Do BDBNs and SMSF wills need knowledge and approval to be effective?

- by Matthew Burgess, Director, View Legal

In a range of respects, binding death benefit nominations (BDBNs) are often seen as analogous to a key aspect of any holistic estate plan, namely an SMSF member's personal will. Similarly, some advisers recommend a "hardwired" BDBN, which, depending on the exact mechanics, is marketed as an "SMSF will".

A key issue in relation to whether a purported last will is in fact valid is whether the willmaker had "knowledge and approval" of it.

Arguably, the principles in relation to wills in this regard are therefore also relevant for ensuring any form of BDBN is valid — and perhaps even more so when the approach adopted is that of an SMSF will.

Last week, the appeal decision in *Lewis v Lewis* [2021] NSWCA 168 provided some clarity in relation to a number of key issues in this area, as summarised below. Each of the points made by the court should arguably be considered in the context of any BDBN or SMSF will.

In summary:

1. The fact that a will is read aloud is not necessarily conclusive evidence that the willmaker had knowledge and approval of it (see *Church v Mason* [2013] NSWCA 481).

2. Furthermore, the fact that a willmaker reads the document, and then signs it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption of law that there was in fact knowledge and approval (see *Crerar v Crerar* [unreported, April 1956, noted 106 *Law Journal* 694]).

3. There is no universally applicable rule of a "mistake doctrine". That is a rule that mandates that where a willmaker instructs, or relies upon, another party to formulate in writing their testamentary intentions, the willmaker will be bound by the legal effect of the words actually used, even if, by mistake or ignorance, the drafter fails to use words that successfully implement the willmaker's intention (see *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831).

4. Rather, any "mistake doctrine" cannot be considered in isolation as a reason for undermining or diluting the requirement that the willmaker know and approve their will.

5. With reference to the decision in *Tobin v Ezekiel* [2012] NSWCA 285 where a person who plays a part in the preparation of a will and takes a substantial benefit, in order to establish knowledge and approval, it is necessary to show that the willmaker "knew the contents of the will and appreciated the effect of what they were doing so that it can be said that the will contains the real intention and reflects the true will of the willmaker".

6. The only qualification to the above point is that this level of evidence will not be necessary in every case; it will depend on the degree to which the circumstances are suspicious, the sophistication of the willmaker, the complexity of the will and the overall factual matrix of the situation.

The original decision (see *Lewis v Lewis* [2020] NSWSC 1306) was essentially upheld on appeal. The earlier decision also sets out some key ways that advisers can best help ensure the test of knowledge and approval is satisfied, including the following (which, again, arguably are each relevant for BDBNs and SMSF wills):

1. Adopting the practice of reading parts of the will to the willmaker, and asking them to summarise the effect of what had been read.

2. Inviting the willmaker at the outset to state in their own words the testamentary plans they wish to make, and asking questions in open-ended form, rather than in a leading form.
3. Where there is evidence of a failing mind and a beneficiary has been involved in the instructions for the will, the court will require more than proof that the willmaker knew the contents of the document signed and its effect.
4. In particular, the court may require evidence that the effect of the document was explained, that the willmaker did know the extent of their property and did comprehend and appreciate the claims on the estate to which they ought to give effect. This is because the court needs to be satisfied that the willmaker did, in fact, truly know and approve the contents of the will (see *Hoff v Atherton* [2004] All ER (D) 314).
5. Thus, in other words, a willmaker may have testamentary capacity, but it may be found that they did not know and approve of the contents of the will.
6. This may occur notwithstanding that the willmaker in fact understood the contents of the will, if the person did not exercise their capacity to comprehend and appreciate the claims to which they should give effect.
7. Ultimately then, if there are suspicious circumstances, evidence will be required that the deceased not only knew the contents of the will, but approved them, and proof of approval may require evidence that the deceased not only was capable of weighing the claims to which they might be expected to give effect, but also that they did so (see *Estate of Stanley William Church* [2012] NSWSC 1489).