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# SMSFs urged to rethink BDBN approach following court case

***By Miranda Brownlee, Deputy editor, SMSF Adviser - 24 May 2022***

## In light of the recent *Benz v Armstrong* decision, some SMSFs may need to consider a binding death benefit nomination that is non-lapsing and "double entrenched" in the trust deed, says a specialist lawyer.

View Legal director Matthew Burgess said the decision *Benz v Armstrong; Benz v Armstrong; Benz v Armstrong [2022] NSWSC 534* provides some stark reminders on the need for SMSF advisers to carefully consider wider estate planning issues before implementing any superannuation death benefit nominations.

"This is particularly the case if there is an intention to have a binding death benefit nomination (BDBN) that is enforceable and implemented," said Mr Burgess.

"While in the Benz decision the BDBN appears to have been valid under the superannuation legislation, the notional estate rules effectively made it be deemed to in fact be invalid."

Where a BDBN is being considered, Mr Burgess said the starting point should always be looking at the requirements under the trust deed.

"Indeed, a BDBN can only be used where the deed allows one to be made," he noted.

However, superannuation fund members living in NSW or those with members in other states where there is a relevant level of connection with NSW may need to do more than just ensure that the trust deed and BDBN are appropriately aligned, he cautioned.

"Historically, in all Australian jurisdictions, courts have only been able to make further provision for a beneficiary out of the assets that directly form part of the deceased's estate when there is a challenge against a will," he explained.

"In NSW however, special rules have been implemented that allow the courts to make orders in relation to assets that do not in fact form part of a deceased's personal estate – for example superannuation benefits."

Mr Burgess said that in many respects, the NSW rules are analogous to the bankruptcy legislation in that willmakers who take steps to remove assets from their personal name leave those assets exposed to be "clawed back" into the estate for the purposes of family provision applications made within three years of the date of their death.

"In the context of the Benz decision it seems clear that only removal of funds from superannuation, or a BDBN that is non-lapsing and 'double entrenched' in the trust deed directly to the desired beneficiary – and in each instance implemented at least three years before the date of death – will be outside the NSW notional estate regime," he explained.

The ability to implement non-lapsing BDBNs is, however, a strategy that is itself subject to the pending High Court decision in the case of *Hill v Zuda*, he noted.

The approach of removing benefits from superannuation is predicated on ensuring the assets are held via a structure that cannot be attacked under the notional estate rules, he explained.

"An example in this regard, which is perhaps the most (in)famous, was leveraged by Richard Pratt (of Visy fame) and focused on ensuring all assets are in a trust that is outside the reach of the notional estate regime – that is relevantly, removing the assets from the SMSF entirely and transferring them into (say) a discretionary trust," he said.

"In the Pratt case, despite the apartment in dispute being physically located in NSW, the structure used of a series of trusts and companies not controlled by Mr Pratt – which meant there was nothing else that created a nexus between the deceased, being Mr Pratt, and the NSW notional estate rules. In other words, the apartment could not be attacked by a disgruntled beneficiary."

In relation to "double entrenching" a BDBN, Mr Burgess said it seems clear that even if a nomination (which appears to be binding) is embedded under the deed for an SMSF, unless the provision of that deed has a prohibition against amendment, the intentions of the parties may not in fact be achieved.

“For example, the remaining trustees after death could elect to vary the deed and effectively remove the binding nomination before ultimately making a death benefit payment, although this itself would be a step at risk of attack under the notional estate rules,” Mr Burgess confirmed.

The branding associated with double entrenching deeds of variation to include a BDBN, he said, often includes terms such as “SMSF wills”, “non-lapsing BDBNs”, “Hard-wired BDBNs”, and “irrevocable BDBNs”.

“Ultimately, regardless of the description of the approach adopted, arguably the single most important lesson from Benz is that if there is a desire to avoid the notional estate rules, the strategy must be implemented as part of a holistic estate plan; outside the three year clawback period imposed by the legislation,” said Mr Burgess.