Superannuation nominations for persons lacking capacity

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Snapshot

- In the recent decision case of *G v G (No. 2)* [2020] NSWSC 818, the NSW Supreme Court held that the binding death benefit nomination that was made by financial managers for a protected person, was void.
- The decision casts new doubt over the ability of an enduring attorney to make a binding death benefit nomination for a principal.

It is clear that an attorney or financial manager cannot make a will for an incapable person, but there has been considerable uncertainty around whether they can make a binding superannuation death benefit nomination ('**BDBN**'). In Tasmania, the issue has been clarified for attorneys by s 31(2A)(i) of the *Powers of Attorney Act 2000* (Tas) which specifies that an attorney may exercise any power in respect of superannuation. In other jurisdictions, including New South Wales, the legislation is silent and we must look to the case law for guidance on this question.

The question has been considered in Queensland in *Re Narumon Pty Ltd* [2018] QSC 185 and in *Re SB; Ex parte AC* [2020] QSC 139. In both cases the Court held the making of a BDBN was not a testamentary act and can be done by an attorney or administrator (in NSW, a financial manager) as long as it is not otherwise prohibited, e.g. as a conflict transaction. In Western Australia, by contrast, the State Administrative Tribunal reached the opposite conclusion in *SM* [2019] WASAT 22, holding that the making of a BDBN is a testamentary act, not within the proper functions of an administrator. The NSW Supreme Court recently considered the issue in *G v G (No. 2)* [2020] NSWSC 818 ('***G v G***').

The facts in *G v G*

G's father and sister were the financial managers of G's protected estate, which was in the order of $15 million with about $10 million held in a retail superannuation fund. The financial managers sought orders confirming the NSW Trustee & Guardian had power to authorise the investment in the retail superannuation fund. Doubts about that power arose from observations made in *Perpetual Trustee Company Limited v Cheyne* [2011] WASC 225 that suggested that a payment by a trustee into a superannuation fund was not an 'investment' of trust property by the trustee because, by the payment into the fund, the trustee divested itself of trust property, lost control of that property, and put the property beyond the protective control of the Court. However, the position was far from certain because in other jurisdictions a trustee was found liable for failing to consider the action that the WA Court decided the trustee couldn't undertake. The financial managers also sought an order that they be excused by the Court for any breach of duty as a result of transferring funds into superannuation, and as a result of their execution of BDBNs in favour of G's deceased estate.

The decision and reasoning in G *v* G

The Supreme Court (Lindsay J) was satisfied that the NSW Trustee & Guardian had power to authorise the investment of G's protected estate, in whole or in part, into regulated superannuation funds. However, the Court decided that neither the power to invest, nor any authorisation granted by NSW Trustee, extended to making a nomination for payment of a death benefit, binding or otherwise. The Court stated that 'the vice in a death benefit nomination made by a protected estate manager is the possibility that the manager might induce the trustee of a superannuation fund to make a payment from the fund otherwise than to the deceased estate of the protected person' (at [45]).

So, the Court stated, where the financial manager of a protected person purports to make a nomination, the nomination is void. '[A]s a fiduciary called upon to exercise fiduciary powers, it is not open to a protected estate manager (or financial manager) to exercise the powers of that office for a purpose other than one protective of the protected person (for example, by diverting estate property away from the ownership of the protected person, or away from the control of those charged with management of his or her estate on his or her behalf) so that the act of communicating a nomination, or acting upon it, may be a breach of fiduciary obligations owed to the protected person or his or her estate' (at [53(c)]). The Court also observed that 'upon an assessment of any security risk attaching to the investment, a decision-maker must also be satisfied that, upon the death of the protected person, there is no practical possibility (by means of a purported "death benefit nomination", an exercise of a

discretion by the trustee of the superannuation fund or otherwise) that the estate of the protected person will, in whole or part, be paid otherwise than to the legal personal representative of the deceased person' (at [62(b)]).

Ability to make a nomination

The Court observed that the 'prevailing view in Australia is that a binding death benefit nomination… is not a testamentary act'. That result was 'either because: (a) it is merely the exercise of a contractual right; or (b) the rules of the fund pursuant to which the nomination is given to the trustee confer a discretion on the trustee as to the identity of the person, or persons, to whom the benefit is to be paid' (at [47]). Although the reasoning is different, the conclusion supports the conclusion reached in *Re Narumon Pty Ltd* and *Re SB; Ex parte AC*. In other words, a fiduciary is not prevented from making a nomination because the nomination is considered a will substitute.

Fiduciary obligations when making a nomination

However, the decision in *G v G* relies less on the characterisation of a BDBN as a testamentary or non-testamentary act, and more on the general law principle, reflected in section 39 of the *NSW Trustee and Guardian Act 2009,* that whatever is done, or not done, on behalf of a protected person should be that which is calculated to be in the interests, and for the benefit, of that person. These are standard fiduciary obligations. Lindsay J expresses the view that a purported nomination that directs the trustee of a superannuation fund to pay a benefit otherwise than to the estate of the protected person cannot usually be taken to satisfy the test and may be a breach of fiduciary obligations.

Implications for an attorney

The same 'vice' exists with an attorney making a nomination as exists with a protected estate manager; the nomination could be directed to dependants rather than the principal's legal personal representative ('**LPR**'). An attorney also, generally, owes fiduciary duties (*Smith v Smith* [2017] NSWSC 408). However, the attorney's fiduciary duties may differ in a number of ways. First, the principal could authorise action that otherwise would amount to a breach of fiduciary duty (*Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; *Commissioner of State Revenue v Rojoda Pty Ltd* [2020] HCA 7 at [30]). So, depending on the authority being clearly conferred by the terms of the power of attorney, the attorney may be able to make a nomination in favour of the principal's dependants and not the LPR.

Secondly, the attorney may be acting in the principal's interests if it remakes a nomination that is about to lapse, even if the nomination (previously made by the principal) favours a dependant rather than the LPR. It may be said that the attorney's action could deprive the principal's estate of something it would otherwise receive if the attorney did not act, namely the death benefit. This cannot be predicted at the time the attorney acts as, in the absence of a valid BDBN, the trustee of the fund will determine the recipient of the death benefit after the principal's death. There is nothing inevitable about the LPR receiving the death benefit. In fact, often, that is the last resort for the trustee. In *Case 626510 (concerning HEST Australia Ltd)* AFCA noted that 'a trustee having identified a dependant, may decide not to pay the benefit to a LPR, as payment to the dependant may better serve the purpose of superannuation'. Sometimes there is no LPR because the modest size of the deceased member's estate does not require that appointment. A recent example is *D19-20\164* [2020] SCTA 286.

Matters for instruction

The decision of *G v G* means that principals should be alive to these issues. Ideally, the principal would make it clear from the power of attorney whether the attorney was authorised to make, remake/confirm, amend or revoke a death benefit nomination. If authority was given, the circumstances and manner of exercise should be considered. For example, there may be a risk of abuse if the attorney is able to nominate him or herself (see *D07-08\030* [2007] SCTA 93). Apparently this action is even encouraged by fund trustees (see *Case 658770 (Perpetual Superannuation Ltd*). It also needs to be recalled that, ultimately, whether any authority conferred on the attorney can be exercised will depend on the terms of the trust deed establishing the fund.

A reason to obtain judicial advice

An attorney may wish to remake a lapsed nomination to preserve the principal's intentions. But that action could, potentially, deprive other dependants or the principal's residuary beneficiaries of the death benefit. The attorney's actions could therefore expose it to personal liability for breach of fiduciary duty. In that situation, the attorney may seek the comfort of obtaining judicial advice about whether it is justified in acting, or not acting. That facility is conferred by section 38 of the *Powers of Attorney Act 2003*, in relation to any matter relating to the scope of the attorney's appointment or the exercise of any function by the attorney. An additional and wider facility may exist by reason of the court's equitable jurisdiction (*Jeavons v Chapman (No 2)* [2009] SASC 3).

Protection from personal liability

Another basis for comfort for an attorney may be the Court's willingness in *G v G* to excuse the financial manager from personal liability for breach of fiduciary duty. Section 85 of the *Trustee Act 1925* enables a court to relieve a trustee from personal liability for a breach of fiduciary duty if the person has acted honestly and reasonably, and ought fairly to be relieved. However, the court has a wider power under its protective jurisdiction which may be exercised to excuse a breach even if

the conduct concerned was not both honest and reasonable, if it was in the interests, and for the benefit, of an incapable person (*C v W (No 2)* [2016] NSWSC 945 at [47]).

How, on different facts, *G v G* might be distinguished

In *G v G,* the money was contributed to the superannuation fund by the financial manager. If the money had been contributed by the member prior to incapacity, then the Court may have applied a different lens, on the basis that the funds were already in superannuation and had not been taken out of the member's estate by the financial manager.

In *G v G,* the superannuation fund in question was a retail fund and, as Lindsay J acknowledged, different considerations may apply to a Self Managed Superannuation Fund (at [16]).

Practice tips

For solicitors preparing enduring powers of attorney ('**EPA**') it is prudent to advise clients:

- there is uncertainty around whether an attorney can make, revoke or confirm a BDBN;
- if they want their attorney to do those things, express authority should be included, noting however the lack of certainty about whether the attorney can do those things;
- if they do *not* want their attorney to do those things, an express limitation could be included in the EPA;
- to check the terms of the trust deed for their fund, as some deeds clearly allow or deprive an attorney of authority.

For solicitors advising attorneys and financial managers on superannuation BDBNs:

- Financial managers should not make BDBNs for superannuation contributed while under management – such BDBNs are likely to be held to be void;
- For superannuation contributed by the protected person and the subject of a BDBN previously made by the protected person, a financial manager might consider seeking directions from the Court regarding a proposed extension of a BDBN;
- Attorneys under enduring powers of attorney should consider seeking judicial advice as to whether, and to what extent, they can make a BDBN (even if that authority is expressly authorised in the EPA);
- Solicitors advising attorneys in relation to the making of BDBNs otherwise than in favour of the principal's estate may find themselves in breach of a duty of care owed to the beneficiaries (*McFee v Reilly* [2018] NSWCA 322) unless the attorney is advised to seek judicial advice before acting. **LSJ**