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Williams v Williams - Death Benefit Nomination invalid. What a difference the plural makes! Or, comply with the formalities

SUPERCentral News

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In this case a binding death benefit nomination was held to be invalid because it had not been given to the trustee, that is, not given to all the trustees of the fund. The court found that only one trustee had been given the nomination. (Case reference Williams v Williams [2023] QSC 90).

The facts are relatively straightforward. Anthony Williams and his wife Margaret Williams established the Boosey Doherty Superannuation Fund as a self-managed superannuation fund and they were the initial trustees and only members of the fund. Margaret died in December 2014 and their elder son Paul was appointed as a trustee. It seems Paul was never a member of the fund.

In 2019 Anthony married his second wife, Gayle Williams. His second wife was never admitted as a member of the Fund and was not appointed as a trustee of the Fund.

In December 2021, Anthony died being survived by Gayle and his two sons, Paul and Mark from his first marriage with Margaret. Mark was the executor of Anthony's estate and in that capacity was appointed as the second director in March 2022.

Anthony made two binding death benefit nominations, the first in February 2018 and the second in March 2018. It seems both nominations were materially identical in that Anthony provided that 50% of his death benefit was to be paid to Gayle and 50% to his Estate. The reason for making two materially identical nominations was not discussed in the judges' reasons. The March 2018 had a provision, the effect of which was to revoke all prior nominations.

Gayle sought a declaration from the Court that the March 2018 nomination was valid and an order for the removal of the current trustees (Paul and Mark) and the appointment of an independent professional trustee. The current trustees argued that the March 2018 nomination was invalid as it failed to comply with the requirements of the trust deed and they also opposed the order for their removal.

This situation raised a number of issues:

- Why was the first nomination invalid?
- Why was the second nomination invalid?
- Did the fund satisfy the definition of a self-managed superannuation fund?
- If not, what are the consequences?

or both of the sons be removed as trustees?

Invalidity of the first nomination

This is not discussed in the reasons. Most likely, the first nomination suffered from the same procedural defect as the second nomination. However, the second nomination did expressly revoke the first nomination. This raises the question, if the second nomination is invalid, can it still operate to revoke the first nomination? Possibly the answer to this question is that the written instrument which constitutes the nomination has two aspects – the nomination and the revocation. The fact that the nomination is invalid does not mean that the revocation is also invalid assuming the revocation satisfies the specified requirements of the trust deed.

A contrary argument is that revocation is conditional upon the second nomination being valid. The contrary argument may be more pervasive if the instrument explicitly stated that the revocation was conditional upon the second nomination being valid.

On balance it seems that as a prior nomination can be revoked without making a replacement nomination, in the absence of the revocation being conditional upon the second nomination being valid, the revocation can be effective while the second nomination is invalid.

Invalidity of the second nomination

The second nomination was held to be invalid as the second nomination was not given to the "trustees", that is Anthony and Paul. The trust deed for the fund expressly provided that a nomination is binding on the trustees if, amongst other things, the nomination must be in writing and be given to "the Trustees" and "the Trustees" must by written resolution, accept the terms of the nomination.

The second nomination was not given to Paul. Further, as the nomination was not given to Paul, the nomination could not be accepted by the Trustees and that acceptance could not be evidenced by a written resolution. Consequently, the Court held that the second nomination was not binding on the Trustees.

The second nomination did contain a "trustee confirmation" provision in which Anthony recited that, in his capacity as trustee, he confirms acceptance of the nomination. This "confirmation" was held to be insufficient and did not operate as a substitute for the trust deed provisions dealing with the acceptance of nominations.

Arguments for the validity of the second nomination

Lawyers for Gayle gallantly, valiantly and lawyerly argued for the validity of the second nomination. The argument was to the effect that the deed contained a general interpretation clause (as almost all deeds do) which was to the effect that the singular includes the plural and vice versa. Using this general interpretation clause, the lawyers argued that the term "Trustees" could be read as referring to only one trustee. If so read, the argument went, the requirement of acceptance had been satisfied as Anthony, as trustee, by the trustee confirmation provision, accepted his own nomination. Presumably, the trustee confirmation also satisfied the requirement of written acceptance.

General interpretation provisions are usually preferred by the qualifying words "unless the context otherwise requires". The lawyers for Paul and Mark argued that the trust deed provisions dealing with binding nominations provided the relevant context and the context otherwise provided. The Court agreed. For a nomination to bind the trustees under the terms of the trust deed, all trustees must be given the nomination. This substantive requirement cannot be avoided or side stepped by the application of a general interpretation clause.

SUPERCENTRAL nations were held to be invalid.

Did the fund satisfy the definition of "self-managed superannuation fund"?

A superannuation fund which has elected to be regulated under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) will be a self-managed superannuation fund if the membership/trustee structure of the fund satisfies the elements of the definition.

There is no requirement that the elements must be embedded into the terms of the trust deed.

Additionally, including a provision that a superannuation fund must be a self-managed superannuation fund or that the trustee or trustees must ensure that the fund is a self-managed superannuation fund does not cause the fund to be a self-managed superannuation fund.

The definition of a self-managed superannuation fund as it applies to superannuation funds with individual trustees has two limbs – one for single member funds and the other for multi-member funds.

In the case of a single member fund, either the fund has two individual trustees one of whom is the member or the fund has a one corporate trustee where the member can be the sole director or one of two directors.

In the case of multi-member funds, each member must be a trustee or director of the corporate trustee and each trustee or director of the corporate trustee must be a member.

These are the general rules, there are exceptions and qualifications dealing with members who are minors, members who have appointed a legal personal representative (under a power of attorney) and executors of the estate of deceased member being appointed pending the allocation and payment of the death benefit of the deceased member.

When the Boosey Doherty Superannuation Fund was established, there were only two members and each member was a trustee and there was no trustee who was not a member.

On the death of Margaret, the fund had only one surviving member, Anthony and one trustee, again Anthony. Did the fund cease to exist at this time due to the identity of trustee and beneficiary? The better view is no as there was an interest in the fund (being the death benefit of Margaret) so there was no complete identity of interest between the trustee and the member. Further, the fact that the fund is a regulated superannuation fund would probably constitute a statutory override of the legal rule about identity of interests.

The fund will remain a self-managed superannuation fund for 6 months after the death of Margaret, as the SIS Act deems the fund to have satisfied the definition of self-managed superannuation fund, for a grace period of 6 months. After the expiration of this 6-month grace period (assuming the trustee structure of the fund has not changed) then the fund will no longer qualify as a self-managed superannuation fund. The 6-month grace period does not apply if the reason (or one of the reasons) that the fund ceased to satisfy the definition of self-managed superannuation fund is there is a breach of the 7-member rule or if an individual is admitted as a member without that individual (or their LPR or parent or guardian in the case of a child) being a trustee or director.

While the fund is now not a self-managed superannuation fund, the fund is still a regulated superannuation fund (the election to be regulated is irrevocable) and the fund does not become a non-complying fund merely because it has ceased to satisfy the definition of self-managed superannuation fund. However, the fund is now a registrable superannuation fund. This change will have significant issues for the trustees – they must be licensed by both APRA and ASIC; they must register the fund with APRA and the exemption from issuing

SUPERCENTRAL ests without a PDS no longer applies and they must have a Target Market ngst other matters. However, the main consequence is that the trustees (as they are unlicensed by APRA) will be committing an office.

It should be noted that if Anthony was the executor of the estate of Margaret, then in the period from Margaret's death until her death benefit has been used to commence a pension or paid as a lump sum, the fund will continue to be a self-managed superannuation fund as the fund will, for this period, satisfy a permitted exception to the main definition. This exception to the general rules is the "Legal Personal Representative" (LPR) exception. Once the death benefit is allocated, then the 6-month grace period would apply.

On the appointment of Paul as the second trustee the Fund would once again satisfy the definition of self-managed superannuation fund. In this situation, the fund has one member (Anthony Williams) and two individual trustees where the second trustee is not a member – which is a permitted variation of the structure rules. There is no tax issue arising from the fund again satisfying the definition of self-managed superannuation fund.

On Anthony's death on 28 December 2021, Paul became the sole surviving trustee. Paul, it seems was not the executor of Anthony's estate, consequently the LPR exception did not apply. From this time the fund again failed to satisfy the definition of self-managed superannuation fund. However, the 6-month grace period commenced on 28 December 2021. Mark who was the executor of Anthony's estate was appointed as trustee on 25 March 2022, within the grace period. Consequently, from the time of Mark's appointment the Fund satisfied the definition of self-managed superannuation fund.

The important point is that a regulated superannuation fund which ceases to be self-managed superannuation fund does not become a non-complying superannuation fund simply because the fund ceased to be a self-managed superannuation fund.

Order for the removal of Paul and Mark as trustees

The Court has the power to remove trustees from a trust, whether a superannuation fund or family trust – or any other trust, if the continuation of the trustee is detrimental to the welfare of the trust (and the beneficiaries of the trust).

The Court resolved that both Paul and Mark be removed as trustees and that they be replaced by independent trustees.

This decision was reached, it seems, because of the past actions of Paul which had shown an unfitness for the office of trustee; for the irregularities in the appointment of Mark and as both Paul and Mark are potential beneficiaries of the death benefit of Anthony they are in a conflicted position.

Paul only provided relevant information about the fund and death benefit to Gayle because of a Court Order to provide that information (and even then, reluctantly). He had also formed the view that Anthony had acted dishonestly and that his benefit was for this reason forfeited to the fund. He also required Gayle to provide a satisfactory explanation of Anthony's alleged dishonest conduct. This behaviour indicated to the Court that Paul was likely to not discharge the duties of a trustee in the appropriate manner.

In relation to Mark, the Court focused on the irregularities in his appointment as a trustee. While he was named as executor of Anthony's estate, probate had not been obtained in relation to the Will. The trust deed required, as a precondition for the appointment of the executor for the deceased member as a trustee, that probate had been granted to the Will. In the case of Mark, while he was named as the Executor, probate of the Will had not been granted. Consequently, a necessary precondition for his appointment as trustee had not been satisfied and this appointment was defective.

SUPERCENTRAL by which Mark was appointed as a trustee was a deed dated March 2022 ony's death) which had three parties – Anthony, Paul and Mark. The deed purports to remove Anthony as trustee (on his death, he ceased to be trustee, so Anthony already had ceased to be trustee in December 2021).

Finally, the trust deed provided that a trustee could be appointed by a 2/3rds majority resolution of the members. The March 2022 deed purported to satisfy this requirement by a "resolution" of Anthony and Paul. Unfortunately, on Anthony's death, his membership terminated and Paul was never admitted as a member. Consequently, the basis of the appointment of Mark as trustee did not satisfy the requirements of the trust deed.

In relation to the conflicts issue, clearly Paul and Mark were in a position where their duties as trustees conflicted with their interests as potential beneficiaries. This conflict is almost statutorily embedded in self-managed superannuation funds, given the statutory definition. Most trust deeds for self-managed superannuation funds deal with this inherent conflict by containing a provision which overrides the general law rule and allows trustees (or directors of corporate trustees) to act notwithstanding the conflict.

NOTE: This article was prepared as at May 2023. The article has not been updated in light of subsequent developments.

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Restraint of Trade

Restraint of trade

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