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Death, taxes ... and disputes in relation to super benefits - the 3 certainties

by Matthew Burgess, Director, View Legal

As is the case in many areas of holistic estate planning, perhaps the only certainty for specialist self managed superannuation fund (**SMSF**) advisers in 2024 is that there will be no slow down in work.

Perhaps too will the litigation lawyers running matters disputing aspects of binding death benefit nominations (BDBNs) become increasingly busy; further supporting a conclusion that unlike the Benjamin Franklin reflection of death and taxes being the only two certainties, there are in fact 3 for SMSF advisers.

Historically, the decision in *Walter William Nespolon v Lindy van Camp* [2022] NSWSC 1190 provided a stark example of the above observations.

In this case a surviving spouse was alleged to have coerced her de facto less than 24 hours before he died to sign a BDBN in her favour.

One of the reasons the deceased was said to have been interested in a BDBN was that after speaking with his accountant, he believed that there would be tax advantages in doing so - despite the fact that, of itself, a BDBN has no impact on the tax outcome.

While the judgment did not resolve the dispute, the court was blunt in confirming that it would be wholly inappropriate for the trustee of the SMSF to pay the death benefit into court. That is, if the purported BDBN was ultimately held to be unenforceable or set aside, the trustee would be required to exercise its discretion and determine how to pay the death benefit. The trustee was not entitled to abrogate that responsibility by simply paying the death benefit into court.

Recent Decision

In the subsequent decision of *van Camp v Bellahealth Pty Ltd* [2024] NSWSC 7, the court concluded that the BDBN was in fact valid and instructed the trustee to arrange payment of the death benefit of over $4.5M (including $3M of life insurance proceeds) to the surviving de facto spouse.

While during the early stages of the proceedings there were suggestions that the BDBN was invalid for a failure to comply with Superannuation (industry) Supervision Regulation 6.17A, the court was blunt in dismissing this suggestion, citing *Hill v Zuda Pty Ltd* [2022] HCA 21 as authority for the fact that this regulation does not apply to SMSFs.

Instead the court had to determine whether the:

(a) member lacked capacity to make the BDBN; and

(b) BDBN was liable to be set aside by reason of unconscionable conduct by the de facto.

In summary the key elements of the factual matrix were as follows:

1. the SMSF was a sole member fund;

2. the member and his de facto shared 2 infant children together and had been in a relationship for around 7 years;

3. as part of the wider estate plan the member had created a testamentary trust will, with flexibility for a special purpose 'superannuation proceeds trust' to be established (ie a form of testamentary trust whereby the range of beneficiaries is limited to tax dependants to ensure the concessional tax treatment otherwise afforded to death benefits paid directly to tax dependants could be accessed);

4. the trustees of the testamentary trust appear to have been the de facto, the member's brother and the member's lawyer, acting by majority;

5. a key driver for the structure of the will was the member's concerns that his de facto was not a good saver and that the assets should be protected for the long-term benefit of the children, particularly given the assumption that his de facto would re-partner;

6. the accountant for the SMSF had advised that unless the death benefit was paid to the de facto there would be adverse tax outcomes;

7. the lawyer for the estate plan had flagged that given the commercial objectives, it should still be possible to achieve most of the desired tax outcomes even if the benefits were paid to the legal personal representative and formed part of the estate.

Capacity

In deciding the member had sufficient capacity to validly make the BDBN, the court confirmed:

A. unlike the member's will, the BDBN itself was not complex in this case - rather it was a short document, and straightforward in its terms;

B. thus the key consideration was simply whether the member had the capability of understanding that all of his member benefits would be paid directly to his de facto - and would not be used by the executors in accordance with the terms of his will; which required only a general understanding and not an overly complicated explanation in the circumstances of this case;

C. this was particularly so given the member was educated in business as well as medicine, a director of various companies and experienced in dealing with his financial affairs and businesses, and had received advice about the nature and effect of making a BDBN from his lawyer historically, and accountant immediately before it was signed;

D. the question of capacity was determined not by reference to what the member, in fact, understood - but instead whether he would have had the capacity to understand, if the matter had been explained to him;

D. in all the circumstances the member was held to have either understood, or been capable of understanding, that his member benefits would not be available to his estate or to his executors to pay debts (in which case tax would have likely been payable);

E. the fact that the 2 doctors who witnessed the BDBN considered it was reasonable to do so, without doing a formal cognitive assessment, supported a conclusion that the member's mental functioning was not so obviously impacted by the medications being administered so as to raise real reservations or concerns about his capacity;

F. furthermore, given the member's lawyer had experience in estate planning, her observations that during a very short phone call with the member shortly before the BDBN was prepared that the member seemed 'drugged up' were not critical, particularly given that:

(I) the discussion was not an in-person meeting, where the court held she could have more properly observed and tested the issues with him (cf *Drivas v Jakopovic* [2019] NSWCA 218);

(II) the lawyer did not contemporaneously relay any concerns to the other partner working on the matter; and

(III) nothing was raised by the lawyer about capacity issues in the cover email sending the BDBN for signing.

Unconscionable conduct

In deciding that the de facto had not acted unconscionably in relation to the BDBN, the court confirmed:

(i) the conclusion that the member did not lack mental capacity to make the BDBN did not mean automatically that he could not be in a special disadvantage - that is disadvantage may be situational or relational, have been created or exacerbated by an absence of advice or explanation, and may coexist with a 'full understanding' of the disputed transaction (see *Mentink v Olsen* [2020] NSWCA 182, citing *Bridgewater v Leahy* [1998] HCA 66);

(ii) the fact that the de facto printed the BDBN without giving a copy of the lawyer's email of advice to the member nor explain the advice to him, was not due to some contrivance on her part or focus on her own material gain and while this was not of itself determinative of the question of unconscionable conduct, it did point to an absence of a predatory state of mind and conscious victimisation or taking advantage;

(iii) there was insufficient evidence to support a conclusion that the de facto actually knew, or ought to have known, of the existence and effect of a special disadvantage being endured by the member; that is she did not know or suspect that the member was confused, could not recall things or was in a very vulnerable state in relation to decision making concerning his financial affairs;

(iv) thus the BDBN was not signed as a result of the de facto taking unconscionable advantage of any known special disadvantage of the member.