THOMSON REUTERS

WEEKLY TAX BULLETIN
www.thomsonreuters.com.au/tax

Tax planning, super and the NSW notional estate regime

by Matthew Burgess, Director, View Legal

As is arguably becoming increasingly understood, the 'notional estate' rules that apply in New South Wales (**NSW**) have the ability to see assets retained via a self managed superannuation fund (**SMSF**), that is assets that are not owned personally by a deceased,) to still be subject to attack when the estate itself is challenged.

Arguably the leading decision in this regard is the case of *Benz v Armstrong; Benz v Armstrong; Benz v Armstrong* [2022] NSWSC 534.

In a situation where the personal assets of the deceased that would have passed to children from his first marriage under the will were negligible, the application of the notional estate provisions instead created a pool of available assets of in the region of $18M.

While the second wife of the deceased (who would have otherwise received all wealth) retained more than half of the assets, 4 adult children from the first relationship received amounts in the region of $1M (2 children) and $2M (2 children, noting for completeness that one child appears to have secured their payment by calling in a credit loan owed by a family trust (controlled by the deceased) to that child, that was held to be repayable on demand).

The allocations to the adult children were despite the fact that the court concluded that all children had a relatively privileged childhood, including attending private schools and receiving a university education. Further none of the children had particularly dire financial or medical issues.

The ability for the courts in NSW to access superannuation entitlements 'by stealth' under the notional estate regime does not automatically mean however that SMSF assets will be treated in a manner that is contrary to the wishes of the deceased member.

Recent decision

For example, in *Boyd v Roberts* [2024] NSWSC 1310, while the court confirmed the assets of the SMSF could have been used to satisfy a successful challenge against the estate, such an approach in the circumstances was held inappropriate and instead other non-estate assets were used to make the required payments to the aggrieved beneficiary.

In a factual matrix where the sudden death of both the deceased and (historically) his first wife, the deceased's only child (a daughter from the deceased's first marriage) was successful in securing $450,000 (with payment of $100,000 deferred for 12 months) sourced from bank accounts in the sole name of the second wife (which accounts had been held as joint tenants with the deceased, meaning that at law she became the sole owner by the rule of survivorship).

The bank accounts were held to form part of the deceased's notional estate, which was valued at circa $2M (less legal fees of around $130,000 for each of the daughter and second wife).

The deceased's personal estate had no assets, thus, but for the NSW notional estate regime, the daughter would have not have received anything on her father's death.

In relation to the decision to ignore the assets held via an SMSF for the purposes of the notional estate determination the court confirmed:

1. the trust deed for the relevant SMSF (and likely most SMSF trust deeds) provided a general power to distribute capital and income of the superannuation fund to a range of persons including the deceased (prior to death) and the second spouse (who was the sole controller of the SMSF following the death of the deceased;

2. the SMSF (with its sole asset being a residential property) was held to be an important component of a stable financial future for the second wife, providing future capital growth and present income for her, within a 'low tax superannuation environment';

3. if the SMSF was held to be part of the notional estate, it would have practically forced the sale of the only asset of the SMSF, an unacceptable outcome in the court's view due to:

(a) the second wife's long-term financial welfare being held to be best served by preserving her superannuation to its maximum extent, given that 'superannuation is a tax-sheltered environment from which she can earn income to fund her retirement - that was her and the deceased’s plan and it was a good one';

(b) the property market was accepted as being not at its best and therefore it was not a good time to force a sale of the property; and

(c) the corporate trustee for the SMSF had not been joined as a party to the proceedings - the court noted that while this was not an insuperable obstacle (given the second wife, who was a party to the proceedings, was the controller of the corporate entity) it was a complication that was able to be avoided.

An adviser warning

Interestingly, the court accepted the advice of the accountant for the SMSF, that while he had previously prepared a binding death benefit nomination (**BDBN**) in favour of the second spouse, this had lapsed prior to death 'by operation of law, as it is required to be renewed every three years'.

Generally, certainly since the decision in *Hill v Zuda Pty Ltd* [2022] HCA 2, most SMSF trust deeds reflect the position at law that an SMSF may permit members to make death benefit nominations that are binding on the trustee, whether or not in circumstances that accord with the rules in regulation 6.17A of the superannuation regulations (which imposes the 3 year lapsing rule) - that is SMSFs with appropriately crafted deeds can permit non-lapsing BDBNs.

Even though a non-lapsing BDBN may have still been subject to unwinding via the notional estate regime, given this is only relevant in NSW, the accountant's approach would likely be subject to far greater scrutiny in another jurisdiction. The risks in this regard are ones that advisers have received many warnings about in recent times, for example the decision of *the Application by Ellasil Pty Ltd* [2023] VSC 69, where the accountant to the SMSF apparently:

A. failed to identify the fundamental issues that flowed from a lost SMSF trust deed until many years after the problem could have first been identified;

B. made no file notes of discussions in relation to a BDBN they drafted, nor were they able to provide more detail as to when the discussions occurred;

C. had not considered whether preparing and issuing a BDBN amounted to legal advice; and

D. failed to confirm whether each BDBN was valid in accordance with the trust deed for the SMSF, and in turn whether it was signed, dated and witnessed correctly.