SMSFAdviser

Trust deed details critical for BDBN planning, advisers cautioned

by Miranda Brownlee

Advisers have been reminded on the importance of reading the deed before implementing any death benefit nominations, particularly those that are binding.

Speaking at a recent conference, View Legal director Matthew Burgess explained that, as with many other aspects of superannuation-related estate planning, whenever considering a binding death benefit nomination (BDBN), the starting point should always be the requirements set out under the trust deed.

Indeed, a BDBN can only be used where the deed allows one to be made, Mr Burgess told delegates at the SMSF Association National Conference.

"One key difficulty is that many deed providers will mandate specific requirements that must be met in order to ensure the BDBN is valid," Mr Burgess confirmed.

While Mr Burgess said almost all modern trust deeds allow BDBNs, at times, there will be additional provisions that are not necessarily expected. Some examples in this regard include:

1. A requirement that the trust deed for the superannuation fund cannot be amended in a way that impacts on any BDBN – without the consent of each member who has made one;
2. A provision that empowers the trustee to accept amended BDBNs from the financial attorney of a member;
3. The trustee may be required to consider and accept a BDBN before it is valid; and
4. There may be a particular table or form that is required to be embedded into the BDBN, which sets out the percentage entitlement of each beneficiary.

Mr Burgess said it's also important that SMSF advisers consider the practical and administration issues around whether a purported BDBN is valid.

"Advisers of all specialisations, including lawyers, have been involved in the type of approach the National Australia Bank (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. While not all BDBNs require two witnesses, if there is this requirement, both witnesses must be present at the time of the member signing," he explained.

As further examples, both ANZ and Infocus have had at least one adviser found by ASIC to have falsely witnessed BDBNs, backdated documents, and falsified a client's signature on documents.

In one instance, ASIC banned the adviser for eight years for the failure to act with honesty and integrity and be of good fame and character and be likely to comply with the financial services law, as previously reported by SMSF Adviser.

He also outlined that it will generally be the adviser's responsibility to consider the trust deed and determine whether a BDBN meets the rules of the document, the superannuation laws, and considers the tax laws.

Mr Burgess also highlighted examples of lawyers failing to understand the importance of following the rules in relation to valid witnessing of legal documents.

“For example, in the case of *Lewis v Lewis [2020] NSWSC 1306*, a lawyer made a will for his mother and arranged for her to sign it without witnesses present. 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,” he said.

“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 onto the witnesses was described as ‘positively discreditable’.”