

TAX TALKS

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113 | Binding Death Benefit Nomination

A binding death benefit nomination is an important tool in your successful SMSF succession planning. But on their own they are rarely effective.

Binding Death Benefit Nomination

In this episode Daniel Butler of DBA Lawyers will walk you through the ins and outs of binding death benefit nominations.

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Instructions to the Trustee

In a binding death benefit nomination a member instructs the trustee how to pay out their super benefit upon their death. The instructions might say to pay it to their dependants and / or to their legal personal representative or something else.

Documentation

An important issue around BDBNs is whether the documents stack up. Is the nomination actually binding?

It only is when the wording actually compels the trustee to act in a certain way. The moment the trustee has some discretion in the matter, it is no longer binding.

To be binding the BDBN must be subject to the SIS Act and SIS Regulations. And the trust must actually receive the BDBN. Because the trustee can't follow something they haven't received.

Not Mandatory

BDBNs are not mandatory. You don't have to do a BDBN. In fact you might not need one. But BDBNs often provide greater certainty around what will happen to your SMSF assets when you pass away.

Retail Employees Superannuation v Pain

In *Retail Employees Superannuation Pty Ltd v Pain [2016] SASC 121* the South Australia Supreme Court commented extensively on the BDBN provisions in the SIS Act and SIS Regulations. And found it woefully lacking.

The court (Blue J) identified significant problems with the provisions and called for reform in this area ([512]).

The structure and drafting of sections 58 and 59 of the SIS Act and regulations 6.17A of the SIS Regulations give rise to ambiguities, uncertainties and potentially unintended consequences... it is

highly desirable that those provisions be reviewed by the Commonwealth and recast.

So even the courts recognise that the current legislation around BDBNs leave a lot to be desired. So even if you do a BDBN in conjunction with a deed that relies on the SIS Act and SIS Regulations, it may not be effective.

Perry v Nicholson

In *Perry v Nicholson [2017] QSC 163* the deceased 's daughter sought to challenge the validity of her father's BDBN. The point of contention was that his BDBN directed benefits to his de facto partner Jennifer Nicholson. The daughter disputed the validity of the change of trustee. The issue was that the trust deed required the BDBN to be 'given to the correct trustee'.

Cantor Management Services v Booth

In *Cantor Management Services Pty Ltd v Booth [2017] SASCFC 122* the BDBN allocated the death benefit to the estate. The deceased's brother controlled the corporate trustee as its sole director. The brother contented he had never become aware of the BDBN before. And that the BDBN therefore did not meet the 'given to' requirement in the trust deed. So the deceased' executor brought action against the corporate trustee.

Re Narumon

In *Re Narumon Pty Ltd [2018] QSC 185* the deceased member completed five BDBNs over four years prior to being assessed as lacking legal capacity in November 2013. The first four nominations were consisten in paying his spouse and their son Nicholas.

But then the member completed his last BDBN in 2013. In this BDBN the deceased's sister was to receive 5% of benefits. And the spouse and son the rest in equal halves, so 47.5% each. The sister was not a dependant. And this was the first issue.

The second issue was that the 2013 BDBN contained a 3-year lapsing provision. To stop the BDBN from lapsing in 2016, the member's joint attorneys (his spouse and sister) extended the 2013 BDBN. The member's attorneys then completed a new BDBN later in 2016 nominating 50% to the spouse and the son. Ostensibly to correct the 5% nomination to the non-dependant.

But the sister didn't appreciate all this and went to court. And so there was a lot of backwards and forwards about which BDBNs were valid and whether the extension and new BDBN were valid. But the moral of the story is actually very simple: If a BDBN is the right solution for you, make sure that it is drafted correctly and water-tight when contested. And draft it to last indefinitely.

Holistic Approach

The best way to make sure your BDBN will work is to use a holistic approach. And to make sure that your will, EPoA, SMSF deed, reversionary pension and BDBN all work together in sync.

All this is just our brief take on the issue, but please listen to the episode above. Daniel Butler explains all this in a much better way than we ever could.

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