Senate Select Committee on Superannuation and Financial Services

Main Inquiry
Reference (a)

Submission No. 47

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Date 15 June 2000 — Number of pages (including this one): 6

Subject Select Committee on Superannuation & Financial Services

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I am an attendee at the public hearing set for Friday 16 June 2000.

I am transmitting a copy of my submission paper. As requested, I will bring 10 further copies with me.

Gary Lanham

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BNE3_382038_1

Select Committee on Superannuation & Financial Services

16 June 2000

This submission addresses the following questions:

1. whether the *Superannuation Industry (Supervision) Act 1993* ("SIS Act") or the *Superannuation Industry (Supervision) Regulations* ("SIS Regulations") permit an enduring attorney to make, amend, revoke or confirm a death benefit nomination;

2. whether enduring attorneys have the authority to do so under their constituent State or Territory legislation. This is a matter for the States and Territories and is mentioned briefly only for completeness;

3. whether (in the event that enduring attorneys already have that power under SIS Act or SIS Regulations, or are in the future granted that power where they presently do not have it) they should have an unlimited, or a restricted set of options from which to choose;

4. whether SIS Act and SIS Regulations place any obstacles in the way of a superannuation fund which wishes to vary its trust deed to introduce a binding death benefit nomination regime.

1. Can enduring attorneys presently act

The short answer is that they possibly cannot - certainly lawyers are likely to be in doubt in advising clients about the capacity of an enduring attorney to act. The main reason is because of the definition of "legal personal representative" (as to which, see below).

Section 59(1) (a) of SIS Act, creating the binding death benefit capability, refers to "a member of the entity" as the person who can give a notice to the trustee.

- There is no definition of "member" or "member of the entity" in SIS Act.
- SIS Regulation 2.01(2) provides that a member of a superannuation entity is any one of a member of the entity or a person who receives a pension from the entity or a person who has deferred his or her entitlement to receive a benefit from the entity.
- None of those definitions encourage the belief that the alter ego of a member namely his/her enduring attorney, might stand in the shoes of the member.
- On the contrary, in SIS Act, the expression "legal personal representative" inclusively refers to the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person.
- With that definition, it is difficult to suggest that an enduring attorney could act unless the SIS Act or SIS Regulations employed the very term "legal personal representative" within which the description of an enduring attorney is found.

The following observations derive from a consideration of SIS Regulation 6.17A:

- the form of binding notice required is set forth in SIS Regulation 6.17A(6)
- those form requirements only seem to apply in relation to SIS Regulation 6.17A(4)(c) and SIS Regulation 6.17A(5)(b;
- SIS Regulation 6.17A(5)(b) refers to a notice which will "amend, or revoke, the notice by giving to the trustee notice, in accordance with sub regulation (6), of the amendment or revocation".
- confirmation of a notice which is the subject matter of SIS Regulation 6.17A(5)(a) is not made subject to the form requirements.

To put it another way, it would seem that a member who wishes to give a notice or amend or revoke a notice must comply with the form requirements expressed in SIS Regulation 6.17A(6), but a member who merely wishes to confirm an existing notice need only comply with the less stringent requirements expressed in SIS Regulation 6.17A(5)(a).

These formal requirements bear an unmistakeable resemblance to the formal requirements for a will. However the stand out difference between these formal requirements and the formal requirements for a will is that if a willmaker fails to comply with formal requirements when making a new will (putting aside questions of substantial compliance), the existing will still stands - wills do not have a "use by date". Notices under SIS Regulation 6.17A do.

Over time, funds accumulated by way of superannuation may come to represent the largest resource that a family may have. The average "legal health check up" for every citizen who walks through a lawyer's door will involve:

- checking the will;
- checking the enduring power of attorney;
- checking the status of superannuation and the in-place pay-out mechanism.

There is likely to be a public expectation that the onset of mental incapacity should not bring down the curtain on a person's ability to keep under review (even if through the agency of another) the destiny of a significant family asset. The "culture shock" of empowering someone else to decide is not great in a society becoming accustomed to enduring attorneys, and will reduce over time, particularly if other jurisdictions follow Victoria's lead in empowering a Court to make a will for a person after the onset of mental incapacity.

2. The constituent state and territory legislation

This point requires only brief attention.

Committees of the various Law Societies and other interest groups will be monitoring changes in this area and can be expected to agitate for State and Territory amendments to ensure that enduring attorneys have the necessary constituent power.

3. What options should enduring attorneys be given

The short answer is that views may legitimately vary.

Here are some propositions:

- for an enduring attorney to change the nomination in favour of dependants other than any that the member had previously nominated, might be thought to be going too far. Certainly it would be difficult to support that capacity on a principle of substituted judgment (as to which, see later).

- it seems less drastic to limit an enduring attorney's capacity to:

  (a) confirming (and reconfirming every three years) the last valid nomination that the now incapacitated member had created - this is not perfect but it is no more imperfect than the general philosophy applying to wills (excepting those jurisdictions which have now introduced the Court made will for incapacitated persons);

  (b) the enduring attorney might be permitted to change a nomination away from a named dependant or dependants, but only in favour of the personal representatives of the member for the division of same in terms of the member's will or intestacy. This will largely preserve the rights of the undoubtedly disappointed dependants under the family provision jurisdiction of Courts.

Clear guidance in SIS Act or SIS Regulations may be very helpful - to leave the matter to be determined based on the individual State and Territory legislation may produce inconsistent results. This is because of possible variations among the States and Territories as to the underlying philosophy of an enduring attorney's actions.

For example, under the "general principles" set out in the Queensland legislation, attorneys are required to apply a principle of substituted judgment. This means that an enduring attorney has to take into account what the incapacitated person's views and wishes might be, based on the incapacitated persons previous actions and any views and wishes that may have been expressed by the incapacitated person.

On the other hand, another statutory regime from another State or Territory might oblige an enduring attorney to follow a principle of "best interest".

4. Can funds easily amend their trust deeds

The short answer is that SIS Regulation 13.16 seems to throw up some obstacles.

It reads as follows:

> "For the purposes of sub section 31(1) of the Act, it is a standard applicable to the operation of regulated superannuation funds that, subject to sub regulation (2), a beneficiary's right or claim to accrued benefits, and the amount of those accrued benefits must not be altered adversely to the beneficiary by amendment of the governing Rules or by any other Act carried out, or consented to, by the Trustee of the Fund". (my underlining)

There is no definition of "beneficiary" in SIS Regulations but the term is defined in section 10 of SIS Act as:

> "..... in relation to a fund, scheme or trust, ...a person (whether described in the governing rules as a member, a depositor or otherwise) who has a beneficial interest in the fund, scheme or trust and includes, in relation to a superannuation fund, a member of the fund despite the express references in this Act to members of such funds".

There is no definition, either in SIS Act or SIS Regulations, of "accrued benefits".

SIS Regulation 13.16 has the potential to prevent an amendment being made to a fund's deed if what is proposed constitutes an adverse alteration to a beneficiary's right or claim to accrued benefits.

A binding death benefit regime does not affect the quantum of member's benefits, only their disposition. The person who can be adversely affected by such a regime is a dependant who is:

- not the recipient who is nominated by the member, but;
- is a dependant and therefore under a non-binding regime, might well have been favoured in whole or in part by the trustee's discretion, in the absence of a binding death benefit regime.

A dependant has an argument against an alteration to the trust deed if

- a dependant has "a beneficial interest" and;
- if the benefit is an "accrued benefit".

A dependant certainly has an interest in the fund in the sense that a dependant has an expectation. That would not normally be regarded, in trust law parlance, as a beneficial interest, but trust law parlance may not be the determinant of the meaning of these terms.

"Accrued benefits" would usually refer to benefits in respect of which some mechanics of qualification and selection have been satisfied, but a simpler meaning might be benefits which have simply aggregated.

On what one might call the less likely outcomes of the two preceding propositions, may hang the argument that an adverse effect upon a dependant's interests is sufficient for SIS Regulation 13.16 to block an amendment to introduce a binding death benefit nomination regime.

For completeness, what follows is an examination of those parts of SIS Regulation 13.16 in the form of provisos, which may counter that embargo and permit an alteration to introduce a binding death benefit nomination regime. The outcome of that examination is that none of those provisos are likely to counter the embargo.

- on examination of the various provisos, it appears that at one stage or another, notice has to be given to beneficiaries. If beneficiaries do include the member's dependants and personal representatives, the practicalities of giving notice are either extremely formidable or else they go as far as practically ruling out such a course of action;
- of the various "allowable adverse alterations" the only one that appears to be useful is that which is expressed in Regulation 13.16 (2) (c) in these terms:

"..... the alteration is expressly permitted by the Act or these Regulations ....."

Section 59(1A) has already been described and it is certainly a provision of the Act which expressly permits the proposed alteration, but that section is itself conditional upon the trustee complying with the Regulations and so there is a certain degree of circularity when one seeks to follow that approach;

- there is no allowable adverse alteration which can be made simply with the consent of the Regulator.

If the definition of "beneficiary" either within, or with application to, SIS Regulation 13.16, could be confined to the contributing member him/herself, the difficulties analysed in this fourth part will be resolved.

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