

# Technical update



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## How marriage can have an impact on your super

On 9 January 2018 Australia saw the introduction of recognised same sex marriage. This change has meant that more couples are now legally able to marry and with that comes additional legal rights and financial benefits. One particular benefit relates to superannuation death benefit nominations.

Let's take a closer look...

Currently, superannuation law permits the trustee of a super fund to pay a benefit upon the death of a member to a dependant or legal representative of the member. Under superannuation law, a dependant includes a legally married spouse, and a spouse who is not legally married, but is living in a domestic relationship with the member. So, good news for same sex couples who, if they choose to marry, would be a legally recognised spouse and dependant of the member.

Should this situation occur and a member passes away their spouse can apply for the death benefit claim. To be eligible, the spouse needs to prove the marriage existed, which is easily done by producing the marriage certificate. This proves it is a legal marriage, and the spouse is dependent on the member. Relatively simple, right?

To qualify as a 'de facto' spouse, the person needs to prove, at the time of the member's death that they lived with the member on a genuine domestic basis in a relationship as a couple. There is no pre-requisite for the relationship to exist for a required length of time, merely that it existed at the time of the member's death. However the duration of the relationship would still be a relevant factor in a trustee's determination.

A de facto spouse may qualify as a dependant if they can prove they are financially dependent on the member or are in an interdependency relationship with the member. Whatever route a de facto spouse takes, requires proving the relationship or financial dependency, to the trustee's satisfaction, and this is where it can get a little more difficult and time consuming than simply producing the marriage certificate.

## Living together

Proving that a couple live together may seem relatively straight forward. However disputes may arise if there is conflicting evidence about the living arrangements of the couple. This is commonly seen where one member of the couple has their mail delivered to a different residential address, or the lease was only in one person's name or the member died while in an aged care facility or hospital.

To illustrate, there was a case before the Superannuation Complaints Tribunal (SCT), whereby the trustee of the super fund exercised discretion to pay 100% of the benefit to the deceased member's de facto spouse, to the exclusion of his children from a former marriage, aged 17 and 21 years. The de facto spouse asserted that she was in a relationship as a couple with the deceased member for five years and they lived together in her house for three years prior to his death. Her friend and relative also gave evidence to that effect. However, the Tribunal concluded that they were not living together and she did not satisfy the definition of a spouse. Ultimately, the Tribunal determined to distribute 40% to the 17 year old, 30% to the 21 year old and 30% to the estate (of which the spouse was the sole beneficiary).

## Existence of a de facto relationship

Although trust deed provisions and evidential requirements may differ according to the super fund, generally the trustee has to consider a wide variety of factors relating to the particular relationship, to determine whether a de facto relationship exists. These include:

- the duration of the relationship
- whether or not a sexual relationship exists

# Technical update



- the ownership, use and acquisition of property
- the degree of financial interdependence, and any arrangements for support, between or by the parties
- the care and support children
- the reputation and public aspects of the relationship
- the degree of emotional support.

Again, it is clear that evidence of a de facto relationship can be harder, and more time consuming, to prove, whereas a marriage is more easily proven by producing the marriage certificate.

## Conclusion

Marrying can avoid some of the obstacles of proving that a de facto relationship exists. Marriage, as formal recognition of the relationship may reduce the risk of claims by competing interests, by alleviating any doubts that the couple were mutually committed to a shared life together.

There may be many reasons why a couple will or won't marry and this article is not to persuade you one way or the other to get hitched or remain in a happy de facto relationship. It simply highlights one of the differences in relation to superannuation law.

If this article has raised questions for you we encourage you to seeking some guidance from your financial planner, who can discuss superannuation law in relation to your situation and circumstances, which are all different and unique. You can contact Benchmark Consultants on 9293 2922.

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