

## Article Information

Authors: Donna Benge, Rod Jones

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## Attorneys & Super - can they make a valid Binding Death Benefit Nomination?

**Justice Bowskill in *Re Narumon Pty Ltd* [2018] QSC 185 has provided a very useful judgment regarding whether an attorney can enter into a Binding Death Benefit Nomination (BDBN) on behalf of the principal who provided the power.**

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The attorneys of Mr Giles (his wife and sister) signed a document entitled “*extension of Binding Death Benefit Nomination*” in 2016, in which the nomination made by Mr Giles in June 2013 was confirmed and extended for a further three-year period.

Her Honour first determined that the BDBN made by Mr Giles in June 2013 was validly executed after examining the relevant clauses of the fund Trust Deed and a discussion around whether self-managed superannuation funds needed to comply with section 59(1) of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*. She concluded that the restrictions in section 59(1) do not apply to the governing rules of a Self-Managed Superannuation Fund. In paragraph 44 of his judgment she says, “*It follows that the trust deed which contains the governing rules for the self-managed superannuation fund will govern the form in which a binding nomination may be given*”.

She further concluded that whilst the trust deed referred to compliance with the format of the BDBN set out in the deed as being necessary the fact that it was not in strict compliance with that wording did not remove its validity.

Useful commentary was also provided around the validity of the nomination as a whole if a non-dependent for superannuation purposes was listed as a nominated beneficiary. She concluded at paragraph 49 of her judgment that “*If a member gives a notice to the trustee, nominating a person who is not a dependant, or legal personal representation, the nomination is to that extent of no effect - the member is not authorised to nominate such a person, and the trustee is not authorised to pay a benefit to such a person*”.

She further stated, after considering a section of the trust deed concerning the validity of nominations, that a “practical and purposive approach” should be adopted and that the preferable construction of the relevant clause was that the notice was binding on the trustee to the extent that the person nominated in it was the deceased member’s dependent or legal personal representation.

### Validity of the 2016 form where the attorneys extended the nomination for a further three years

In assessing whether attorneys have the right to extend or renew a valid nomination Her Honour went through the following process:

#### Consideration of the Trust Deed

The relevant terms of the Trust Deed included a provision that any power or right given to a member could be exercised, if the person is under a legal disability, by any person who holds an enduring power of attorney from that person.

Her Honour found that it did not matter there was no express power to “*confirm*” or “*extend*” the nomination signed (refer paras 57 & 58).

### Statutory provisions governing an Enduring Power of Attorney under the relevant State Powers of Attorney Act

Her Honour found that there was nothing in the deed itself which prohibited an attorney signing a nomination for the member and in fact a particular clause of the deed expressly contemplated that any power or right given to a member may be exercised by a person who holds an Enduring Power of Attorney.

She also concluded that there appeared to be no restriction under the SIS Act which would prevent an attorney from executing such a nomination on behalf of the member.

Her view was that the answer to the question of whether an attorney can sign a nomination depends upon a construction of the relevant provisions of the Queensland Powers of Attorney Act. Her examination of the Queensland Act, and in particular Section 32, lead to commentary on what an eligible attorney could do in relation to *“one or more financial matters or personal matters for the principal that the principal could lawfully do by an attorney”*. A further review of the Act on what an attorney could not do (as set out in the legislation and regulations) did not preclude an attorney from renewing a BBN.

She also considered whether the execution of a BDBN in a superannuation context was a *“financial matter”* as defined in the schedule to the Act had any impact and the definition of what was *“a legal matter relating to the principal’s financial or property matters”*.

Despite finding that a BDBN did not seem to fall within any of the examples in the definition of a *“financial matter”*, including as a legal matter, she noted that examples provided in the Act are not exhaustive and did not limit the meaning of the provision. She also found that the making of a nomination is not a testamentary act and hence did not breach any restriction against delegating to an attorney the making of a Will.

Her Honour also undertook a review of whether there were any other protective features within the Act that were relevant. She noted that S 73 of the Act, dealing with an attorney avoiding conflict transactions unless authorised to do so, was a consideration and noted that Mr Giles did not authorise his attorneys to enter into a conflict transaction of any particular kind or type or generally.

She formed a view however that the renewal of the 2016 nomination did not involve a conflict transaction because the reasons for executing it was to ensure continuity in Mr Giles’ estate planning and to ensure that his wishes in respect of the distribution of the superannuation benefits continued to have effect. She accepted submissions that the duties of the attorneys towards the principal in this situation coincided rather than conflicted.

She also noted that Mr Giles had made five binding nominations over the course of three to four years before losing capacity and those notices consistently nominated payments of the majority of any available benefit to the nomination that was renewed by the attorneys. She found this despite one of the attorneys, Mrs Giles, and her son benefiting from the extension of the nomination. She concluded that in the circumstances there was no conflict between the interests of Mrs Giles and the duty that she owed as attorney to Mr Giles. It was consistent with the exercise of Mr Giles’ own nominations up until he lost capacity. She was therefore satisfied that it was not a conflict transaction.

At the same time as renewing the 2013 nomination the attorneys also made a fresh nomination removing a 5% benefit that Mr Giles had provided to his sister who could never be a dependant for superannuation purposes in any event. In all other terms it was consistent with the 2013 renewal nomination. Her Honour did not make an order in relation to giving effect to the *“new”* 2016 nomination but preferred to make an order that the 2016 extension nomination was an effective binding nomination for the payment of the member’s benefit in accordance with the trust deed.

At paragraph 90 she expressed the view that the execution of a death benefit nomination by an attorney, in circumstances of actual or potential conflict contrary to section 73 of the Act, in the absence of authorisation from the principal, could result in a declaration of invalidity of the nomination and if in doubt the attorney should approach the court for directions.

## Summary

- A full review of the judgment is suggested given its importance in this space.
- Based on the reasoning of Her Honour the individual circumstances of each client will need to be considered before advising clients on whether a renewal of a BDBN is likely to be valid. This will include a review of the trust deed, the client’s previous nominations (if any) and general estate planning history and issues of potential conflict.
- The question of attorneys executing a new nomination were not resolved in this judgment and Her Honour’s view was that it would be prudent and appropriate for attorneys to approach the Court for directions if they wished to make a new nomination.
- An analysis and review of each state’s relevant Power of Attorney Act is also necessary to understand if that places any restrictions on Attorney’s performing certain functions.