

DEATH BENEFIT GUARDIANS – AN ALTERNATIVE TO BINDING DEATH BENEFIT NOMINATIONS

Whilst binding death benefit nominations are the most commonly used estate planning tools for SMSFs, there are alternatives, such as a death benefit guardian.

The role of the death benefit guardian is, basically, to ensure death benefits from a SMSF are applied in accordance with the wishes of the deceased member.

The appointment of a death benefit guardian can support existing estate planning documentation that is in place for a member, such as a binding death benefit nomination or a reversionary pension nomination, but it can also be used as an effective alternative, as we will see in the following case study.

Charles and Susan

Charles and Susan, who have been married for 10 years, have their own SMSF. They act as individual trustees of the Fund.

Each was previously married, with children from those relationships:

- Susan has 2 children from her previous marriage, William & Jane; and
- Charles also has 2 children from his previous marriage, Tom & Jerry.

The ages of the 4 children, who (at this stage) live permanently with Charles and Susan, are

very similar, ranging from 14 to 16.

Over the years, Charles and Susan have come to consider the children of the other as if they were their own.

Charles and Susan are each receiving a pension from the SMSF, and each also has an accumulation account in the Fund.

Being concerned about their estate planning, Charles and Susan sought advice and put in place:

- reversion of their respective pensions to the other; and
- a binding death benefit nomination which directs those benefits not subject to reversion to:
 - the spouse in the 1st instance; and
 - equally amongst the 4 children if the spouse is not living at that time.

Some 3 years later, Susan becomes very ill and passes away. Her pension reverts to Charles, who resolves to retain the balance in Susan's accumulation account within the Fund, and commences an

additional pension from that balance.

Charles seeks advice regarding the trustee structure of the (now) single member Fund and is provided with details of the various options available. As he feels the expense of establishing a company to act as trustee is not warranted, he arranges to have his eldest son, Tom, appointed as the second trustee of the SMSF.

As Tom has recently commenced work, he also becomes a member of the Fund and has his employer contributions paid to the Fund.

At this time, Charles raised the issue of the estate planning exercise conducted 3 years previously, and was advised that the binding death benefit nomination:

- allows for the instance of Susan predeceasing Charles; and
- provides direction to Tom, in the event of Charles' death, regarding the payment of the superannuation death benefits.

Not long after the last of the children finds a job and moves out of home, Charles has an

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accident and passes away as a result of his injuries.

The scenario at this point is that Tom is the sole trustee, with a binding death benefit nomination directing those benefits to William, Jane, Tom & Jerry.

Any Problems?

Do you notice any payment risks at this point? There are a few already, but it is about to get worse.

Tom likes the position of power, and decides he deserves more of his father's money. He destroys the binding death benefit nomination with the intention of stating, if asked, that his father had taken it from the files and destroyed it.

Tom adds his girlfriend as the second trustee and the trustees decide to pay the entire benefit to Tom.

Payment Risks

1. William & Jane

As William & Jane were not Tom's children - they were his stepchildren until Susan's death - they would not meet the SIS definition of 'child'. They had moved out of home and were working, so it is unlikely they would meet the financial dependency definition, meaning their entitlement under the binding death benefit nomination would fail, regardless of Tom's actions.

This may give rise to action against the adviser, who could be expected to have foreseen this eventuality and recommended that the share of William & Jane be paid via Charles' estate.

2. Jerry

Jerry had a valid entitlement but, unless he can prove Tom's wrongdoing, he has very little grounds for action. Those familiar with the New South Wales Supreme Court case of *Katz v Grossman* ([2005] NSWSC 934) will note some similarities to Jerry's position.

What safeguards should have been recommended?

Firstly, as touched on above, both Charles and Susan should have been advised to direct the entitlement of the stepchildren through their estates.

Otherwise, the entitlements under the binding death benefit nomination were likely to fail.

Unfortunately, had that advice been given and acted upon, Tom's actions would have still resulted in William & Jane being denied their entitlement.

Death Benefit Guardian

However, had Charles and Susan been advised to appoint a death benefit guardian, Tom may not have succeeded with his plan for 2 main reasons:

- the death benefit guardian may well have had a copy of the binding death benefit

nomination and known Charles had not rescinded it; but, in any event

- the death benefit guardian would need to have approved, in terms of the SMSF trust deed, the payment of the superannuation death benefits.

The degree of protection a death benefit guardian provides when the trustee is paying death benefits can be a very important safeguard.

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The role of a death benefit guardian is to ensure death benefit payments are made as intended.

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A death benefit guardian - generally a trusted friend or relative, or a professional adviser, does not act as trustee but ensures benefit payments are made as intended. The death benefit guardian would be entitled to restrict the payment of benefits by the trustee if:

- automatic pension reversions; or
- death benefit rules; or

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- binding death benefit nominations;

were not in place or not valid.

Conclusion

It is very important that the SMSF trust deed permits the appointment of a death benefit guardian as a means of overseeing the payment of benefits to surviving loved ones.

Utilising the power to appoint a death benefit guardian then becomes an important component of the estate planning process.

More information

Should you have any queries, or require more information, please contact the team at Topdocs on 1300 659 242