SMSFAdviser

Qld court ruling highlights documentation is crucial in BDBNs

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The importance of good quality documents, especially in regard to BDBN, was highlighted last week in a Queensland Supreme Court decision.

In Williams v Williams & Anor [2023] QSC 90, Gayle Dianne Williams was seeking a declaration as to the validity of a binding death benefit nomination (BDBN) made by her late husband in respect of the death benefit payable from an SMSF.

She was also seeking the removal of the current trustee or trustees, Paul Francis Williams and Mark Anthony Williams, from the super fund and the appointment of independent professional trustees.

The issue for determination on the first order was whether or not notice of the BDBN was given to the trustees in accordance with the super fund governing rules. The issue of the second order was whether or not the current trustees have behaved in a way that justifies their removal.

Anthony Vincent Williams died on 28 December 2021 and was survived by the applicant, whom he married in 2019, and his adult sons Paul Francis Williams and Mark Anthony Williams.

In the will he executed in 2020, the deceased appointed Mark Williams as his executor. At the date of his death, the deceased had a superannuation interest in the self-managed superannuation fund known as the Boosey Doherty Superannuation Fund (the Fund).

The trust deed for the Fund (the Deed) provided that the original trustees were the deceased and Margaret Williams (the deceased's first wife). The initial members were the deceased and his late wife. Margaret Williams died in December 2014 and Paul Williams was appointed as a trustee in her place in 2016.

The deceased executed two BDBNs. The first on 1 February 2018 and the second on 26 March 2018. The latter, apart from declaring it to be his last binding death benefit nomination, directed the trustees to pay 50 per cent of his death benefit to Gayle Williams and 50 per cent to the deceased's legal personal representative.

By letter of 24 February 2022, Mark Williams told Gayle Williams that the BDBN of 1 February 2018 was invalid. By a purported deed of removal and appointment of trustee of 25 March 2022 (the 2022 deed of appointment), Mark Williams was appointed a trustee of the Fund.

On 26 March 2018, the deceased executed a BDBN (the second BDBN) by which he directed the trustees to make the payments referred to above. The BDBN is executed in accordance with the requirements of the Deed. It also contains a "trustee confirmation" in which the deceased recites that, in his capacity as trustee for the Fund, he confirms that he accepts the BDBN.

The primary objection by the respondents to the BDBN (whether the nomination in February or the nomination in March 2018) is that the trustees were not given the required written notice of the nomination by the deceased. The Deed provides for the making of binding nominations. The nomination is a non-lapsing death benefit nomination.

As a result, clause 24.6A of the Deed applies. It provides:

"If the Trustees are given a written notice by Member requesting that benefits be paid following the death of that Member to a person or persons or other permitted payees then the Trustees must:
(a) by written resolution, accept the terms of the Member's notice; or
(b) give written notice to the Member of a proposed rule in respect of the death benefit specifying the terms thereof in accordance with the Member's request.

Furthermore, on the date of that resolution referred to in (a) or the date of the written acceptance by the Member of the death benefit referred to in (b), the Trustees are bound by those terms unless and until that member and the Trustees otherwise in writing agree or until a later binding nomination in accordance with the SIS Act is given to the Trustees or a later non-lapsing nomination is given effect under (a) or (b)."

The respondents say correctly that the first respondent was not given written notice by the deceased of the BDBN. The applicant argues that the deceased, as trustee, had notice of the BDBN because he had executed the document.

The applicant then argues that the term 'trustees' need not be interpreted as meaning all the trustees under the Deed because of the provisions of the interpretation clause in the Deed.

Daniel Butler, Director of DBA Lawyers said the judge's ruling in the case is another BDBN decision that highlights the need for good quality documents and making sure the governing rules are complied with.

He said that clause 24.6A of the Boosey Doherty Superannuation Fund's deed required the trustees to be provided written notice of the death benefit nomination for it to be binding on the trustees.

"The court had to then decide whether notice to the trustees required notice to 'all' trustees or just notice to the deceased trustee (who had knowledge of his own BDBN as it was prepared by him)," he said.

"The court decided that, in the context of the fund's deed, all trustees had to be notified and that a general interpretative provision that the singular included the plural should not be relied on (not the deceased who had 'constructive' notice)."

Mr Butler said the purported change of trustee was then reviewed and this change was also held to be invalid due to failure to comply with the deed.

"A valid change of trustee required a resolution of a two-thirds majority of members. However, the removal was documented by a resolution of the deceased (Anthony Williams) and Paul Williams," he said.

"However, only Anthony's legal personal representative (LPR) held the power to make this change. In this regard, rule 2.5(a) provided that a person ceases to be a member upon their death and the deceased member's LPR is deemed to be a member on that death.

"Clause 2.1 defined LPR as being the person who has been granted probate of the will of an estate of that deceased member. Thus, since probate of the will had not been obtained, there is no LPR under the fund's deed. Thus, the purported appointment of Mark Williams and Paul Williams as trustees was invalid."

The court decided to remove Mark and Paul as trustees and replace them with independent trustees given, among other things:

Mark and Paul were conflicted given that they are dependants of the deceased in relation to his death benefits and beneficiaries under the deceased estate.

Paul refused to cooperate and hand over trust documents until required by a court order.

“The court decided the conflicts that appear to exist for both Paul and Mark lead it to the view that this is a case in which it is appropriate to exercise the discretion to remove the trustees,” Mr Butler said.

“This decision highlights the need for advisers to obtain quality advice and documents, especially making sure BDBNs and change of trustee documents are prepared by lawyers.

‘While these documents do appear relatively simple and straightforward, there are various complexities and risks that result in these being rendered invalid like in this case.

“If a non-qualified adviser prepares faulty documents they can be sued and are unlikely to be covered by professional indemnity insurance cover where they have prepared documents that should have been prepared by a qualified lawyer.”

Matthew Burgess, director, View Legal, said in holistic estate planning, disputes in relation to SMSFs – and particularly (purported) binding death benefit nominations (BDBN) – are arguably risks of such high probability that there is need for advisers to consider the issues habitually.

The decision in Williams v Williams & Anor [2023] QSC 90 provides a stark example in this regard.

The factual matrix in this case was arguably ‘generic’ for a material number of SMSFs, that is a blended family with competing interests and (arguably) less than ideal documentation.

Mr Burgess said in relation to the invalidity of the BDBN, the court confirmed:

1. The purpose of communicating a BDBN to the trustees is largely practical - that is, to give effect to a BDBN the trustees must know about it and, in the case of multiple nominations, must know which was current and which had been superseded (these points were confirmed in the decision of Cantor Management Services Pty Ltd v Booth [2017] SASCFC 122, which in a similar factual matrix confirmed that a BDBN sent to the registered office of the corporate trustee was a valid approach for a member to provide the requisite notice to the trustees);

2. While the trust deed had standard provisions that deemed ‘singular wording to include plural’ and vice versa (a provision that is included by statute in all deeds and instruments, for example see section 48(1) of the Property Law Act 1974 (Qld)) - these type of provisions were subject to the context of the trust deed.

3. So too the provisions in the trust deed that provided “the ‘Trustees or the Trustee for the time being of the Fund’ and ‘Trustee’ have the same meaning” were subject to the context of the wider deed and required that where there was more than one trustee the word ‘trustees’ should be taken to mean all the trustees.

4. Thus, while the deceased member was aware of the BDBN he had signed, and was also a trustee, the context of the trust deed required both trustees to be notified. This conclusion was further supported by the fact that the deed required that on receiving the written notice, certain further steps were mandated, namely, the trustees creating a written resolution accepting the terms of the BDBN.

5. In other words, the knowledge of the deceased member could not automatically affect the co-trustee with knowledge of the transaction (see Cummings v Austin (1902) 28 VLR 347).
The other key aspect of the decision also serves as a blunt reminder of the ‘read the deed’ mantra so critical for all trust advisers, including in the SMSF space.

He said in particular, a purported change of trusteeship by the surviving son to appoint his brother as a co-trustee was held to be invalid for a range of reasons, including:

1. The relevant documentation purported to have the deceased member as a party - at a minimum the relevant party would have needed to be the deceased member’s LPR.

2. While the deed gave a two-thirds majority of members the right to appoint a trustee, the relevant documentation did not rely on these provisions.

3. While the deed also appeared to allow a member's LPR to assume the rights of the member in relation to trustee appointment, the definition of LPR under the deed was limited to a person who had obtained probate of the member's estate; and probate had not in fact been obtained. Therefore, for the purposes of the deed, there was no LPR of the deceased member and the provisions giving rights to the member's LPR were a nullity.