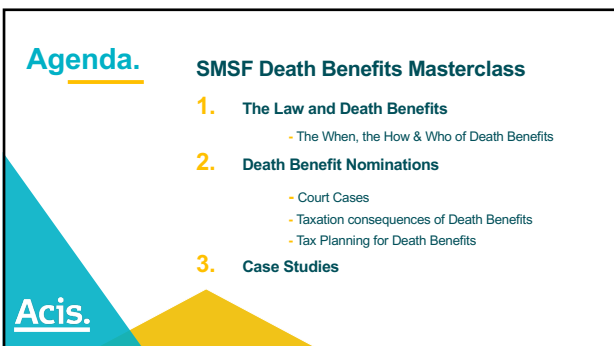




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The Law and Death Benefits

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4

“When” Do You Have To Pay Them

Regulation 6.21

- “Subject to subregulation (3), a member’s benefits in a regulated superannuation fund must be cashed as soon as practicable after the member dies.”
- Subregulation 3: (3) For the purposes of subregulation (1), it is sufficient if, instead of being cashed, the benefits are rolled over as soon as practicable for immediate cashing.

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5

“How” Can Death Benefits Be Paid?

SIS Reg 6.21(2)

2) The form in which benefits may be cashed under this regulation is any one or more of the following forms:

- in respect of each person to whom benefits are cashed:
 - a single lump sum; or
 - an interim lump sum (not exceeding the amount of the benefits ascertained at the date of the event mentioned in subregulation (1)) and a final lump sum (not exceeding the balance of the benefits as finally ascertained in relation to the event).
- subject to subregulations (2A) and (2B):
 - 1 or more pensions, each of which is a superannuation income stream that is in the retirement phase;
 - the purchase of 1 or more annuities, each of which is a superannuation income stream that is in the retirement phase.

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May be paid in specie but MUST actually be paid (TA 2015/2 withdrawn)

SMSF Death Benefits Masterclass – Section: The Law and Death Benefits

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“Who” Can Receive A Benefit


SIS Regulation 6.22

2) The conditions of this subregulation are satisfied if the benefits are cashed in favour of either or both of the following:

- a) the member's legal personal representative;
- b) one or more of the member's dependants.

3) The conditions of this subregulation are satisfied if:

- a) the trustee has not, after making reasonable enquiries, found either a legal personal representative, or a dependant, of the member; and
- b) the person in whose favour benefits are cashed is an individual.



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“Who” Is A Dependent

SIS Act Section 10(1); a Dependent “includes”

- the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship

- A Dependent; or
- A Child

Hints:

1. A person in an interdependent relationship is a dependent
2. Tax Dependent is different to SIS Dependent
3. An adult child can still be a dependent (but can't get a pension)
4. ATO ID2014/22 – child caring for a terminally ill parent

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Interdependency Relationship

SIS Act Section 10A:

1) Subject to subsection (3), for the purposes of this Act, 2 persons (whether or not related by family) have an interdependency relationship if:

- a) they have a close personal relationship; and
- b) they live together; and
- c) one or each of them provides the other with financial support; and
- d) one or each of them provides the other with domestic support and personal care.

2) Subject to subsection (3), for the purposes of this Act, if:

- a) 2 persons (whether or not related by family) satisfy the requirement of paragraph (1)(a); and
- b) they do not satisfy the other requirements of an interdependency relationship under subsection (1); and
- c) the reason they do not satisfy the other requirements is that either or both of them suffer from a physical, intellectual or psychiatric disability

they have an interdependency relationship.

SMSF Death Benefits Masterclass – Section: The Law and Death Benefits

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“Who” Can Receive A Pension

- A Dependent
- A Child – provided that either
 - They are less than 18 years old; or
 - Financially dependent and less than 25 years old; or
 - Have a disability of the kind described in subsection 8(1) of the Disability Services Act 1986
- Child pension must be commuted to lump sum and paid out at age 25 unless they have a disability

Hints:

1. Make sure your deed allows it
2. You don't need to make a pension reversionary to pay a death benefit pension
3. Can't pay a pension to child over 25 even if they are a dependent

SMSP Death Benefits Masterclass – Section1: The Law and Death Benefits



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Commuting Death Benefit Pensions

- If a death benefit pension is commuted it must then be paid out as a lump sum “as soon as practical”

Hint:
Be careful of failing to meet the minimum pension payment (The ATO have provided some relief here)



SMSP Death Benefits Masterclass – Section1: The Law and Death Benefits



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Death Benefit Nominations



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Types of Death Benefit Nominations


1. **None**
2. **Non-Binding**
3. **Binding**
 - In accordance with or written in to the trust deed (SMSF only); and/or
 - In accordance with the SIS Regs (not applicable to SMSFs)

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SMSF Death Benefits Masterclass – Section 2: Death Benefit Nomination

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“Why” Have No Nominations



- This leaves control to the other trustee
- If that is who you want to get the money, no issue
- Structuring is way better than trying to make nominations effective
- Why be in an SMSF with someone you don't trust?
- Flexibility to pay the most tax effective benefit e.g. child pension

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SMSF Death Benefits Masterclass – Section 2: Death Benefit Nominations

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Non-Binding

- **Similar to having none for SMSFs**
- **But courts certainly rely on them**

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SMSF Death Benefits Masterclass – Section 2: Death Benefit Nomination

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Binding In Accordance With Trust Deed

- Not applicable to Public Offer funds unless trustee agrees
- **SIS Act Section 59:**
 - 1) Subject to subsection (1A), the governing rules of a superannuation entity other than a self-managed superannuation fund must not permit a discretion under those rules that is exercisable by a person other than a trustee of the entity to be exercised unless:
 - a) those rules require the consent of the trustee, or the trustees, of the entity to the exercise of that discretion


SMSP Death Benefits Masterclass - Section 2: Death Benefit Nominations




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Binding In Accordance With Trust Deed

- Understand the trust deed requirements
- You can actually write it into the trust deed
- Be careful of a full rules update



SMSP Death Benefits Masterclass - Section 2: Death Benefit Nominations




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Trust Deed 1


5.6 A Member may from time to time prepare and give to the Trustees notice in writing (the form and content of which notice need not comply with the Regulations and which notice may be contained within a testamentary instrument and which may be given to the Trustees after the Member's death and which does not need to be given by the Member personally) as to the names of those Nominated Beneficiaries (being persons who would be Dependents, if the Trustees were determining dependency at the time of notification, or the Member's Legal Personal Representative or any other person authorised by the Regulations) to whom the Member directs any Death Benefit to be paid and, if more than one, in what proportion and may include a direction by the Member about persons to whom a Benefit is not to be paid. The Member may elect that all or some (as specified by the Member in the notice) of the directions in any such notice shall be binding upon the Trustees but to be binding the content of such notice does not require an express statement that it is a notice binding upon the Trustees and it shall be sufficient if such notice uses words or language that satisfy the Trustees that the notice was intended by the Member to be binding upon the Trustees. If the Member does not make a binding election, the Trustees shall use their discretion in distributing any Death Benefit not covered by a binding election in accordance with Rules 5.11 and 5.12.

SMSP Death Benefits Masterclass - Section 2: Death Benefit Nominations



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Trust Deed 2



BDBN

- 37.2 A Member may at any time provide notice to the Trustee that they have made a BDBN if the BDBN:
 - a) is in writing;
 - b) is signed and dated by the Member in the presence of one or more witnesses, who:
 - i. have each turned 18 years; and
 - ii. are not a Nominated Beneficiary; and
 - c) contains a declaration signed and dated by each witness, stating that the notice was signed by them and the Member while all together.

SMSF Death Benefits Masterclass - Section 2: Death Benefit Nominations

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Binding In Accordance With The Regs


- **SIS Regulation 6.17A**
- The High Court in **Hill & Zuda** confirmed does not apply to SMSFs
- **6.17A(1) - (1)** *For subsections 31(1) and 32(1) of the Act, the standard set out in subregulation (4) is applicable to the operation of regulated superannuation funds and approved deposit funds.*
- **6.17A(4)** details the BDBN Requirements
 - Beneficiaries must be dependents or LPR
 - Proportion paid to each member is ascertainable
 - Notice is in Accordance with Sub-regulation 6 and still in effect

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SMSF Death Benefits Masterclass - Section 2: Death Benefit Nominations

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Binding In Accordance With The Regs

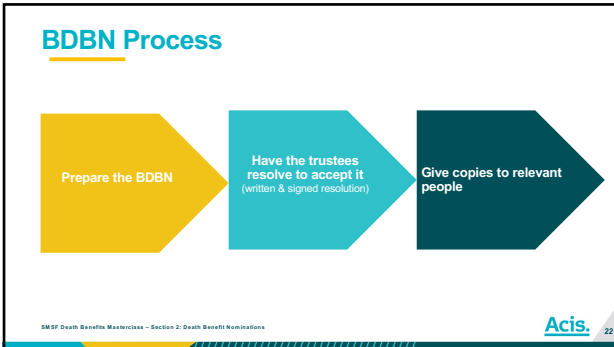


- **SIS Regulation 6.17A(6)**
 - Must be in writing
 - Must be signed and dated in the presence of two witnesses who are both over 18 and not mentioned in the notice
 - Must contain a declaration by the witnesses that they witnessed the signing
- **6.17A(7)** – Unless revoked by the member earlier a nomination in accordance with Sub-reg 6 ceases to have effect after three years unless the trust deed provides a shorter period

SMSF Death Benefits Masterclass - Section 2: Death Benefit Nominations

Acis. 21


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- ### Succession Act (NSW)
- Notional Estate Orders
 - Relevant Property Transactions
 - Any asset held on trust controlled by the testator
 - This overrides BDBN's
 - Only NSW but what state controls the trust deed of your public offer funds?
- SMSF Death Benefits Masterclass - Section 2: Death Benefit Nominations
- Acis. 23

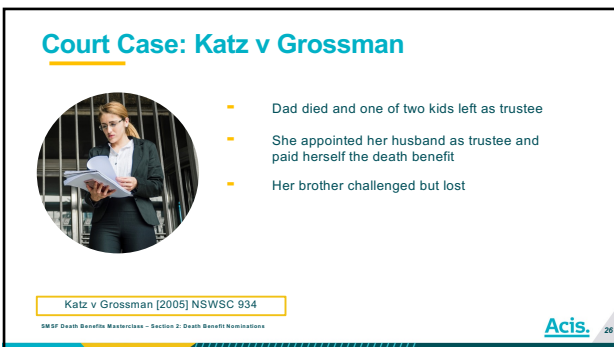
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- ### BDBN v Reversionary Pension
- If BDBN has priority over a reversionary pension it is not auto reversionary
 - Read the Deed
 - Maybe both are valid
- 
- SMSF Death Benefits Masterclass - Section 2: Death Benefit Nominations
- Acis. 24

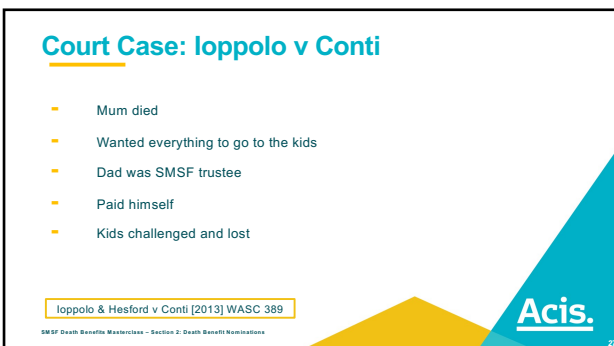
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Court Case: Wooster v Morris

- Mum & Dad trustees
- Dad died
- BDBN to kids from 1st marriage
- Mum decided BDBN was invalid
- Court disagreed
- Kids eventually got the money



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Wooster v Morris [2013] VSC 594

SMSF Death Benefits Masterclass - Section 2: Death Benefit Nomination

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Court Case: McIntosh v McIntosh

- Young man died with no will
- Mum was granted administration of the estate
- Then got all the funds to pay her (\$450k)
- Tax free as she was deemed dependent
- Court ruled she had a fiduciary duty to the estate
- Confirmed in Denise Hilda Burgess as administrator of the estate of Brian Michael Burgess -v- Burgess [2018] WASC 279 (6 September 2018)

McIntosh v McIntosh [2014] QSC 99

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SMSF Death Benefits Masterclass - Section 2: Death Benefit Nominations

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Court Case: Munro v Munro



- Solicitor made BDBN to "Trustee of Deceased Estate"
- SMSF Trustees didn't want to pay it that way
- Court said BDBN was invalid
- LPR & Trustee are different

Munro & Anor v Munro & Anor [2015] QSC 61

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SMSF Death Benefits Masterclass - Section 2: Death Benefit Nominations

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Court Case: Re Marsella

- Lady died with 450k in super
- BDBN deemed invalid
- It nominated the grandchildren
- 3 years had passed (it was in the deed)
- Daughter paid herself
- 2nd husband challenged and won
- *decision was made in bad faith; for improper purposes and with inadequate deliberation*

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Estate of Helen Marsella [2019] VSC 65

SMSF Death Benefits Masterclass - Section 2: Death Benefit Nomination

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Court Case: Narumon

- Confirmed Regulation 6.17A didn't need to be complied with in an SMSF

Re Narumon Pty Ltd [2018] QSC 185

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SMSF Death Benefits Masterclass - Section 2: Death Benefit Nominations

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Court Case: Hill & Zuda

- High Court confirmed that a BDBN does not have to comply with SIS Reg 6.17A for an SMSF
- Further, confirmed that SIS Reg 7.17A has no application to an SMSF



Hill v Zuda Pty Ltd [2022] HCA 21

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SMSF Death Benefits Masterclass - Section 2: Death Benefit Nomination


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Court Case: Benz & Armstrong

- Dr Benz left everything to his 2nd wife
- 4 of his 6 children challenged (3 proceeded)
- He executed a valid BDBN
- Super formed part of the "Notional Estate"
- The BDBN proved worthless even though valid


Benz v Armstrong [2022] NSWSC 534

SMSF Death Benefit Wasteclass - Section 2: Death Benefit Nominations



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Court Case: Williams & Williams



- Dad was in an SMSF with one son
- His other son was named as executor
- There was a BDBN to pay half super to his 2nd wife and half to the estate
- Court determined BDBN was invalid
- But also suggested removing the trustees for bad behaviour


Williams v Williams [2023] QSC 90


SMSF Death Benefit Wasteclass - Section 2: Death Benefit Nominations



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Case Studies




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Case Study: Mrs Smith



- Mrs Smith is 82 next birthday
- She has \$600,000 in super (all taxable)
- No husband but 34 adult children
- She talks to her financial planner who recommends that she prepare BDBN's to pay 1/3 each to each of her 3 children.
- Mrs Smith dies
- \$166,000 is paid from her retail fund to her 59yo son Peter in accordance with her BDBN


SMSF Death Benefits Masterclass - Section 3: Case Studies



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Case Study: Mrs Smith

Tax Consequences To Peter



- Peter is on a salary of \$140,000 and has access to the Private Health Insurance Rebate
- This lump sum pushes his taxable income \$340,000 and he receives a lump sum rebate to ensure he only pays 17% on the super death benefit ETP
- He now pays Div 293 on his Super Guarantee and he also decided to make extra contributions up to the concessional cap so his Div 293 is \$4,125
- He also lost his health insurance rebate and has to pay an extra \$3,000 in health insurance premiums.
- Plus an extra \$2,800 in medicare over what the estate would have paid.
- So all up he is basically \$10,000 worse off than if the fund paid the estate


SMSF Death Benefits Masterclass - Section 3: Case Studies




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Case Study: Mr Smith

- Mr Smith (Michael) is the son of another Mr Smith (Alfred)
- Alfred died and had an SMSF with a property worth \$600,000 in the fund
- His will directed the trustee to transfer the property to Michael's SMSF
- Michael has come to you for advice




SMSF Death Benefits Masterclass - Section 3: Case Studies



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Case Study: Mr Smith



Possible Strategies

- Take the property
- In-specie 300k now
- In-specie 300k in 3 years time
- Death benefits tax of \$90,000
- Plus stamp duty on the property

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SMSF Death Benefits Masterclass – Section 3: Case Studies

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Case Study: Mr Smith

What they should have done?

- In-specie take the property from super (pay stamp duty)
- Put in the will that son and wife get half each
- Son & wife in-specie to SMSF
- In NSW so no stamp duty on this transaction
- No death benefits tax
- Withdraw all the other money from super



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SMSF Death Benefits Masterclass – Section 3: Case Studies

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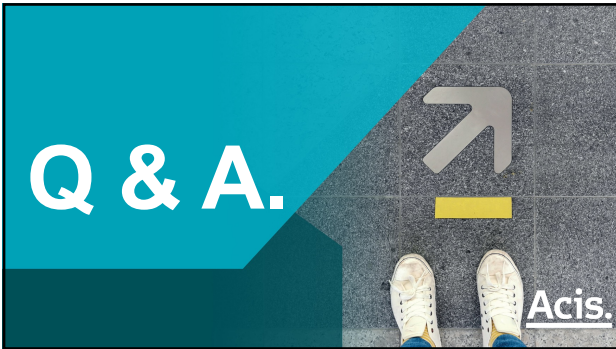
Case Study: Mr McGuigan

- Mr McGuigan has been diagnosed with a terminal illness
- He has a wife and three kids aged 15 to 20
- He has a \$1 million life insurance policy in his SMSF
- The SMSF has an LRBA over his wife's business premises
- They want to pay out the loan and keep the property in the SMSF
- He has a BDBN to his wife
- He has come to you for advice?

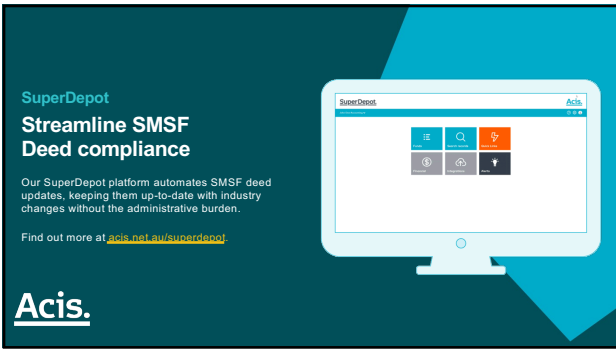
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SMSF Death Benefits Masterclass – Section 3: Case Studies

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