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Self-managed superannuation funds and binding death benefit nominations

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High Court determines Binding Death Benefit Nominations for self-managed super funds are not bound by Reg 6.17A of the *Superannuation Industry (Supervision) Regulations ("***the SIS Regulations***").*

On 15 June 2022, the High Court of Australia delivered its unanimous decision in *Hill v Zuda Pty Ltd as Trustee for the Holly Superannuation Fund [2022] HCA 21*. The Court determined that the provisions of Regulation 6.17A of the SIS Regulations do not apply to Binding Death Benefit Nominations (BDBNs) for self-managed superannuation funds (SMSFs). Regulation 6.17A deals with a direction by a member to the trustee as to the payment of a benefit on or after the death of a member.

Background

A daughter of the deceased member of an SMSF challenged a provision written into the superannuation deed, that the deceased member's benefit should be paid to the other member of the fund either as a lump sum or a pension.

This clause was expressed in the deed to be a "binding death benefit nomination".

The other member of the fund was the deceased member's later domestic partner. The daughter claimed that the provisions of the deed failed to comply with *Regulation 6.17A*.

Effect of the High Court decision on self-managed super funds

The effect of this decision is that a BDBN if permitted by the terms of the trust deed, does not have to follow the requirements of *Regulation 6.17A*. That is,

- the requirement for two adult witnesses who sign in the presence of the member;
- the 3-year limitation unless renewed or confirmed; and
- the need to serve on the trustee.

But it remains critical to ensure that any BDBN complies with the requirements of the fund's trust deed. Some printed deeds refer to, or incorporate, the requirements of *Regulation 6.17A*.

Example of a Binding Death Benefit Nomination found to be invalid

In *Donovan v Donovan [2009] QSC 26*, the Queensland Supreme Court held that a trust deed that stated that a Binding Death Benefit Nomination had to meet "statutory requirements" (which were defined to mean "the requirements imposed under any law… which must be satisfied by a superannuation fund in order to qualify for income tax concessions") was **not valid** if it did not meet the requirements of *Regulation 6.17A* of the *SIS Regulations*.

Check your Binding Death Benefit Nomination is valid

In creating an estate plan, particularly involving the allocation of superannuation funds, it is essential that any BDBN is valid and not open to challenge, whether that be within a self-managed super fund or other fund.

Retail and industry funds must still meet the requirements of Regulation 6.17A and other requirements. It is important to ensure that any BDBN provided to those funds meets the requirements of the *SIS Act* including a requirement that the persons nominated be either the legal personal representative or a "dependant" as defined.

Get help

If you're unsure if your SMSF trust deed (and subsequently any BDBN) is valid, we can arrange a review of your fund's setup and documentation.

Contact Daenke Lawyers

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