

- The main advantage of making a binding nomination is the certainty provided.
- By completing a binding nomination the risk of challenges to the fund that may arise on the member's death are minimised.
- The main disadvantage of making a binding nomination is that the nomination locks the trustee of the fund into directing any death benefits to those dependants or to the estate nominated. If a person's circumstances change, for instance, due to divorce, separation or bankruptcy, such occurrences may negate the certainty which was hoped to be created.

### Case Study – *Munro v Munro*

#### Using the wrong terminology in a BDBN

In the case of *Munro v Munro* [2015] QSC 61 the BDBN was prepared by accountants, and the process was overseen by the deceased's financial planner.

- Barrie John Munro and his wife Patricia Suzanne Munro were the two individual trustees of their SMSF – "The Barrie and Suzie Super Fund".
- Mr Munro had two daughters from a previous marriage.
- Mr Munro was a lawyer, his binding death benefit nomination was prepared for him by his accountants.
- Mr. Munro's accountants sent him a printed form titled "Binding death benefit nomination" which included his name and particulars. In the section of the form that provided for the specification of nominated beneficiary was typed in the words: "Trustee of Deceased Estate". The percentage benefit was stated as "100%". The relationship of nominated beneficiary to the member was described as "trustee".
- The nomination form also stated that: "Each nominated beneficiary must be your spouse....or the executor of your estate (as stated in your will). When you nominate your executor you should enter legal personal representative in the relation column".
- Mr Munro signed the nomination document on 22 September 2009.
- The main question before the Court was whether the BDBN was valid.
- After Mr Munro's death he was replaced as trustee by one of his second wife's daughters. The trustees argued that the BDBN dated 22 September 2009 was not binding and that they could distribute the deceased's death benefit in the fund according to trustee discretion. Mr Munro's two daughters, opposed this, arguing that the trustees were bound to distribute the death benefit according to the BDBN.
- Her honour Justice Mullins found that the nomination of the "Trustee of Deceased Estate" was

## Recent Case – *Munro v Munro*

### Trustee

Another lesson from the *Munro v Munro* case was that on the death of one member, the surviving member and trustee appointed a trustee favourable to the surviving member's interests. Mrs Munro was the surviving member and trustee she appointed her daughter as another trustee.

In this type of situation the trustees may not honour the deceased member's wishes set out in a non-binding nomination or the will. It is open to the trustees to pay the superannuation death benefit to any dependant or the Legal Personal Representative.

In *Munro* it is possible that the death benefit was paid directly to his wife and not to the Legal Personal Representative. This would have reduced the funds available in the estate to be distributed to Mr Munro's daughters in accordance with the terms of his will.

## 4. Is the trust deed up to date?

- Costly and timely problems may arise if the SMSF trust deed is not up to date and compliant with the law and planning strategies.
- Any deficiency in the trust deed may result in substantially extra tax to pay and severe lack of flexibility and possibly certain matters being rendered invalid. It should be ascertained whether:
  - the deed permits the making of a binding nomination;
  - if the deed does allow for binding nominations, whether there are any restrictions in relation to them (for instance, in relation to who may be paid, whether the benefit is to be paid as a lump sum or as a pension, are there any time limits within which the death benefit is to be paid);
  - the deed permits a broad range of benefit options including lump sum benefits, pensions and a mixture of these. Also the deed should authorise reversionary pensions (i.e. allowing the member's pension to be paid to the member's dependants upon the member's death);
  - the deed complies with current legislative provisions;
  - the deed allows for individual and/or corporate trustees, as desired;
  - benefits can be paid out "in kind";
  - "in kind" contributions can be made; and
  - eligible spouse contributions can be made.
- Generally, in the absence of a specific need to be prescriptive in relation to particular areas, SMSF trust deeds should be drafted so as to be as flexible as possible.

## Reserves

- In relation to reserve accounts, generally it is recommended that the trust deed provide the ability for the creation of reserve accounts. This is particularly important in relation to excess contributions.

## Death benefit nominations

- Many of the older trust deeds contain a provision that a binding nomination will lapse after a specific period of time (generally three years) or that a binding nomination can only be made in favour of a particular class of persons (for example, in favour only of the member's legal personal representative and not in favour of an individual).
- Ideally, these provisions should be crafted as flexibly as possible and leave it up to the member at the time of making the binding nomination to place restrictions on their nomination, rather than to have a trust deed which prescribes particular restrictions.

## 'Hard-wired' binding nominations

- There may also be cases where a member's binding nomination is hard-wired into the deed itself, rather than being contained in the more usual form of a separate nomination addressed to the trustee and given by the member.
- When drafting or reviewing a hard-wired binding nomination it is important to ensure that, as well as the nomination itself, there are clauses which specifically state that:
  - the clause containing the nomination cannot be changed, nor can any other clause be changed which would make the clause containing the nomination invalid, without the member's consent; and
  - the clause containing the nomination cannot be changed, nor can any other clause be changed which would make the clause containing the nomination invalid, after the relevant member's death.
- The main advantage of this strategy is that it limits the possibility that the SMSF trustee may lose a binding nomination or, after the member's death, may read the trust deed to determine the method for paying the member's death benefit without being aware that the BDBN is in place.

## 5. Re-contribution strategy

- Any savings (and earnings on these savings) held within superannuation that are 'tax free components' are able to be distributed tax free on death.
- Tax free components include: