

Senate Select Committee on Superannuation and Financial Services

Main Inquiry Reference (a)

Submission No. 64

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The Voice of Super

File: P289

27 July 2000

Senator John Watson
Chair
Select Committee on Superannuation and Financial Services
Parliament House
CANBERRA ACT 2600

Dear Senator Watson

BINDING DEATH BENEFIT NOMINATION REGULATIONS

I refer to your letter to ASFA inviting the Association to put views to the Select Committee on Binding Death Nominations and the role of an Enduring Attorney, and the attached submission from Bruce Baker. I apologise for the delay in replying.

ASFA sought views from industry members addressing specifically the issue of the lapsing of a binding death nomination after three years and the difficulty posed by permanent mental incapacitation. Three options emerged from this discussion and these are shown in the attached paper.

The use of an Enduring Attorney gained only marginal support within the industry. In summary, there was consensus that building exceptions to the three year rule into what is already a complicated set of requirements is most undesirable. ASFA's view is that the decision should revert to trustee discretion.

Yours sincerely,

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RECEIVED TIME 8. AUG. 8:23

PRINT TIME 8. AUG. 8:25 07/27/00 11:59

Proposal: Binding Death Benefit Nominations – Continuation in the event of Incapacity to Act.

Current Legislative/Regulatory Provisions

Binding Death Benefit Nominations are covered by the SIS Act and Regulations by virtue of Section 59(1A) of the Act and Regulations 6.17A, 6.17B and 2.24C. Of particular note for this issue is SIS regulation 6.17A(7) which states that Binding Death Benefit Nominations continue for a period of three years from the date when first signed or the last confirmed amendment, or any shorter period fixed by the relevant governing rules or until revoked by the member before the expiry date.

Issue

The issue arises as to what happens if the member becomes permanently mentally incapacitated and unable to control their affairs either because of age or other circumstances (such as a serious accident) which in turn prevents 'refreshment' of the Binding Death Benefit Nomination, although the member may still be alive. The Binding Death Benefit Nomination subsequently expires. How then can the member's wishes be followed?

Background

Binding Death Benefit Nominations are seen as a complex issue in superannuation and there are a number of other considerations which need to be evaluated in conjunction with this discussion. It worth noting that not many superannuation funds offer this process. An informal survey of 17 corporate funds in April 2000 revealed that 9 have considered the matter and will not be introducing the option at this time; 7 had not considered the matter and 1 will be introducing the option. Equally there is not sufficient evidence at this stage that significant numbers of fund members have been taking up this option.

The complexities already evident in the use of Binding Death Benefit Nominations apply not only to the actual information sought by Trustees but also to the accuracy and legality of material provided by members. Below are examples of perceived current weaknesses/complexities and sources of potential problems in the existing system:¹

- Are the witnesses over 18 years of age? Should the Trustee demand evidence of age?
- Was the nomination actually signed 'in the presence of witnesses'? Technical challenges to Wills have highlighted this difficulty.
- Are witnesses to the nomination, also persons listed as beneficiaries?

¹ Quoted from a paper by Heather Gray titled "Binding Death Nominations" March 2000

- How will the trustee know whether the persons named in the nomination are legal personal representatives or dependants? The trustee will be unable to pay the benefit in accordance with the nomination, if at the time of death, the nominees do not qualify as one or the other.

- Are nominations sufficiently clear as to the status and identities of beneficiaries (such as with children, either adopted, foster, from complex parentage) ?

Response from Industry

The views of a selection of ASFA members with experience of different types of funds were sought. There was strong concern over any proposal to alter the existing provisions regarding the 3 year limit. Three possible options, which could address the circumstance of inability to act through mental incapacity, were then put forward for consideration:

Options

In the event of a member being unable to "refresh" the binding death benefit nomination:

- (1) **provide for use of an enduring attorney to "refresh" the nomination**
- (2) **the nomination remains in force similar to a will**
- (3) **revert to Trustee discretion**

Option 1 - Provide for an Enduring Attorney to "refresh" the nomination

The matter raised is whether another party could 'refresh' the binding death nomination. The enduring attorney does not have the power to alter the nomination and would only be in a position to continue the existing one. Several issues arise with this option -

- if the enduring attorney dies or is non contactable, then the nomination would lapse;
- if the enduring attorney is a beneficiary, this may lead to problems rather than provide an effective solution;
- it introduces a further administrative complexity.

Option 2 - The Binding Death Benefit Nomination remains in force similar to a Will.

Where a member has made a Binding Death Benefit Nomination and during the period of its life, being 3 years, the member subsequently is deemed by a court, tribunal or medical authority to be unable to administer his/her own affairs, the Binding Death Nomination shall remain in force. This removes the requirement for refreshing the Nomination given the Member would not have the capacity to do so.

A Binding Death Benefit Nomination would need to have the same status as that of a Will in so much as being defined as a testamentary instrument which cannot be altered by a guardian (such as one appointed by a Court or Tribunal) or by Power of Attorney. This would increase the problems discussed earlier. For example, making the witnessing provisions of nomination testamentary is a huge burden on large superannuation funds.

It is likely that even fewer would take up the option of offering binding death benefit nominations.

Option 3 - revert to trustee discretion

This option has strong support. The view is that, in exercising the discretion as to who should receive the death benefit, the trustee would take into account the lapsed binding death benefit nomination as if it were a non-binding nomination.

In summary, there was consensus that building exceptions to the 3 year rule into what is already a complicated set of requirements is most undesirable.

July 2000