# EPA can affirm existing binding death benefit nomination!

**A power of attorney can execute a superannuation death benefit nomination on behalf of its principal member!**

*Re Narumon Pty Ltd* [2018] QSC 185 is now authority for that proposition. *But* – and there is always a 'but' – the devil is in the detail.

As with many decisions, it is fact specific, nuanced and may be confined to Queensland. A recent and lengthy judgment of 29 pages, it has excited the world of succession and superannuation lawyers, with much having been written about it already.

As such, the focus of this column is to provide a helicopter view for practitioners, while considering some questions that, by the nature of the decision, have now arisen.

The facts involved a lapsing binding death benefit in a self-managed superannuation fund, where the donor of an enduring power of attorney lost capacity during its term. The donor had appointed two enduring powers of attorney – his wife and his sister, who prior to the expiration of the lapsing death benefit nomination, sought to affirm an extension of the existing nomination, whilst executing a new nomination.

The original nomination divided the superannuation 47.5% to the donor's son, 47.5% to his spouse (attorney), and 5% his sister (attorney). The 5% allocation was an invalid nomination. Prior to the nomination lapsing, the attorneys simultaneously affirmed an extension of the existing nomination, whilst out of an abundance of caution also executed a new nomination, in proportion of 50% to his spouse and 50% to his son.

The court found that the original nomination was valid, except for the portion of the 5% that sought to be provided to a non-dependent, that the extension of the existing nomination was valid,[1] and that the new nomination was an unauthorised conflict transaction,[2] therefore not binding.

> "an attorney could prospectively approach the court for directions, under s118"[1]

Her Honour Justice Bowskill found that, notwithstanding concerns expressed in the Australian Law Reform Commission (ALRC) report into elder abuse,[3] there are no restrictions within the *Superannuation Industry (Supervision) Act* 1993 (Cth) (SISA) preventing "an enduring power of attorney, from executing such a nomination on behalf of a member".[4] However, regard must be had to any restrictions that may exist in the trust deed.[5]

She then analysed the relevant provisions of the *Powers of Attorney Act 1998* (Qld) with particular focus on Section 32, which is the authorising provision permitting attorneys to undertake personal or financial matters on behalf of their principal. By way of guidance, the provision sets out examples of those things that may be done.

Her Honour found that "the examples given are not exhaustive and do not limit the meaning of the provision".[6] She found that the execution of a binding death benefit nomination was a financial matter,[7] that it was "not a testamentary act",[8] and not one that was required to be performed personally.[9] Further, absent a transgression of the requirement to avoid conflict transactions,[10] an enduring power of attorney could execute superannuation binding death benefit nomination.

Many commentators view the decision as an important superannuation case. My perspective is that it is an important substituted decision-making judgment. The judgment focuses, at length, on the provisions of the *Powers of Attorney Act 1998* (Qld), the interpretation of several of its provisions and the interaction of its provisions with the documents in question – the nomination and the superannuation trust deed.

Given that the definition of financial matters in the *Powers of Attorney Act* is mirrored verbatim in the *Guardianship and Administration Act 2000* (Schedule 2), there is scope for this decision to also apply to financial administrators appointed by the Queensland Civil and Administrative Tribunal. This would be limited, having regard to the distinction between affirming a nomination and making an entirely new nomination.

Her Honour said [at 89]: "There is a distinction…Where an attorney purports to make a binding death benefit nomination for a principal/member, who has lost capacity, for the first time (that is, where the principal/member had not previously done so personally); or purports to amend or vary a binding death benefit nomination previously made personally by the member, different considerations, in particular in terms of actual or potential conflicts of interest, may arise. In that context, questions as to the scope of the authority of the attorney would arise, in terms of whether the principal had authorised them to enter into a conflict transaction of that type, or generally; and in any event, whether the act was nevertheless one 'on behalf of' and in the interests of the principal." *(footnotes omitted)*

In addressing the concerns expressed in the ALRC report "that BDBNs should be seen to be 'will-like' in nature, and, from a policy perspective, treated similarly to wills",[11] her Honour identified the numerous provisions of the Queensland *Powers of Attorney Act* that have "protective features".[12]

As practitioners will be aware, all jurisdictions have powers of attorney and guardianship legislation. While they are generally similar, they are not the same. So, for example, there is no equivalent provision to the s73 *Powers of Attorney Act* conflict provision in New South Wales (NSW), South Australia (SA), Western Australia (WA) and Norther Territory (NT), with those jurisdictions relying on the common law.



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Similarly, there is no equivalent to our provision s66 – Act honestly and with reasonable diligence in NSW, the Australian Capital Territory (ACT) and the NT. [13] It may be that this distinguishing feature will have a limiting effect, to the extent that practitioners should have regard to the jurisdiction in which a power of attorney is executed in advising clients as to the impact of this decision on their estate plan.

When in doubt as to the attorney's ability to execute a nomination when there were questions as to it being a conflict transaction, her Honour identified that "an attorney could prospectively approach the court for directions, under s118".[14]

With that, the key aspects to be drawn from the decision are:

- *Certain:* A Queensland enduring power of attorney can affirm an existing binding death benefit nomination.
- *Probable:* An enduring power of attorney cannot make a new binding death benefit nomination in favour of themselves; an enduring power of attorney may be able to make a new binding death benefit nomination in favour of other dependents of the principal – but should, in that case, seek court guidance via an application for directions.
- *Limits:* May not apply to EPOAs from other jurisdictions.

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Notes

[1] At [93].
[2] At[86].
[3] At [54],[73].
[4] At [60].
[5] Ibid.
[6] At [69].
[7] Ibid.
[8] At [71] citing *McFadden v Public Trustee for Victoria* (1981) 1 NSWLR 15 at 29-32; *Re Application by Police Association of South Australia* [2008] SASC 299; (2008) 102 SASR 215.
[9] Ibid
[10] Discussed at length [76]-[91].
[11] At [73].
[12] At [75].
[13] These provisions were specifically referred to in the judgement. There are a numerous other statutory differences between the Queensland *Powers of Attorney Act* and that of other states and territories.
[14] At [90].