

TRUST DEEDS RULE IN SMSFs

The High Court decision of *Hill v Zuda Pty Ltd* is an important reminder that superannuation fund trust deeds are not all the same particularly when it comes to death benefit nominations.

Failing to understand what will happen to superannuation benefits in the context of estate planning has led to claims where the client's will was incorrectly drafted because assumptions were made about where the superannuation payments would be made.

For self-managed superannuation funds (SMSFs) the High Court has recently confirmed it is only the trust deed that directs superannuation death benefit notice requirements. Practitioners should consider seeking instructions to review the terms of the client's trust deed particularly where there is a SMSF. It is important to know whether the deed has a binding or non-binding nomination clause and whether any nomination notices comply with the relevant requirements.

Where trust deeds allow, binding death benefit nominations (BDBN) are usually made by the fund member giving notice to the trustee of their super fund directing where the death benefit must be paid. If there is no BDBN, the trustee has absolute discretion as to whom the benefit will be paid. This can make it difficult for clients to arrange for the distribution of their estate as they wish.

For most retail and industry superannuation funds, reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* sets out requirements for BDBN notices, including the notice must:

- be "given" to the trustee
- be in writing
- be signed and witnessed by two people
- contain a declaration by the witness stating that the notice was signed by the member in their presence.

Any notice lapses after a period of three years, unless the deed stipulates a shorter time frame.

In the recent case of *Hill v Zuda Pty Ltd* [2022] HCA 21, the High Court held that reg 6.17A does not apply to SMSFs, unless specifically imposed by the wording of the trust deed. Requirements for BDBNs will turn on the specific wording of the trust deed, subject of course to the deed's general compliance with superannuation and trust law.

The facts

Zuda Pty Ltd was the trustee of a SMSF created by a trust deed where Mr Sodhy and his de facto partner, Ms Murray, were members of the fund and directors of Zuda.

In 2011 the trust deed was updated to allow for BDBNs to be made, and a notice was given requiring that if Mr Sodhy or Ms Murray died, Zuda was to distribute the whole of the deceased member's benefits in the fund to the surviving member.

Mr Sodhy died five years later and Zuda paid the balance of Mr Sodhy's benefits to Ms Murray who was also the executor of Mr Sodhy's will.

Mr Sodhy's only daughter from a previous relationship, Ms Hill, was a beneficiary of Mr Sodhy's will and made a family provision claim on the estate. Ms Hill challenged the BDBN and payment to Ms Murray on the grounds that the BDBN was invalid and ineffective because the deed did not comply with reg 6.17A. In particular, the notice was not signed in the presence of two witnesses, and it was made more

than three years before her father died. In the circumstances, it was contended by Ms Hill that the superannuation should go to the estate of which she was a beneficiary.

The decision

The High Court unanimously dismissed Ms Hill's appeal. The Court held that reg 6.17A, properly construed, does not apply to SMSFs. This means that the wording of an SMSF trust deed itself – and not reg 6.17A – will determine whether an SMSF can have a BDBN as well as the form of the notice.

The BDBN can last more than three years and be made indefinite, subject to the specific terms of the trust deed. Some SMSF trust deeds may still impose a specific requirement for the BDBN to comply with the requirements of reg 6.17A which highlights the importance of reviewing the terms of the deed.

Risk management

The decision is a good prompt for practitioners to revisit their processes and procedures when drafting wills or providing advice to clients about superannuation issues.

In what circumstances should the trust deed be reviewed and when is it safe to rely on what the client thinks or verbally advises about the distribution of their superannuation? The risk profile is different for a well-known industry fund, with clear communication about what can be done, compared to a SMSF with a bespoke trust deed.

When reviewing a trust deed, be alert to any drafting issues and ambiguities which may render any nomination invalid and check that the BDBN works as intended and that it is consistent with the client's will.

When the will is finalised, confirm in writing whether superannuation is expected to form part of the estate or who is expected to receive it. Confirm what steps the client should take to make this happen such as the need to keep their BDBN current. ■

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TIPS

- Consider the need to check the wording of the client's trust deed to determine whether the fund has binding or non-binding nomination provisions.
- For BDBNs check any notices given comply with the requirements of the deed for SMSFs, and the requirements of regulation 6.17 for regulated superannuation funds.
- Be alert to drafting issues and ambiguities in the trust deed which may render any nomination invalid.
- Check the BDBN works as intended and is consistent with the client's will.
- Confirm if the BDBN needs to be renewed every three years.