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Précis Paper

Complex Nature of Binding Death Benefit Nominations

A discussion of binding death nominations and the complexities that arise when executing a valid nomination.

Discussion Includes

- Overview of binding death benefit nominations
- Types of nominations that exist
- Where do these nominations go wrong?
- Creation of pensions within super funds
- Importance of trustees to death benefit nominations
- How to ensure a binding death benefit nomination is valid
- Examples of where things have gone wrong
- Key takeaways

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Video Title

In this edition of BenchTV, Monica Ross-Maranik (Consulting Principal – Keypoint Law, Sydney) and Rod Cunich (Consulting Principal – Keypoint Law, Sydney) discuss the importance of binding death benefit nominations to individual's superannuation funds, and the issues that arise when attempting to execute a valid death benefit nomination.

Overview of binding death benefit nominations

1. Binding death benefit nominations are becoming as important in estate planning as wills themselves, as superannuation is often the largest, or the second largest asset for an individual. However, the complexity surrounding binding death benefit nominations creates a whole myriad of pitfalls and dangers for advisors.

2. Many advisors do not understand how a death benefit nomination works, how and when to use a death benefit nomination as a planning tool, and what is required to actually ensure that a valid nomination in created. If a valid nomination is put in place, advisors need to know what the circumstances are that might, over time, create a situation where the nomination is no longer relevant, or becomes invalid.

3. Some of the common issues with existing nominations are that they haven't been dated, witnessed or signed properly, they refer to an executor rather than a legal personal representative, and so on. Once a person passes away, issues regarding the nomination cannot be rectified.

4. A will with a superannuation clause in it is ineffective if the superannuation does not flow through the person's estate, which is more often the case than not. Some of the common reasons that binding death benefit nominations are not valid are:
    - The member did not make a binding death benefit nomination which was valid at the date of their death
    - They made a binding nomination which was valid, but had lapsed at date of death
    - The nomination was in effect unduly completed, or not properly signed or witnessed
    - It was not made in accordance with the trust deed, or was not made in accordance with the trust deed and the *Superannuation Industry (Supervision) Act 1993* (Cth)
    - The person nominated in the nomination no longer meets the definition of a 'dependant' under the trust deed or the *Superannuation Industry (Supervision) Act 1993* (Cth)

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- No nomination is made at all, in which case the trustees of the superannuation fund decide where the superannuation is paid at death, and only if there are no dependants is the superannuation paid to the legal personal representative

5. Superannuation only becomes part of the estate if it is paid, either by nomination or by default, to the legal personal representative. If it is a self-managed super fund you look at the trust deed. If it is a retail fund, you look at the retail fund deed and the *Superannuation Industry (Supervision) Act* 1993 (Cth) and the regulations under the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (the regulations). The *Superannuation Industry (Supervision) Act 1994* (Cth) and the regulations also apply to self-managed super funds. However, the trust deed of the self-managed super fund can exclude certain provisions.

6. When deciding whether to make a binding death benefit nomination, you must look within the trust deed to see whether a binding nomination can be made on the fund, and you must consider whether the fund requires strict compliance with regulation 6.17A of the Act. Regulation 6.17A requires that the binding death benefit nomination be in writing, signed by the member and dated, witnessed by two adult witnesses and dated again, and then it must be provided to the trustees for acknowledgment. If compliance with regulation 6.17A is required, then strict compliance is mandatory. Regulation 6.17A also provides that if it is required to be complied with, the nomination only lasts for three years. Some trust deeds provide a non-lapsing period, so if a valid nomination is made, you are not captured by the three year rule.

7. One must also consider the common law cases which guide what the tribunals and the courts consider to be an appropriate and valid complaint. In each case you must check to see whether a particular nomination complies with the particular deed in question. Many self-managed super fund deeds have a draft nomination as part of the documents produced, so you must request to see these documents because often embedded in the trust deed will be a clause which says you can make a binding nomination, but only in the form approved by the trustees.

8. If the binding nomination is not valid, or there is no binding nomination made, then the trustees of the superannuation fund decide where the superannuation is paid upon death. In each case, to be valid, whether it is a binding nomination or a decision of the trustees, they have a limited group of people they can pay the benefit to. This is determined by the legislation and the trust deed. The trustees have to pay it to a dependant within the meaning of the Superannuation Industry legislation.

9. A 'dependant' in relation to a person includes the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship, or the

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legal personal representative. A 'child' includes an adult child, a child under 18, an adopted child, or an ex nuptial child. Whether someone is dependent or not is discerned at the date of death.

Types of nominations that exist

10. A binding nomination is a nomination made in accordance with a trust deed as a binding nomination. If it is a self-managed super fund, you must look at what is required to have a binding nomination. Most super fund trust deeds provide for nominations, but not all. If the trust deed tells you how to do the binding nomination, you must strictly comply with the terms of the trust deed. If it is a retail fund, the nominations are required to comply with regulation 6.17A, meaning the binding nomination will have a lifecycle of 3 years.

11. A non-lapsing nomination is a binding nomination that doesn't have a three year period and most trust deeds, but not all, say that if the deed allows a non-lapsing nomination, you must still strictly comply with the requirements of the deed. A non-binding nomination on the other hand, means that a nomination has been made, but the trustees are not required to comply with it.

Where do these nominations go wrong?

12. In the case of *Munro & Anor v Munro & Anor* [2015] QSC 61, the binding death benefit was made by the solicitor on his own self-managed superfund and the Court found that the solicitor had written on the nomination that it was to be payable to the trustees of the deceased's estate. It was held that this did not comply with the trust deed or the *Superannuation Industry (Supervision) Act 1993* (Cth) as Mr. Munro had used the wrong terminology, making the nomination non-binding.

13. In *McIntosh v McIntosh* [2014] QSC 99, there was no nomination made and no will as the member was quite young. His mother applied for letters of administration on the basis of intestacy and she was granted this. The intestacy provisions in Queensland at the time provided that his estate would be divided between his parents equally. His mother, after obtaining a grant, then applied to each of the trustees of the superannuation retail funds for the superannuation to be paid out in full to her, and it was. The Court found Mrs. McIntosh's conduct to be inappropriate, and expressed the view that there is a clear conflict of duties and interest, contrary to the fiduciary duties owed as administrator. When the applicant made application to the super funds for the money to be paid to her personally, rather than to the estate, she was acting in her own interests rather than acting within her duty of the legal

personal representative. An administrator of an estate has a duty to apply for payment of superannuation to the estate.

14. If it is a retail fund, the Superannuation Complaints Tribunal has consistently said in judgements that the purpose of superannuation is to provide income in retirement to a member and his or her dependents in the event of death before retirement. The approach is to consider what might have occurred had the deceased member not died, and where there is an expectation of ongoing financial support had the deceased member not died.

15. Under the *Superannuation Industry (Supervision) Act 2013* (Cth) 'dependant' includes all children, but under the *Income Tax Assessment Act 1997* (Cth), it only includes children under 18 as dependants, unless they are in an interdependent relationship with the deceased. The Superannuation Complaints Tribunal will look at income, who is financially dependent, emotionally dependent, and who would be seeking that income long term had the deceased not passed away. The goal is to have a binding nomination to the person the deceased intended, but also for tax reasons, to save 16.5% to the person who is an income tax dependent. You should first focus on what your client desires to achieve, before you consider the tax consequences. Often beneficiaries would rather see themselves receive the benefit and pay the 16.5% tax on the superannuation benefit, rather than not receive it at all.

Creation of pensions within super funds

16. When you move your superannuation into pension mode, subject to the provision of the trust deed, often results in a revocation of the binding death benefit nomination and then the pension, on the death of the member, is paid in accordance with the trust deed. There are not many trust deeds that preserve the death benefit nomination when the member moves into pension mode.

17. In the case of *Webb v Tealing* [2009] FCA 1094, the son died and the death benefit was paid to the mother. When the mother subsequently passed away, the trustee tried to pay the balance of the benefit to the estate of the mother. The Federal Court found that the time of establishing a dependent was the time of the son's death, and regulation 6.22 of the *Superannuation Industry (Supervision) Regulations 2014* (Cth) provided that payments to the legal representative of the mother's estate was not possible. The balance of the superannuation on the death of the mother had to be paid back to the son's estate or to dependents of the son.

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Importance of trustees to death benefit nominations

18. Self-managed super fund deeds are each established by each superannuation fund separately, and there is very little similarity among the deeds. You must look at the trust deed primarily, and then the *Superannuation Industry (Supervision) Act 2013* (Cth) and the regulations

19. You need to undertake timely reviews of superannuation death benefit nominations – either every two and half years, or after a change in circumstance. It is also important to know who is going to make the decision if you do not have a binding death benefit nomination, i.e. know who the relevant trustees of your super fund are. A trustee can be an individual, but they also have to be a member, or it can be a corporate trustee, who must be a member but does not have to be a shareholder. In *Katz v Grossman* [2005] NSWSC 934, there was a non-binding death benefit nomination, ~~ but t~~The daughter ~~was validly~~ appointed her husband as a co-trustee of the fund, they then~~and she~~ decided, as ~~t~~trustees, to pay the super fund benefit to her~~self~~. As ~~s~~he husband was validly appointed as a director of a trustee corporate company or as the replacement trustee on the death of a member, that decision was valid.

20. In *Cantor Management Services Pty Ltd v Booth* [2017] SASCFC 122, the members signed the binding death benefit nomination and the binding nomination was left at the accountant's office and was put into the records. The Court had to consider whether leaving the death benefit nomination at the address of the accountants was giving notice to the trustees, which was a requirement of the trust deed. The accountant's office was the registered office of the trustee company, so it was held that it did comply with the trust deed as notice was given to the trustees of the binding nomination.

How to ensure a binding death benefit nomination is valid

21. In order to ensure that the nomination is valid, ~~you have to serve~~the trust deed normally requires that the nomination ~~a copy on~~ be provided the trustees, and the trustees have to accept the nomination. One option is to draft a binding death benefit nomination that contains an acknowledgement by the trustee that states 'I acknowledge receipt of this nomination and accept it', and put an attestation clause for the trustee to sign. If the trustee signs it, you have acknowledgement of receipt and acceptance on the same document. However, this is not possible with retail fund nominations ~~s~~.

22. A will, on the other hand, is not a valid binding death benefit nomination. This is mostly because notice has not been given to the trustees of the will before death, and that is usually an essential element for it to be binding. There are a lot of similarities between a valid will and regulation 6.17A, but a will cannot be considered a valid binding death benefit

nomination, notwithstanding a specific provision in a will whereby the superannuation is given to a beneficiary.

23. However, it is important to note that even if the trustees acknowledge and accept the nomination, this does not automatically mean the nomination is valid. You must ensure that all other requirements set out in the trust deed and/or the Superannuation Industry legislation are strictly complied with.

24. The Law Reform Commission have recently questioned whether or not an enduring power of attorney can be used to make a binding nomination on a superannuation fund. Often solicitors, when they are drafting the power of attorney, put in a specific provision in the power of attorney authorizing the attorney to make a binding death benefit nomination. Where the member is the sole trustee of a self-managed superfund, or a director of the trustee company, powers of attorney are used in that sphere quite commonly for the same reason. Section 17 of the *Superannuation Industry (Supervision) Act 1993* (Cth) allows an attorney to discharge the responsibilities of an incapacitated director ~~and still be confined~~ for superannuation.

Examples of where things have gone wrong

25. In a case worked by Monica Ross-Maranik, there was a disabled lady who had quite a large estate. She had a will before disability which was valid, which gave her estate to her children and step children in equal shares. The superannuation was over half of the estate, but there was not a valid binding death nomination at the date of death, so her two children successfully applied for all of the superannuation. The children then got their share of the balance of the estate, and there was nothing the step children could do because their father had divorced her during the period of disability, so they were not considered dependants.

26. In another case, the trustees made a decision to pay the superannuation benefit to the de facto partner of the member. The member had made a will where his estate would go to his nieces, nephews, brother and partner, but with the real property held as joint tenants passing to the partner by the doctrine of survivorship, and the only other main asset was the superannuation, there was unlikely to be a grant of probate because there ~~was~~were no other assets of sufficient value.

27. In *Williams v IS Industry Fund Pty Ltd* [2016] FCA 524, the deceased's father made a claim for his son's superannuation on the basis that he was in an interdependent relationship with his son. At first instance, the Tribunal held they were not in an interdependent relationship, and the father appealed to the Federal Court. The Federal Court set out what constitutes an interdependent relationship and looked at the necessity to be members of the household

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immediately before the date of the death, and referred the matter back to the Superannuation Complaints Tribunal to be re-heard. It was found that the father was not in an interdependent relationship with the deceased member immediately before his death, therefore the father did not qualify as a dependant ~~under the trust deed~~.

28. In *Ievers v Superannuation Complaints Tribunal* [2016] FCA 936 there was a claim for superannuation by the de facto partner. The evidence suggested that the member committed suicide, and that that suicide may have been precipitated ~~regarding~~ by the breakdown of the relationship. The Court held that the Tribunal was correct in concluding that the de facto partner was a dependant at the date of death, despite the disharmony, altercations and grievances.

29. In the case of *Application by BT Funds Management Ltd* [2017] NSWSC 45, a non-binding nomination was made but the trustee wereas on actual notice that the relationship had come to an end before the death of the member, and the trustees asked the Court whether they were bound by it, and the Court held that they were not bound.

30. The Superannuation Complaints Tribunal focuses on paying the superannuation to the person who may be most financially dependent, and where the income would have gone had the member not died. Section 10A of the *Superannuation Industry (Supervision) Act 1993* (Cth) does set out the order of dependants upon which the courts and tribunals should follow when determining who the superannuation is to be paid.

Key Takeaways

31. In summary, it is essential to not ignore superannuation. It is a very large asset and as the taxation advantages of putting money into superannuation continue, it will continue to be a large asset.

32. When creating a binding death benefit nomination, you must look at the requirements of the trust deed. If it is a self-managed super fund, you must look at the company's constitution and how the shares are held in the company, because control or right to appoint directors, if there is not a binding nomination, will be highly important. The deed of a self-managed super fund will tell you whether it has to comply with regulation 6.17A. If it is a self-managed super fund, you ~~need~~ should ~~to~~ use the form provided with the fund deed, if one is provided. If it is a retail fund, you need to ask the superannuation fund for the correct form, and make sure it is filled in and completed properly.

33. Currently, big uncertainty surrounds dementia and what happens when someone loses the capacity to renew or refresh their binding death benefit nomination. The possible solution is

to do away with trustee's discretion entirely, and simply have all superannuation death benefits paid directly into the estate where the money can be dealt with just like any other asset of the deceased. If the superannuation death benefit came into the estate and was managed pursuant to all of the established law surrounding wills, there would be a lot more certainty. But of course, this is not currently the way it often works.

34. The negative aspect of this approach is that it removes, as a planning tool, a tool that is used quite regularly to help preserve an asset. This is particularly the case in blended families where you may have a partner you were in a relationship with, leave their superannuation to children of a prior relationship, and have some certainty that the money will go there directly from the trustee of the super fund without going through the estate and thereby possibly being exposed to a challenge by other interested parties. The elimination for ~~of~~ a family provision claim would not make a lot of difference in New South Wales where there are notional estate provisions, but it would make an enormous difference in the other states and territories.

35. There is no uniform succession law in Australia, but it is arguable to say that if there was, a myriad of issues would self-resolve. Currently exists a juxtaposition where superannuation is legislated at a federal level, and succession and family provision are state legislature~~, which means there is no uniform approach across all states and territories~~.

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BIOGRAPHY

Monica Ross-Maranik

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Monica is an accredited specialist in wills and estates law in NSW, working predominately in estate litigation, probate, estate administration and estate planning. She has over 20 years' practise in the field, including extensive experience conducting high profile litigation and mediation. Monica holds a Masters of Laws from Sydney University, and is a current member of the International Society of Trust and Estate Practitioners (STEP).

Rod Cunich

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Rod has over 30 years legal experience and specialises in personal estate planning, asset protection and business succession. He has lectured nationally and internationally on a range of topics relating to personal estate planning, business exit planning, business transactions, business structures, corporate governance and asset protection. He also regularly conducts estate planning technical training courses for financial advisers and accountants. Rod has been a director of numerous successful companies and NFPs, with clients also benefitting from Rod's first hand commercial experience. He is also extensively involved in the disability sector, and is a regular voluntary speaker at education functions for parents of disabled children. Rod is author of the acclaimed text "*Understanding Wills and Estate Planning",* a book written for the layman.

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