

The AFCA Approach to superannuation death benefit complaints

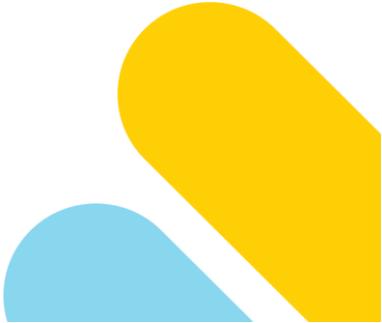
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We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

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.

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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 primary 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 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 generally given to those dependants who might have expected to continue to receive financial support from the member or who had an ongoing right 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 governing 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.

3.1.1 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 the circumstances.

3.1.2 Binding nomination

Some fund governing 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.

3.1.3 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 legal personal representative (LPR). AFCA cannot alter these kinds of distribution because AFCA cannot make a determination contrary to the fund's governing rules.

3.1.4 Fair and reasonable

Our superannuation complaint determinations address whether the trustee'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.

AFCA must not make a determination of a superannuation complaint that would be contrary to law, the fund's governing rules, or any relevant insurance policy.

Under section 1055(3) of the Corporations Act 2001 (Cth), AFCA must affirm a decision relating to the payment of a death benefit if AFCA is satisfied that the decision was fair and reasonable in its operation in relation to the complainant and the joined parties in all the circumstances. With the exercise of a trustee discretion, there is often a range of decisions that might be considered fair and reasonable. While the trustee's decision may not be the decision the AFCA decision maker would make, if the decision falls within that range, it must be affirmed.

When AFCA determines a complaint, it ‘stands in the shoes’ of the trustee and the insurer (if applicable) and has all the powers and discretions of the trustee and the insurer. This means AFCA is not confined to considering only the information that was before the trustee or the insurer when it made its decision.

While this Approach includes guidance about a range of matters, AFCA expects trustees to consider each death benefit claim on its own facts. Circumstances will arise from time to time where applying general principles may not result in a fair outcome, and AFCA expects trustees to review each proposed decision about a death benefit claim, to satisfy themselves that the decision is fair and reasonable.

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 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.

The relevant superannuation legislation is the Superannuation Industry (Supervision) Act 1993 (Cth) (SIS) and the Superannuation Industry (Supervision) Regulations 1994 (Cth) (SIS Regs) (together, superannuation legislation).

3.2.1 Who is a dependant?

Under superannuation legislation, a dependant includes:

- 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’s governing rules should be considered first and they may not permit distribution of a death benefit to all possible types of dependants under superannuation legislation listed above. However, the governing rules cannot allow death benefits to be paid in a way that is not allowed under superannuation legislation. The governing rules may also specify a certain level of dependence (for example, substantial financial dependence) for a person to be considered a dependant.

The governing rules of many funds adopt the definition of 'dependant', 'child', 'interdependency relationship', 'legal personal representative' and 'spouse' in SIS (See References section below)

Spouse

The definition of the term 'spouse' in SIS is an inclusive one, and therefore includes a person who was legally married to the deceased member.

The SIS definition also includes:

- a person living with another person on a genuine domestic basis in a relationship as a couple; and
- a person in a relationship with another person, where that relationship is registered under a law of a State or Territory prescribed for the purposes of section 2E of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purposes of that section.

While a marriage or registered relationship will be evidenced by the relevant certificate, trustees and therefore AFCA often need to make an assessment of whether two people were living with each other on a genuine domestic basis in a relationship as a couple.

There is no definition of 'de facto relationship' or 'de facto spouse' under superannuation legislation. However, common law factors for a de facto spousal relationship may be used to determine whether two people live with each other on a genuine domestic basis in a relationship as a couple. These factors include:

- the duration of the relationship
- nature and extent of a common residence
- whether or not a sexual relationship exists
- degree of financial dependence or interdependence
- ownership, use and acquisition of property
- the degree of mutual commitment to a shared life
- the care and support of children
- the reputation and public aspects of the relationship.

See: *Roy v Sturgeon* (1986) 11 NSWLR 454.

Not all these factors will always be relevant to any given situation – see *Wan v BT Funds Management Limited* [2022] FCA 302 [176].

Definitions of terms such as 'de facto relationship' in the Acts Interpretation Act 1901 (Cth) or in state legislation are not relevant for these purposes, as the relevant

definitions are found in the governing rules of the superannuation fund in question, and in superannuation legislation.

Child

The definition of child will depend on the fund's governing rules and may refer to the SIS definition which includes:

- an adopted child
- a step-child
- an ex-nuptial child
- a child of a person's spouse
- someone who is a child of the person within the meaning of the Family Law Act 1975 (Cth).

Unless specified in a fund's governing rules, there is no age requirement in the definition of a child.

The SIS definition is inclusive and includes a person's biological child. AFCA considers this can also include a biological child who has been adopted away from the deceased member unless the trust deed says otherwise.

Interdependency relationship

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

Basic test

Two people were in an interdependency relationship at the time one of them died if they:

- had a close personal relationship, and
- lived together, and
- one or each of them provided the other with financial support, and
- one or each of them provided the other with domestic support and personal care.

All four criteria must be met for an interdependency relationship. The SIS Regs provide further guidance about what factors should be taken into account when considering whether two persons had an interdependency relationship. These are discussed further below.

Living apart test

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, or because they are temporarily living

apart (for example, because one of them is working overseas or is in gaol) they are still considered to be in an interdependency relationship.

Factors to be considered in determining whether an interdependency relationship exists

Superannuation legislation contains a list of factors to be considered in determining whether there is an interdependency relationship. The factors are very similar to the factors for a de facto spousal relationship, with the addition of whether the relationship was intended to be permanent and whether the relationship was one of mere convenience. They suggest that a mere friend or flatmate would not be in a 'close personal relationship' of the kind required by the interdependency relationship definition. While an interdependency relationship need not satisfy all of these factors, AFCA generally considers such a relationship must include a mutual commitment to a shared life and a sense of permanence.

It is not expected that children will generally be in an interdependency relationship with their parents.

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 a parent requiring additional care or support, and they may have a permanent commitment to caring for the parent for the parent's lifetime.

For further detail please see AFCA's Interdependency Fact Sheet. [\[Link to be provided following Fact Sheet publication\]](#).

Financial dependant

The concept of financial dependence requires more than occasional financial support. It generally requires the provision of regular financial contributions for everyday living expenses, even if the amounts are small.

The financial support provided by the deceased member may include:

- paying part or all of the rent/mortgage
- paying part or all of food, clothing, utilities, insurance costs
- carrying out or paying for repairs and alterations to the home
- paying part or all education or medical expenses
- making child support payments.

We consider payment of education or medical expenses for a child and making child support payments are financial support of the child, not the child's parent or guardian.

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

Assessing someone's financial dependency should not be confused with someone's financial position. Parties often claim a person should not receive a portion of the benefit because they do not 'need' the money. This is not something that will alter whether a person was financially dependent and therefore a dependant.

A former spouse may also claim they were financially dependent because they had not received a property settlement. However, unless the deceased member was making regular contributions to support them (including to a joint mortgage) the mere fact that their overall financial position might be improved by a death benefit distribution does not make them financially dependent on the deceased member at the date of death.

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

Because AFCA has the same powers, obligations and discretions 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.

3.3.1 Fund Rules

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

3.3.2 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 generally accepted purpose of a superannuation 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 but for the member's death. This will usually include a surviving spouse, minor children, a person who was in an interdependency relationship with the member and anyone who was financially dependent on the deceased member.

3.3.3 Who had an expectation of ongoing financial support?

Anyone who was being financially supported by the deceased member just before the member died, and who had a reasonable expectation that this support would be ongoing, would generally have high priority in the allocation of a death benefit. This may include a surviving spouse, minor children and any adult children who were

receiving ongoing and regular financial support from the member with an expectation for it to continue.

Generally, a child would be expected to be financially dependent on a parent up to the age of 18. However, there will be exceptions to this if regular support, such as for further education expenses, has been provided, or was reasonably expected to be provided, after age 18.

The extent and expected duration of financial support is a relevant factor in determining the appropriate allocation of a death benefit. It is for this reason that a surviving spouse, who might reasonably have expected to share in the deceased member's retirement income, is often allocated a larger portion. The relative ages of minor children are also relevant for this reason.

3.3.4 The member's wishes

Where a nomination is non-binding, a 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 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 spousal relationship with someone else, the nomination may 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 legislation and the fund governing rules. For example, if the member nominated his or her parents, but the parents were not dependants, under the fund's governing rules and the member did leave dependants, the member's nomination could not be taken into account.

Another indication of the member's wishes may be a recent Will. A superannuation death benefit does not form part of a deceased member's estate (unless the fund rules require the death benefit to be paid to the LPR, the trustee decides to distribute the benefit to the LPR or there is a valid binding nomination to pay the LPR). However, a member's Will, if it was made recently and in the context of the member's circumstances when they died, may provide helpful information about the member's intentions with respect to their superannuation. A Will is only a guide, because a superannuation death benefit must be distributed consistently with the purpose of superannuation, while a deceased member's estate is not subject to this limitation.

3.3.5 Other relevant considerations

Sometimes concerns are raised about behaviour or aspects of a relationship that may not have aligned with generally accepted community expectations. The quality of a relationship will not necessarily determine if a claimant is a dependant. However, AFCA considers that evidence about the behaviour of a person who is claiming a death benefit, including evidence about violence or abuse within a relationship or

towards the deceased member, may be relevant to the fairness or reasonableness of a decision about the allocation of that benefit.

Where a trustee has persuasive evidence that a claimant was involved in the death of the deceased member, in circumstances where there was moral culpability, AFCA would generally consider it fair and reasonable for the trustee not to allocate any part of the death benefit to the claimant.

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

Adult children of a deceased member will generally be dependants, because they will fall within the category of 'child' under the fund's governing rules. However, an adult child would generally not be expected to receive a share of their parent's death benefit unless:

- there are no other dependants;
- there are no other dependants who were financially dependent on the deceased member or who had a reasonable expectation of ongoing support from the deceased member;
- there are financial dependants with a reasonable expectation of continuing financial support from the deceased member, and the death benefit is greater than the amount required to cover that expectation. In such circumstances, making payment of an entire death benefit to the financial dependants to the exclusion of other dependants such as adult children may not be fair;
- 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 have continued but for the member's death;
- the trustee considers it to be reasonable for a small part of a death benefit to be allocated to an adult child in recognition of their relationship with the deceased member, even if there was no financial dependency.

Generally, AFCA does not expect a trustee will allocate part of a death benefit to an adult child simply because the deceased member failed to provide support for them when they were a minor or because the deceased member did not include 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 legislation, 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 LPR?

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

In the absence of:

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

a discretionary decision to pay the member's LPR would generally only be fair and reasonable if there are no dependants. This is because a distribution to the LPR 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 member's estate.

Further, there may be non-dependants named in a person's Will who may benefit, in circumstances where dependants would not share in the benefit, which does not align with the generally accepted purpose of a superannuation death benefit outlined above.

However, there will be circumstances where payment of some or all of a death benefit to an LPR is fair and reasonable, even where there are dependants. As noted above, AFCA expects trustees to consider each death benefit claim on its own facts.

3.7 When is a binding nomination valid?

Superannuation legislation 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 the nomination was signed in their presence and who are not named in the nomination, and
- it is no more than three years old (or has been renewed or amended within the past three years).

The persons nominated must be dependants at the date of the member's death.

Once the nomination has expired, the trustee is no longer bound by it. This is the case regardless of whether the member has seen or understood information from the fund alerting them to the expiry of the nomination.

The requirements set out above do not apply to non-lapsing nominations. The formal requirements for a non-lapsing nomination to be binding will be set out in the fund's governing rules. The governing rules of some funds have the effect that expired binding nominations become non-binding nominations.

3.8 Who should hold a share of the death benefit on trust for a minor child?

Generally, if a surviving parent is the legal guardian of a minor child, it is appropriate for the share of a death benefit allocated to the minor child to be paid to the surviving parent on trust for the minor child. This is because the surviving parent, as legal guardian of the child, is generally best placed to determine how to apply the death benefit share for the child's benefit.

A trustee other than the surviving parent would only be appropriate in exceptional circumstances, such as where the child lives with someone other than the surviving parent, or there are compelling reasons to conclude the surviving parent may not apply the death benefit share for the benefit of the minor child.

4 Context

4.1 Case studies

4.1.1 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.

4.1.2 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 a 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 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 and adult child should seek to reflect the extent of each person's financial dependency relative to the total amount of the death benefit.

4.1.3 Case study three – children and expectation of financial support

The deceased member is survived by four children, three of whom were financially independent adults and one of whom was a minor when the deceased died. The death benefit is in excess of \$500,000.

The trustee distributes 100% of the death benefit to the minor child as it considers the minor child was the only person who was financially dependent on the deceased member when he died.

The adult children complain that under this decision the minor child would receive an amount far in excess of what was needed to meet their reasonable expectation of financial support through to age 18. The parties agree that amount was \$100,000.

AFCA Approach

The trustee's decision would result in the youngest child receiving a benefit significantly in excess of the amount required to fulfil their expectation of receiving the deceased member's financial support.

A fair and reasonable decision would be for \$100,000 of the death benefit to be distributed to the minor child, to be held on trust for them, and the remainder to be distributed equally between each of the children.

4.1.4 Case study four – 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 and before the separation and the start of the de facto spousal relationship.

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.

4.1.5 Case study five – girlfriend / boyfriend

The deceased member was survived by his girlfriend and by his mother, who was also his LPR.

The trustee distributes 100% of the death benefit to the girlfriend as the deceased member's spouse.

The deceased member's mother complains on the basis the deceased member was not in a de facto spousal relationship at the date of death and also says she was financially dependent on the deceased member.

AFCA Approach

The evidence should be considered by reference to the factors outlined above to determine whether the girlfriend was the deceased member's dependant at the date of his death. This would include considering whether there was a spousal relationship, financial dependency and an interdependency relationship.

The evidence provided in support of the mother's claim of financial dependency should also be considered.

If the girlfriend was not found to be a dependant but the mother was financially dependent and therefore a dependant, then it would be fair and reasonable to distribute 100% of the death benefit to the mother.

If the girlfriend was found to be a dependant but the mother was not found to be financially dependent and was therefore not a dependant, it would be fair and reasonable to distribute 100% of the death benefit to the girlfriend.

If the girlfriend and the mother were both found to be dependants, it would be necessary to go on to consider their relative expectations of ongoing financial support from the deceased member to determine a fair and reasonable allocation of the benefit between the two of them.

5 References

5.1 Definitions

Term	Definition
Dependant	<p>Depends on the definition in the fund's governing rules but under superannuation legislation includes:</p> <ul style="list-style-type: none">• 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, a stepchild 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	<p>Depends on the fund's governing rules but under superannuation legislation it means 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.</p>
Interdependency Relationship	<p>Two people are in an interdependency relationship if:</p> <ul style="list-style-type: none">• 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. <p>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, or they are temporarily living part, they are still considered to be in an interdependency relationship.</p>

6 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

7 Document control

Version	Date	Approved by
1	May 2022	Lead Ombudsman, Superannuation
1.1	October 2024	Lead Ombudsman, Superannuation