

BINDING DEATH BENEFIT NOMINATIONS - – KEY GUIDANCE PROVIDED TO ADVISERS

Some recent court cases involving situations where Binding Death Benefit Nominations were not valid, or not accepted when they should have been, provides vital guidance to SMSF trustees and their advisers.

In this article, the significance of effective planning and documentation for the distribution of superannuation benefits, particularly with blended families involved, is highlighted.

Two recent Supreme Court cases will be considered to illustrate the potential problems which can occur, and decisions which need to be made.

Ioppolo & Hesford v Conti ([2013] WASC 389)

This case, heard in the WA Supreme Court before Master Sanderson, related to the Conti Superannuation Fund.

Mrs Francesca Conti, who passed away in August 2010, appointed two of her children as executors of her Will. In her Will, Mrs Conti directed that her superannuation benefits be paid to her four children.

Her Will also directed that none of the superannuation benefits pass to her husband, Mr Augusto Conti.

Mr Conti, as the surviving trustee of the Conti Superannuation Fund, appointed a corporate trustee in his stead, within six months of the death of Mrs Conti. Therefore, the fund remained in compliance with s 17A of the SIS Act, as a SMSF.

The Supreme Court action was brought by Rosario Ioppolo and Grace Hesford, the executors of Mrs Conti's Will, who requested the Court to:

- force the appointment of the late Mrs Conti's legal personal representative (LPR) as a trustee of the Conti Superannuation Fund; and
- determine that no proper exercise of the discretion by the trustee, by not complying with the directions contained in the Will of the late Mrs Conti, occurred.

Appointment of LPR as a trustee

On the first point, the Court did not accept the application. Master Sanderson, in considering whether the surviving trustee was obliged to appoint one or both of the executors as a trustee of the SMSF, stated "Section 17A(3) allows for the appointment of an executor as a trustee of the fund but does not in its terms require such an appointment." (our emphasis)

Proper exercise of discretion

The Trust Deed of the SMSF contained a range of trustee powers, including that 'The Trustee may exercise any of its powers or rights even where there is a conflict of interest ... so long as the power or right is exercised in a bone fide manner ...'.

The argument was that, in not following the directions contained in the Will of the late Mrs Conti, Mr Conti did not act bona fide.

Master Sanderson rejected the application on that point, stating "In my view the trustee was entitled to ignore the direction in the will and the mere fact that he did so could not in and of itself be evidence of a lack of bone fides."

Interestingly:

- Mrs Conti had made two Binding Death Benefit Nominations (BDBNs), both of which had lapsed (presumably, the provisions of the Trust Deed linked the BDBNs to the SIS Act and, as a result, lapsed after three years);
- one of the BDBNs was made after Mrs Conti's last Will; and
- both of those lapsed BDBNs directed Mrs Conti's benefits be paid to Mr Conti.

End result

The result of the application was:

- the intended beneficiaries of the late Mrs Conti's superannuation benefits in terms of her Will, being her four children, did not receive those benefits; and

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- Mr Conti's actions as trustee in paying the benefits to himself were confirmed by the Court.

Wooster v Morris ([2013] VSC 594)

Heard in the Victorian Supreme Court by Justice McMillan, this case also involved a blended family situation. In this Instance, a BDBN was deemed by the trustee to be invalid.

Mr Maxwell Morris and Mrs Patricia Morris were the individual trustees of the Morris Family Superannuation Fund, until Mr Morris passed away in February 2010.

The applicants in this case were the daughters of Mr Morris from a prior marriage, Susan Wooster and Kerry Smoel, the executors of Mr Morris' Will.

Following the death of Mr Morris, Mrs Morris appointed her son, Mr Peter Ashman, as an additional trustee. Subsequently, a corporate trustee, Upper Swan Pty Ltd, replaced Mrs Morris and Mr Ashman as trustee of the SMSF. Mrs Morris was the sole director and shareholder of Upper Swan.

Mr Morris had completed a BDBN in March 2008, in which he directed the trustee of the SMSF to pay his benefits to his daughters, Susan Wooster and Kerry Smoel. Mrs Morris claimed that she was not aware of the BDBN until shortly before the death of Mr Morris.

Validity of the BDBN

Mrs Morris and Mr Ashman sought legal advice as to the validity of the BDBN. That advice suggested that the BDBN was ineffective, as it had

not been prepared and delivered in accordance with all of the requirements set down in the relevant clauses in the trust deed.

In particular, the document had not been 'delivered' to 'the trustees'.

Effectively, Mr Morris had prepared, or arranged for the preparation of, the BDBN but had not formally presented it to his co-trustee.

At about the time they received the advice, the individual trustees were replaced by the corporate trustee.

On the basis of the advice that the BDBN was invalid, the corporate trustee resolved to distribute the benefits to Mrs Morris.

Application to Court

Susan Wooster and Kerry Smoel requested the Court to direct that the BDBN was valid and binding, and to direct Mrs Morris and the corporate trustee to pay the benefits in accordance with the BDBN.

By consent orders, the matter was referred for determination to a Special Referee who found:

- the BDBN was valid and binding;
- the plaintiffs, Susan Wooster and Kerry Smoel, were entitled to be paid the value of the late Mr Morris' interest in the SMSF; and
- interest was to accrue and be payable on the amount of the benefits.

Court ruling

The Court confirmed the ruling of the Special Referee and, in regards

to costs, determined that costs would not be paid from the superannuation benefits, despite a power of indemnity in the trust deed of the fund, as any such payment would predominantly be applied against the amount to be paid to Susan Wooster and Kerry Smoel, due to the respective proportions within the fund held by the late Mr Morris and Mrs Morris.

Justice McMillan stated, in her view:

- “the defendants have lost their right for indemnity by acting (in) a manner designed to benefit Mrs Morris as trustee, co-trustee and sole director and shareholder of Upper Swan”; and
- “two decisions made by Mrs Morris that, given that she did not seek the advice of the Court, amount to a breach of her obligations to the trust ...”:
 - when she made the decision that the BDBN was not binding; and
 - when she made the decision to defend the proceedings brought by the plaintiffs.

Some of the comments and orders from Justice McMillan may appear to be particularly harsh, given that Mrs Morris did obtain and act on legal advice, and when considering the conclusions in the Conti case.

However, it would appear that having consented to putting the matter before a Special Referee, Mrs Morris to some extent incurred the wrath of the court by not proceeding as determined by the Referee, and

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pay the benefits to the daughters of her late husband.

What lessons can we learn?

Usually, any decision by a Court in regards to the matters discussed above will result in the decision of the Court being seen as a success or a failure, depending on which side of the decision each party sits.

It goes without saying that, for advisers and for their clients, it is much preferable to be on the successful side of the decision than the opposite.

Some of the lessons to be learned from the cases discussed include:

- ensuring that the SMSF trust deed is current and contains appropriate powers regarding the nomination of beneficiaries, whether that be by way of reversionary pension nominations, BDBNs, Death Benefit Rules or some other form;
- coordinating instructions contained in the documents mentioned above and the Will of each client to ensure the directions in all documents are complementary, rather than contradictory;
- understanding the rules set down in the trust deed for the completion of such beneficiary nominations, and ensuring that those instructions are complied with when finalising the documents; and
- considering ways to remove the decision making from the surviving spouse when they will

not be benefiting following the death of their partner.

Unfortunately, the cases did not answer all questions regarding death benefit nominations. Questions which remain unanswered by the Courts include:

- whether directions contained in the Will of a member can or should be considered to be a BDBN. Whilst the general consensus is that instructions in a Will cannot direct the trustee of a SMSF, a question which has recently been raised, given the fact that the signing and witnessing procedures of a properly executed Will are similar to how a BDBN is executed, is whether the Will can 'double' as a BDBN¹. The Conti case may have come close to needing consider that issue. The Court may have been required to consider the matter if the trust deed permitted non-lapsing BDBNs (particularly as there was a BDBN made after the Will); and
- the actual issue of non-lapsing BDBNs - many advisers suggest a cautionary approach of renewing the BDBN every 3 years to ensure there is no issue with the validity of the document - but that is not always possible. The question remains from a case law perspective - is it necessary to update BDBNs every three years?²

The appointment of a Death Benefit Guardian is one means by which a surviving spouse, who may consider acting contrary to the

instructions of the deceased member, could be controlled.

Effectively, with a properly appointed Death Benefit Guardian, death benefits could not be paid other than in accordance with the forms of death benefit nominations mentioned previously, without the consent of the Death Benefit Guardian.

The Topdocs SMSF trust deed is one of the very few that provide for the appointment of a Death Benefit Guardian.

The cases covered in this article show that, even with legal advice, problems can still occur in managing death benefit claims.

Properly drafted documentation will assist in providing structures which limit 'wriggle room' and help to ensure a member's death benefit wishes are carried out.

Notes:

¹ The Topdocs technical specialists are of the view that the Will, regardless of similarities in signing, cannot direct the trustee in regards to the distribution of superannuation death benefits.

² The Topdocs technical specialists are of the view that as long as the trust deed for the Fund provides for it, and the BDBN is prepared correctly in line with the requirements of the trust deed, that a BDBN can be non-lapsing.

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