

## Article Information

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Service: Estate & Succession Planning

Sector: Private Clients

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## Fail - SMSF binding nomination not so binding

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### Facts

Barrie Munro was a solicitor who had formed a self-managed superannuation fund with his wife "Suzie" known as "The Barrie and Suzie Super Fund" (Fund) of which they were both the only trustees.

Barrie died in August 2011 leaving a will which named Suzie and two of his daughters from a former relationship as joint executors.

As Barrie's estate was minimal, and perhaps even insufficient to meet his debts, the major asset in dispute was the payment of Barrie's death benefit under the Fund which required an interpretation as to what should be made of a binding death nomination made by Barrie.

On 22 September 2009 Barrie completed and signed a printed form entitled "Binding death benefit nomination" which purported to nominate his beneficiary as "Trustee of Deceased Estate" and the percentage of benefit to be received was designated as "100%". The relationship of the nominated beneficiary to himself was described as "Trustee". It included an instruction that "[W]hen you nominate your executor you should enter legal personal representative in the relation column". Clearly Barrie or his advisors did not do this.

Justice Mullins was prepared to infer that this form had been prepared in the offices of his firm of accountants.

After Mr Munro's signature on the form there was set out what purported to be Barrie's understanding about the nomination, including that:

*"My beneficiary(ies) must be my spouse, child, financial dependant, interdependent or a legal personal representative of my estate at the date of my death..."*

*This declaration must be signed by me in the presence of two witnesses (who are not a nominee on this form), both of whom are over the age of 18."*

Barrie's signature was witnessed by Suzie and Suzie's daughter, Ms Moorecroft. After Barrie's death he was replaced in February 2012 as a trustee by another daughter of Suzie's, Ms Pooley, who was also a respondent to the application with Suzie.

Suzie, and Ms Pooley, as trustees advised the applicants (Barrie's daughters) of their intention to exercise their discretion as trustees of the Fund on the basis that the nomination dated 22 September 2009 was invalid under clause 31.2 of the Fund deed.

Clause 31.2 of the Fund deed required the trustee to pay a benefit payable on the death of the member in accordance with a binding nomination where:

- the nomination is signed
- specifies that a benefit is to be paid to one or more Nominated Dependants or the legal personal representatives of the member
- states that the nomination is binding on the trustee and complies with the Relevant Requirements.

For the purposes of this decision, Relevant Requirements were defined in the Fund deed as any requirements required by the Superannuation Industry Supervision Act (SIS) and any regulations pursuant to it, such as Regulation 6.22 which requires that a death benefit may only be paid to a legal personal representative or a dependant.

### **Barrie's Will**

Relevantly, Barrie's will directed Suzie and his two daughters to:

- provide "Suzie's Gift" of \$350,000 to Suzie directly from superannuation death benefits paid to his estate, less any amount due by Suzie under a loan agreement
- pay the balance equally to two testamentary trusts for the benefit of each of his two daughters.

### **Issues**

The issues that had to be decided by the court were:

- In order to be a binding death benefit nomination for the purposes of the Fund, did Barrie's death benefit nomination have to comply with the requirements of regulation 6.17A of the Superannuation Industry Supervision Act Regulations?
- What did Barrie mean by nominating the trustee of his deceased estate?
- What is the effect of the death benefit nomination form signed by Barrie on 22 September 2009?

Barrie's daughters argued that the nomination dated 22 September 2009 in favour of the "Trustee of the Deceased Estate" was intended to be operative as a binding death benefit nomination and should be given effect as such on the basis that "Trustee of Deceased Estate" is another way of referring either to the executors or, on an alternative argument, to the testamentary trustees as dependants.

Suzie submitted that the Relevant Requirements under the Fund deed included the requirements of Regulation 6.17A of the SIS Regulations in respect of the form of the binding death nomination and that the nomination dated 22 September 2009 did not comply with Regulation 6.17A. Alternatively, it was argued the binding death nomination did not comply with Regulation 6.22 as it was not a nomination in favour of either Barrie's legal personal representative, a dependant or dependants. The definition of legal personal representatives in section 10 of the SIS Act means, in relation to Barrie, the executors of his will and does not extend to the trustee of his estate.

### **Held**

As section 59(1) of the SIS Act does not apply to a self-managed superannuation fund, nor does the exception found in section 59(1A) and therefore Regulation 6.17A of the SIS Regulations also does not apply. The Commissioner of Taxation Super Funds Determination 2008/3 was referred to with approval.

As the definition of Relevant Requirements under the Barrie and Suzie Super Fund Deed imports the requirements of Regulation 6.22 of the SIS Regulations in respect of the form of the binding death nomination the death benefit could only be payable to Barrie's legal personal representative or dependant(s).

The form signed by Barrie on 22 September 2009 did not comply with either clause 31.2 of the Fund deed or Regulation 6.22 of the SIS Regulations as the nomination was of neither Barrie's executors under his will or of a dependant(s). Rather it was expressed as "Trustee of Deceased Estate", which is not an executor. It was therefore not a binding death nomination.

The decision does not disclose how Suzie and her daughter Ms Pooley as trustees exercised their discretion where to pay Barrie's death benefit. One may only guess.

### **Comment**

Advisers beware that this case is yet another timely reminder of the importance of correctly preparing and executing binding death nominations. Consideration must always be given to the self managed superannuation fund deed in the first instance. As no two deeds are the same, a pro forma nomination is unlikely to be adequate and advisers who rely on such a document could be held to account by disgruntled family members.