



# The ALSO Foundation

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## SOME COMMON QUESTIONS AND ANSWERS RELATING TO YOUR SUPERANNUATION

### 1) Can I nominate my same-sex partner as the beneficiary of my super?

It depends on the rules of the fund you are in.

The *Superannuation Industry (Supervision) Act 1993* (Cth) (“**SIS**”) says the superannuation fund *may* pay benefits to a dependent on the death of a member. In the SIS a dependent is defined as:

- a) your children;
- b) your spouse - that is someone who you are either legally married to, or your defacto (unless some very clever arguments win in Court, this means only opposite sex couples);  
and/or
- c) a person with whom you have an "interdependency relationship" a defined term in SIS and which commonly will include a same-sex partner.

The importance of the word of “may” used above is that the rules of the fund can limit the payment of super to only some types of beneficiaries. Thus the rules of a fund will either will say that anyone who is a dependent under the SIS can be paid your super, or only some people specified in the rules who are dependents under SIS can be paid your super. It also is possible a fund’s rules can say that on your death the benefits will be paid to your estate, where they will be dealt with under your will, or if you do not have one, under the law of intestacy.

SIS was changed about 1 1/2 years ago to include people in “interdependency relationships” as dependents. A lot of fund rules list who can be paid benefits by restating who can be dependents under SIS. Sometimes fund rules may have not been updated to include people in interdependency relationships. Thus under the rules of the fund it cannot pay benefits to your same sex partner.

Also it is possible that a fund’s rules do not include people in interdependency relationships because of a deliberate decision by the trustee of the fund, and not just because the fund rules are” out of date”.

### 2) If I can nominate my same-sex partner as the beneficiary of my super, is this binding?

The rules of many funds state that some nominations are binding on the trustee, however many funds do not.

If the rules do not, then the trustee has a discretion to pay the money to any dependents (that is a spouse or a child) or to your estate. Often such funds seek guidance from members on who the money should be paid, however it remains their decision.

If you have no other dependants, then the choice is either your same sex partner or your estate, unless the fund rules do not permit payments to same sex partners, in which case the payment will be to your estate.

### **3) Can my family challenge where my super goes?**

Yes, there are two ways:

- a) Your family can say there was not really an emotionally interdependent relationship between you and your partner. This becomes a factual dispute, which probably will be settled on the facts presented by each side to the dispute. If the person can show evidence of the relationship, that they lived together domestically, had joint bills and bank accounts, has photos, correspondence, and family and friends and/or work colleagues used to treating you as a couple, this should make sure your partner can show the relationship existed before you died. This means the benefit would go to your estate and/or your other dependants (if any);
- b) If there are other dependants, that is kids, an opposite sex partner or spouse (say a spouse who you are separated, but to whom you are still married), as a matter of fairness your family could get some or all of the money. This can become a difficult to predict fight about the intensity of the respective relationships, relative financial needs, and/or other matters.
- c) Your family might be able to raise an argument that even if there was an emotionally interdependent relationship, the benefit should go to the estate. This is rare, but a possibility.

### **4) Where will my super go if I haven't named a beneficiary?**

Often the fund will look to see if you have a dependent, and pay it to him or her, rather than just pay it your estate. However, this may vary between funds.

### **5) What if I don't have a Will?**

If the benefit is paid to your estate and you do not have a will, normally your estate will be paid to your next of kin (after your personal debts are paid off). If you have a same sex partner typically he or she will be your next of kin.

### **6) What does 'Trustee Discretion' mean?**

Commonly trustees of superannuation funds have a discretion as to which of your dependents (if you have more than one) will receive your benefits, or they may decide to pay it to your estate (this will be less common, provided you do have a dependent).

**7) What can I do if I think my super fund is treating me unfairly because of my sexuality?**

The short answer is it depends. The ALSO Foundation is currently surveying a number of super funds to determine those that have inclusive arrangements and those that don't. If and when this survey is completed, the results will be published through the ALSO website.

**8) Can I change super funds?**

It depends on the rules of the fund. Public offer funds normally allow you to withdraw benefits, however some employer-sponsored funds do not allow you to withdraw benefits, often unless you have stopped working for the employer.

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