‘Retro’ witnessing of BDBNs: What could possibly go wrong?

- by Matthew Burgess, Director, View Legal

The recent decision by ASIC to ban a financial adviser for eight years is a timely reminder of the strict nature of the rules in relation to witnessing legal documents such as binding death benefit nominations (BDBNs).

The factual matrix ASIC highlighted was somewhat reminiscent of the conduct NAB found itself in trouble over for regularly allowing advisers to witness BDBNs with only one witness in attendance — and a second witness later signing, despite not actually having been present.

That is, fundamentally misunderstanding that the concept of witnessing has at its core the need for both parties to be present at the same time.

The adviser mentioned in the above press release, while at ANZ and Infocus, was found to have falsely witnessed BDBNs, backdated documents and falsified a client’s signature on documents.

In announcing the ban, ASIC mentioned the failure to act with honesty and integrity and be of good fame and character and the need to be likely to comply with the financial services law.

The witnessing requirements for BDBNs are often analogous to one of the key requirements of signing a will validly; that is, there must be two witnesses and they must be present and observe the willmaker sign (and date) the document.

The rule in this regard is inflexible, particularly where a lawyer is involved, as explained in the case of *Lewis v Lewis* [2020] NSWSC 1306.

Relevantly, the factual matrix involved a son who prepared a will on behalf of his mother.

Realising that if he was one of the witnesses, he would likely be automatically excluded from taking any benefit under the document (see *Hill trading as R F Hill & Associates v Van Erp* (1997) 188 CLR 159), he arranged for two neighbours to be the witnesses.

After handing the will to his mother and explaining the witnesses would be over later in the day, the son went out. When he returned, his mother had gone to bed, leaving the will, signed, on a table in the lounge room.

When the witnesses arrived, the son told them that his mother had already signed the will and gone to bed and said, “This is not the right way to witness the will, but I will have to deal with it at a later stage. Do you mind signing anyway?”

During the hearing when the lawyer was questioned as to why he had knowingly procured false attestations, he evidently did not seem especially troubled — and indeed responded by saying he offered the witnesses a choice and that they could always have refused if they were worried.

The court confirmed its view that the lawyer’s conduct was completely unsatisfactory and it was grossly improper of him to ask the witnesses to make solemn statements that they had witnessed the willmaker signing the will when, in fact, they had not. Furthermore, the attempt to deflect blame on to the witnesses was described as “positively discreditable”.

Ultimately, the court concluded that the conduct of the lawyer may have justified referral to the Law Society for consideration of disciplinary action, although gave the lawyer the right to make submissions against this occurring.

Based on the decision in *Council of the Law Society of New South Wales v Renfrew* [2019] NSWCATOD 63, there is every chance of disciplinary consequences.

In that case, a lawyer was the only witness to a will at the time the willmaker signed, and then arranged for a second witness to sign some period of time later (after the willmaker had died), before then attempting to mislead the court on a probate application that both witnesses had in fact been present.