The AFCA Approach to superannuation death benefit complaints

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We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no AFCA Approach document can cover everything you might want to know about key issues.

1 At a glance

1.1 Scope

AFCA can deal with a superannuation complaint about the distribution of a superannuation death benefit if it is made within the time limits prescribed under the Rules (and legislation).

This document provides general information about superannuation death benefits and sets out the approach we take in handling death benefit complaints.

1.2 Who should read this document?

This document should be read by trustees and by people who wish to make a complaint about the distribution of a superannuation death benefit, and their respective advisers.

1.3 Summary

The purpose of a superannuation death benefit is to provide for those dependants of a superannuation fund member who would have continued to rely on the member for financial support, but for the member's untimely death.

Subject to the requirements of a fund's governing rules and legislative requirements, in allocating a superannuation death benefit among the member's dependants, preference is given to those dependants who might have expected to continue to receive financial support from the member.

2 AFCA's purpose

AFCA is the independent external dispute resolution (EDR) scheme for the financial services sector. AFCA's purpose is to provide fair, independent and effective solutions for financial disputes. We do this by providing fair dispute resolution services. We also work with financial firms to improve their processes and standards of service to minimise future complaints. In addition to resolving financial complaints, AFCA identifies, resolves and reports on systemic issues and serious contraventions of the law.

3 In detail

3.1 Introduction

When a member of a superannuation fund dies, the trustee of the fund must pay a death benefit in accordance with the fund's rules. The rules will set out the potential beneficiaries who are eligible to receive all or part of the death benefit and will also set out how the death benefit is allocated to or among the potential beneficiaries.

Trustee discretion

Most superannuation fund rules require the trustee to decide how the death benefit should be distributed among the potential beneficiaries, although they may allow the member to make a non-binding nomination indicating the member's preference. If a potential beneficiary is dissatisfied with the distribution, AFCA can consider whether the trustee's decision was fair and reasonable in all of the circumstances.

Binding nomination

Some funds do not allow the trustee to decide how the death benefit should be distributed. Their rules may require the trustee to pay the death benefit in accordance with the member's binding nomination or in accordance with a non-lapsing nomination. AFCA cannot alter these kinds of distribution, unless the binding nomination or non-lapsing nomination made by the member was invalid.

Prescribed payment

Some funds may require the trustee to pay the death benefit in a certain way, for example, to a surviving spouse or to the member's estate. AFCA cannot alter these kinds of distribution because, just like the trustee, AFCA is bound by the fund's governing rules.

Fair and reasonable

Our superannuation complaint determinations address whether the financial firm's decision was fair and reasonable in its operation in relation to the complainant and any joined parties in all the circumstances of the complaint.

The primary focus of our review is to assess whether the financial firm made a fair and reasonable decision in its operation in relation to the complainant (and any joined parties). AFCA must not make a determination of a superannuation complaint that would be contrary to the fund's trust deed, any relevant insurance policy or the law.

3.2 Superannuation legislation

Superannuation legislation restricts the people who can receive all or part of a superannuation death benefit to:

- the member's dependants; and
- the member's legal personal representative (LPR).

A death benefit can only be paid to someone who is not a dependant or LPR if the trustee has been unable to locate a dependant or LPR after reasonable inquiry.

Who is a dependant?

Under superannuation law, a dependant may include:

- a spouse (whether legal or de facto and whether opposite or same sex)

- a child, including an adopted child, an ex-nuptial child, a step-child and a child of the deceased member's spouse
- any person who had an interdependency relationship with the deceased member, and
- any person who was financially dependent (whether wholly or partly) on the deceased member.

In each case, the meaning of 'dependant' will depend on the governing rules of the relevant fund. The fund rules do not have to permit distribution of a death benefit to all possible types of dependants under superannuation law and they may also specify a certain level of dependence (for example, substantial financial dependence) in order for a person to be eligible as a dependant.

What is an interdependency relationship?

There are two alternative tests for an interdependency relationship under superannuation law:

Basic test

Two people are in an interdependency relationship if:

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

In order to satisfy the criteria for interdependency all four criteria must be met.

Disability test

However, if two people have a close personal relationship and the reason they do not meet the other elements of the basic test is because either or both of them suffer from a physical, intellectual or psychiatric disability, they are still considered to be in an interdependency relationship.

Factors to be considered in determining whether independency relationship exists

Superannuation law contains a list of factors to be considered in determining whether there is an interdependency relationship. These factors suggest that a mere friend or flatmate would not be in a 'close personal relationship' of the kind contemplated by the interdependency concept.

It is not expected that children will generally be in an interdependency relationship with their parents. This is mainly because it is not expected the interdependency relationship will be permanent. Children will normally move out of their parents' home and lead independent lives.

However, it is possible for interdependency relationships to include parents caring for a disabled child or a child suffering from a serious illness whether an adult or a minor child. In these situations, a parent will usually provide extraordinary support which surpasses the support provided in a normal parent / child relationship. Equally, a child may live with an aged or frail parent, and have a permanent commitment to caring for the parent for the parent's lifetime.

3.3 What are the relevant considerations in distributing superannuation death benefits?

Because AFCA has the same powers and obligations as the trustee, AFCA must take the same considerations into account in deciding whether a trustee's distribution was fair and reasonable in all the circumstances.

If the trustee's distribution decision was within the range of decisions which is fair and reasonable in all the circumstances AFCA must affirm it.

Fund Rules

A trustee is bound by the fund rules in paying a superannuation death benefit and cannot make a payment that is not permitted by the rules. AFCA is similarly bound by the fund's rules in dealing with complaints about the distribution of a death benefit.

Purpose of superannuation death benefits

When a trustee makes a discretionary decision, it must make its decision consistently with the purpose behind the discretion.

The purpose of a death benefit is primarily to provide for those people who were financially reliant on the deceased member at or around the date of death and who might have expected continuing financial support from the member into retirement, but for the member's death. This will usually include a surviving partner, a person who was in an interdependency relationship with the member and anyone who was financially dependent on the deceased member.

Who relied on the member for financial support?

Anyone who was being financially supported by the deceased member just before the member died would generally have high priority in the allocation of a death benefit. This may include a surviving partner, minor children and any adult children who were receiving ongoing and regular financial support from the member with anexpectation for it to continue.

The concept of financial dependence generally requires the provision of regular financial contributions towards the other person's living expenses, even if the amounts are small.

The fact that a deceased member owed money to a claimant does not make the claimant a financial dependant.

The member's wishes

Even where a nomination is preferred and non-binding, the trustee would generally take the nomination into account as an indication of the member's wishes. The weight given to a non-binding nomination may depend on when it was made and whether the member's family circumstances have changed since it was made. For example, if a member nominated his or her spouse at the time of joining the fund but the parties had since separated and the member was in a marriage-like relationship with someone else, the member's nomination would be of little assistance as a guide to the member's wishes.

The trustee must also consider whether the person nominated is someone who can be paid a death benefit under superannuation law and the fund rules. For example, if the member nominated his or her parents, but the member and the parents were financially independent and the member had a child, the member's nomination could not be taken into account.

Another indication of the member's wishes may be a recent Will. While a superannuation death benefit does not form part of a deceased estate (unless the fund rules require the death benefit to be paid to the estate, the trustee decides to distribute the benefit to the estate or there is a valid binding nomination to pay the estate), a member's Will may nevertheless set out the member's intentions with respect to his or her superannuation. However, a Will is only a guide because a superannuation death benefit must be distributed consistently with the purpose of superannuation, while a member's estate is not subject to this limitation.

3.4 When do adult children receive a share of a superannuation death benefit?

Adult children may receive a share of a death benefit if they can show they were financially dependent on the deceased member at the date of the member's death with an expectation that this support would continue but for the member's death. Alternatively, they can receive a share of a death benefit if there are no other dependants who were financially dependent on the deceased member or who had a reasonable expectation of support from the deceased member.

Adult children cannot claim a share of a superannuation death benefit simply because the deceased member may have failed to provide support for them when they were minors or because the deceased member may not have included them in the deceased member's Will. It is not a purpose of superannuation to right past wrongs.

3.5 Can a person claim reimbursement of funeral expenses from a death benefit?

Under superannuation law, there is no provision to allow funeral expenses to be paid from a death benefit. A person who has paid funeral expenses is not a dependant by reason only of paying the deceased member's funeral expenses.

3.6 When can a superannuation death benefit be paid to a deceased member's estate?

Distribution of a superannuation death benefit is different from the distribution of a deceased estate because its purpose is different.

In the absence of:

- a valid binding (or non-lapsing) nomination in favour of the estate, or
- a provision of the fund rules requiring payment to the estate,

a discretionary distribution would usually be made to the member's estate only if there are no dependants. This is because a distribution to the estate could mean that the death benefit is used to pay creditors.

It is not a purpose of a superannuation death benefit to meet debts of a deceased estate.

3.7 When is a binding nomination valid?

Superannuation law states that a binding nomination is only valid if:

- it nominates one or more of the member's dependants or the member's LPR (and the shares each should receive)
- the shares allocated to each person nominated add up to 100%
- it is in writing, signed and dated by the member in the presence of two witnesses over the age of 18 who state that they have seen the member sign the nomination and who are not named in the nomination, and
- it is no more than three years old (or has been renewed or amended within thepast three years).

The persons nominated must be dependants at the dateof death.

The formal requirements for a non-lapsing nomination to be binding will be set out in the fund's rules.

4 Context

4.1 Case studies

Case Study one – Adult child beneficiaries who were not financially dependent

The deceased member is survived by a spouse and minor children. The trustee distributes 100% of the death benefit to the spouse to provide continuing support for the spouse and the minor children following the member's death.

The adult children of a former relationship complain that they have not been allocated any of the death benefit. They say that the deceased member never paid child support for them.

AFCA Approach

If the adult children were not financially dependent on the deceased member as at the date of death, a distribution should be made in favour of the spouse and minor children, consistent with the purpose of a superannuation death benefit. A superannuation death benefit should not be used to remedy historical failures.

A distribution of 100% of the death benefit to the spouse (for the benefit of the spouse and the children) would be fair and reasonable in the circumstances.

Case Study two – Adult child beneficiaries who were financially dependent

The deceased member is survived by a spouse with an infant child who were both totally financially reliant on the deceased member. The deceased member was also meeting tertiary fees for an adult child of the previous relationship.

The trustee distributes 100% of the death benefit to the spouse to provide continuing support for the spouse and the infant child following the member's death.

The adult child complains that he has not been allocated any of the death benefit.

AFCA Approach

Depending on the total amount of the death benefit, a proportionate distribution between the spouse, infant child and adult child may be fair and reasonable in the circumstances, taking into account:

- the likelihood the deceased member would have continued to support the adult child throughout his tertiary education; and
- the degree of ongoing financial support the deceased member was providing to the adult child at or around the date of death.

Unless the amount of the death benefit is small, the proportions allocated between the spouse, infant child and adult child should seek to reflect the extent of each person's financial dependency relative to the total amount of the death benefit.

Case study three – Multiple partners

The deceased member was survived by a de facto spouse who was financially interdependent with the deceased member. There is also a legal spouse who was separated from, and not financially dependent on, the deceased member, but who is the preferred beneficiary under a non-binding nomination made 15 years ago when the member first joined the fund. The trustee distributes 50% of the death benefit to each of the spouses. The de facto spouse complains.

AFCA Approach

It would be fair and reasonable to distribute 100% of the death benefit to the de facto spouse in the circumstances because the de facto spouse is a dependant who was financially reliant on the deceased member and who would have expected to share in the member's superannuation in retirement. While some weight may be given to a non-binding nomination (as an indication of the member's wishes), little weight would generally be given where the nomination was made some time ago and the member's family circumstances have since changed.

4.2 References

Definitions

Term	Definition
Dependant	Depends on the definition in the fund's governing rules but under superannuation law may include: • a spouse (legal or de facto and opposite sex or same sex), • a child (including a natural child, an adopted child, an ex-nuptial child, astep child and a child of the deceased member's spouse) • a person who was in an interdependency relationship with the deceased member • a person who was wholly or partially financially dependent on the deceased member
LPR	The executor of a deceased member's estate or, if the member died withouta Will, the person granted letters of administration by the court
Interdependency Relationship	Two people are in an interdependency relationship if: • they have a close personal relationship; and • they live together; and • one or each of them provides the other with financial support; and • one or each of them provides the other with domestic support and personal care. However, if two people have a close personal relationship and the reason they do not meet the other elements of the test is because either or both of them suffer from a physical intellectual or psychiatric disability, they are still considered to be in an interdependency relationship.

Useful links

Document	Title / Link
Formal requirements for a binding death nomination	Superannuation Industry (Supervision) Regulations, Reg 6.17A
Definition of Dependant	Superannuation Industry (Supervision) Act, Section 10
Definition of Interdependency Relationship	Superannuation Industry (Supervision) Act, Section 10A and Superannuation Industry (Supervision) Regulations, Reg. 1.04AAAA