



Superannuation binding death benefit nomination

Mental capacity and the unconscionable conduct challenge

Gerard Basha

Superannuation legislation and many superannuation trust deeds permit a member of a super fund to sign a binding death benefit nomination (BDBN) in favour of their dependants or the legal personal representative of the member's estate.

A valid BDBN needs to be correctly signed, witnessed by two independent adults and be legally compliant in form. A valid BDBN in favour of a dependant will operate after the member's death to direct the superannuation death benefits to the dependant and outside of the deceased's member's estate.

The recent case of *van Camp v Bellahealth Pty Ltd* [2024] NSWSC7 examined a legal challenge to the validity of a BDBN.

Current legal position

Notwithstanding their method of execution—which is similar to a Will—a BDBN is *not* a Will and the law relating to Wills does not apply to a BDBN. A BDBN is the exercise of a contractual right by a super fund member.

The gift of the superannuation death benefits stems from the lifetime exercise of contractual rights by the member and not from their death. A BDBN is, in effect, succession post-mortem and not testamentary succession.

Facts of the case: *van Camp v Bellahealth Pty Ltd*

On 26 July 2020, the day he died from cancer at the age of 57, Dr Harry Nespolon signed a BDBN in relation to his self-managed super fund, the Nespolon Super Fund (Fund).

The Fund trustee was Bellahealth Pty Ltd (Bellahealth). Dr Nespolon was the sole member of the Fund and the sole director and secretary of Bellahealth.

Dr Nespolon signed his last Will on 23 July 2020. He received advice in relation to his Will and his BDBN.

The BDBN signed by Dr Nespolon directed his superannuation benefits to his de facto partner, Cindy van Camp (Ms van Camp).

The superannuation benefits had an estimated value of \$4,722,000. The relationship between Dr Nespolon and Ms van Camp commenced in June 2014 and they commenced living together in January 2015. They have two daughters, one born in July 2015 and the other in December 2017. They lived together in Dr Nespolon's Cremorne property, in Sydney.

The Superannuation Fund trustee was not controlled by Ms van Camp after Dr Nespolon's death—and the trustee did not pay the \$4,722,000 to Ms van Camp.

Ms van Camp commenced legal proceedings against the trustee Bellahealth and two of its directors. She sought, amongst other

things, a declaration that the BDBN was valid and for an order that Bellahealth pay the Fund benefits to her. The defendants cross-claimed for orders and declarations that the BDBN was effectively invalid.

Issues

The hearing focussed on two issues:

1. Whether Dr Nespolon had capacity to make the BDBN on the day he died.
2. Whether the BDBN should be set aside because of unconscionable conduct by Ms van Camp.

Evidence

The evidence was extensive in a court hearing over four days. There were numerous witnesses of which seven were cross-examined at the hearing.

The parties jointly engaged a tax expert in the area of deceased estates who provided an opinion on the tax consequences of the payment of the superannuation benefits to Ms van Camp, Dr Nespolon's estate or pursuant to Dr Nespolon's Will.

There was also expert evidence from a professor of pharmacology, relied upon by the defendants on the issue of capacity.

There was important evidence that Dr Nespolon described the BDBN as something that would prevent Ms van Camp from "being taxed out of her brains".

Result

The Court declared that the BDBN signed by Dr Nespolon on the day he died from cancer was valid and binding. The Fund trustee was ordered to pay the \$4,722,000 to Ms van Camp within 21 days.

On Dr Nespolon's capacity to make the BDBN, the Court determined the issue on the basis of accepted case law principles on the nature and degree of the required mental capacity to enter into a lifetime transaction where the transaction has been explained.

Interestingly, the Court rejected the submission for the defendants that by analogy the legal tests for determining testamentary capacity should be applied. The BDBN was a short and straightforward document.

On unconscionable conduct by Ms van Camp, the Court also determined the issue on the basis of accepted case law principles. The Court said [at 238] that the defendants were required to prove:

"... Dr Nespolon was at a special disadvantage vis-à-vis Ms van Camp in the sense that the disadvantage adversely affected his ability to make a judgment about the BDBN: that Ms van Camp had actual or constructive knowledge of the existence and effect of Dr Nespolon's special disadvantage; and that Ms van Camp unconsciously took advantage of Dr Nespolon's special disadvantage, with the BDBN being the product of the unconscionable conduct."

On the basis of the evidence, including the advice Dr Nespolon received about the BDBN, the Court found there was no unconscionable conduct by Ms van Camp.

Lessons and future direction

The correct facts and evidence addressing the legal issues, as always, are essential in the determination of any legal dispute.

Independent and arm's length legal and financial advice are important, especially in the case of advanced age and/or life threatening illness. Medical opinions should always be obtained where capacity may be an issue.

Close family members who may benefit from lifetime transactions that affect post-mortem gifts or who may benefit from a Will should always be at arm's length from the independent legal and financial advice and from the medical opinion. In the case of Dr Nespolon, this assisted his de facto partner Ms van Camp.

Finally, the legal dispute about Dr Nespolon's BDBN raises questions about what succession law rules should be made to apply to lifetime transactions that result in succession post-mortem. **FS**

What types of superannuation death benefit nominations can be made?

Superannuation monies do not automatically form part of a deceased's estate. Instead, the Superannuation Industry (Supervision) Act 1993 (SIS Act) provides that the governing rules of a fund may permit a member to complete a notice that nominates a recipient(s) of their death benefits. The trustee must comply with this notice if it is valid, and

the notice must nominate a legal personal representative (legal representative) or dependant(s).¹

There are broadly four types of death benefit nominations:

Binding death benefit nomination: This is a written direction from a member to their superannuation trustee setting out how they wish some or all of their superannuation death benefits to be distributed. The nomination is generally valid for a maximum of three years and lapses if it is not renewed. If this nomination is valid at the time of the member's death, the trustee is bound by law to follow it.

Reversionary beneficiary: A member in receipt of an income stream can nominate a beneficiary to whom the payments automatically revert upon the death of the member. If the nomination is valid at the time of the member's death, the trustee is bound by law to follow it.

Non-binding death benefit nomination: This is a written guide by a member indicating how they wish some or all of their superannuation death benefits to be distributed after their death. However, even if the nomination is valid at the time of the member's death, the trustee retains ultimate discretion to distribute the superannuation death benefits to the deceased's dependants or estate.



The quote

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Gerard heads Bartier Perry's Estate & Probate, Tax for Individuals and Business Succession Groups. He is an Accredited Specialist in Wills and Estates Law, a Notary Public and is recognised as one of Australia's leading lawyers in his fields of expertise. Gerard also specialises in the not-for-profit sector. Gerard combines a broad understanding of the law with specialist skills in the legal issues surrounding estate planning and succession.

Non-lapsing binding death benefit nomination: This is a written direction by a member to their superannuation trustee establishing how they wish some or all of their superannuation death benefits to be distributed. These nominations, if permitted by the trust deed, generally remain in place forever unless the member cancels or replaces it with a new nomination. If this nomination is valid at the time of the member's death, the trustee is bound by law to follow it.²

Trustees are required to deal with death benefit distributions according to the governing rules of the superannuation entity.

Who can receive a superannuation death benefit?

Binding and non-binding death benefit nominations can only be made to the deceased's legal representative or dependant under superannuation law. A reversionary beneficiary must be a dependant under superannuation law.

Legal representative: A legal representative is defined in superannuation law as "the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person".

Dependant: A dependant is defined in superannuation law as "the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship".³

A child of a deceased person under superannuation law includes the deceased's biological child and also extends to an adopted child, a stepchild, an ex-nuptial child and a child of the person within the meaning of the Family Law Act 1975.⁴

Interdependency relationship: There are two alternative tests for an interdependency relationship under superannuation law: the basic test and the disability test. The deceased's superannuation fund will determine whether an interdependency relationship exists.

Source: Australian Government Department of the Treasury/ATO

¹ Refer to section 59(1A), SIS Act

² These nominations are made under s59(1)(a), SIS Act

³ Section 10(1), SIS Act.

⁴ Section 10(1), SIS Act