

## FOS &amp; SCT DECISIONS

# Binding Death Benefit Nomination Deemed Valid Despite Allegation of Duress and Coercion

[Link to determination](#)**Facts**

The Member passed away at the age of 54 and was survived by the adult son and the adult daughter (together the Adult Children), whom he had with the First Spouse, and three minor children (the Minor Children), whom he had with the Second Spouse.

The Member had prepared a will which stated that all but 10% of his estate should be left to his second spouse.

After the diagnosis of a terminal illness and six months prior to his death, the Member signed a new will and Binding Death Benefit Nomination (BDBN) in favour of his two adult children. The Second Spouse made a complaint to the Tribunal on behalf of the Minor Children that the decision of the Trustee to equally divide the Member's death benefit between his Adult Children, in accordance with his BDBN, was unfair and unreasonable and sought that it be divided between all five children. She stated that the Minor Children were dependants for the purposes of the fund's trust deed, and that they had been left without adequate provision for their maintenance and support.

The Second Spouse argued that the Member's BDBN was invalid because one of the witnesses to its signing was the mother of the beneficiaries. She also alleged that the Member was subject to undue influence amounting to coercion by the First Spouse and the adult daughter with respect to the BDBN and will. Finally, the Second Spouse disputed that the Adult Children were entitled to the benefit, as they were not dependants for the purpose of the *Superannuation Industry (Supervision) Regulation* (SIS Regulation) and the Trust Deed.

**Issues**

- Is a BDBN invalid where a Member nominates his two adult children as "dependants" despite not being under the age of 18?

- Was the BDBN invalid as a result of duress, coercion, undue influence, unconscionable conduct and/or the capacity of a member at the time of signing?
- Was the Trustee's decision to pay the death benefit in equal shares to the adult son and adult daughter, in accordance with the Member's BDBN, fair and reasonable in its operation in relation to the Minor Children?

**Determinations**

The Tribunal found that in accordance with section 10A of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), a dependant of a deceased member includes a child of the deceased member, whether or not that child is under the age of 18. Hence the adult children were both dependents of the Member, each being his child at the time of the execution of the BDBN and at the date of the Member's death.

The Tribunal relied on extensive submissions from the Member's mother, doctors and lawyer to determine whether the BDBN was invalid as a result of duress, coercion, undue influence, unconscionable conduct and/or capacity at the time of signing. The Tribunal placed significant weight on the submissions from the lawyer including that the Member had clearly expressed his intentions when he came to change the BDBN and that he had displayed "independent thought and clear instructions".

The Tribunal found that given the extensive amount of evidence in favour of the Member's capacity, no objective evidence was provided to support the claim of coercion, duress and/or undue influence by the First Spouse or the Adult Children. The tribunal noted that in accordance with *Thorne v Kennedy* [2017] HCA 49, direct or inferential evidence is invariably required to substantiate claims of this kind. In this case, it found that there was no evidence nor any merit to the fraudulent allegations submitted by the Second Spouse. Thus the submissions of the

Second Spouse failed to establish that the deceased member had lost his free and independent will to make his BDBN.

The tribunal affirmed the Trustee's decision to pay the Adult Children the death benefit in equal shares, in accordance with the Member's BDBN.

### **Implications**

- A dependant of a deceased member includes a child of the deceased member, whether or not that child is under 18 years of age.
- Evidence to substantiate claims of duress or undue influence must be provided to prove this claim.