SUPREME COURT OF QUEENSLAND

CITATION:	*Re Narumon Pty Ltd* [2018] QSC 185
IN THE MATTER OF:	**An application by NARUMON PTY LTD ACN 091 480 983 as trustee for the JOHN GILES SUPERANNUATION FUND established by deed dated 21 February 1992**
PARTIES:	**NARUMON PTY LTD ACN 091 480 983 as trustee for the JOHN GILES SUPERANNUATION FUND** (Applicant)
FILE NO/S:	BS No 7148 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	24 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2018
JUDGE:	Bowskill J
ORDERS:	**Orders and declarations proposed in paragraphs [93] and [94] of these reasons, subject to any further submissions**
CATCHWORDS:	SUPERANNUATION – PRIVATE SECTOR FUNDS – INTERPRETATION AND CONSTRUCTION – where a deed of variation of the terms of a self-managed superannuation fund was not properly executed by the trustee company, in accordance with s 127 of the *Corporations Act* 2001 (Cth) – whether a subsequent deed of variation is nevertheless valid and effective SUPERANNUATION – PRIVATE SECTOR FUNDS – TRUSTEES – POWERS AND DUTIES – where there is evidence supporting the establishment of a lifetime complying pension, and nomination of a reversionary beneficiary of that pension, but the actual documents cannot be located – whether it is appropriate to grant declaratory relief directing the trustee to give effect to the reversionary pension SUPERANNUATION – BENEFITS – MATTERS AFFECTING ENTITLEMENT TO AND PAYMENT OF – OTHER MATTERS – where the member of a self-managed superannuation fund had made a binding death benefit nomination which had lapsed prior to the member losing

capacity – where the member had appointed attorneys to act for him in relation to financial matters under an enduring power of attorney – whether it is within the scope of the power of the attorneys to execute for the member a document extending the binding death benefit nomination made personally by the member – whether it is within the scope of the power of the attorneys to execute for the member a new binding death benefit nomination

Corporations Act 2001 (Cth), s 127
Superannuation Industry (Supervision) Act 1993 (Cth), ss 10, 31, 55A, 59
Superannuation Industry (Supervision) Regulations 1994 (Cth), regs 6.17A, 6.22
Acts Interpretation Act 1954 (Qld), s 14D
Powers of Attorney Act 1998 (Qld), ss 32, 73 and schedule 2

Cantor Management Services Pty Ltd v Booth [2017] SASCFC 122; (2017) 106 ATR 615
Donovan v Donovan [2009] QSC 26
FSS Trustee Corporation v Eastaugh [2017] VSCA 218
McFadden v Public Trustee for Victoria (1981) 1 NSWLR 15
Munro v Munro [2015] QSC 61; (2015) 306 FLR 93
Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban [2011] QSC 380
Reilly v Reilly [2017] NSWSC 1419
Re Application by Police Association of South Australia [2008] SASC 299; (2008) 102 SASR 215
Re Bundaberg Sugar Superannuation Pty Ltd as trustee of the Bundaberg Sugar Ltd Superannuation Plan [2014] QSC 118
Re Tracey [2016] QCA 194; [2017] 2 Qd R 35
Siahos v J P Morgan Trust Australia Ltd [2009] NSWCA 20
Smith v Glegg [2004] QSC 443;[2005] 1 Qd R 561

COUNSEL: R D Williams for the applicant
K J Kluss for the interested party, Nicholas Giles by his litigation guardian F A Fredriksen

SOLICITORS: Cooper Grace Ward for the applicant
Fredriksen Legal for the interested party, Nicholas Giles by his litigation guardian F A Fredriksen

[1] The applicant, Narumon Pty Ltd, is the trustee of the John Giles Superannuation Fund, a self-managed superannuation fund established in 1992, of which the initial sole member was Mr John Giles. Mr Giles passed away on 14 June 2017, aged 80. He is survived by his wife, Mrs Narumon Giles, to whom he had been married for almost 19 years; their son Nicholas, who is currently 16; four adult children from his previous

marriage, Ms Patricia Giles, Mr Gregory Giles, Mr Anthony Giles and Ms Kelly Giles; and his sister, Mrs Roslyn Keenan.

[2] Mrs Giles is the sole director of the applicant, Narumon Pty Ltd. Up until recently, Mrs Keenan had also been a director, but resigned from that position on 15 June 2018.

[3] Narumon Pty Ltd has applied to the Court for certain declarations and orders in relation to the administration of the Fund, in order to resolve some uncertainties that have arisen.

[4] Mr Giles left a will dated 29 August 2013, appointing Mrs Giles and Mrs Keenan as executors and trustees. They have both renounced their right and title to probate and execution of the will (as well as an earlier will). An order was made by the Court on 18 July 2018 that a limited grant of administration be issued to Ms Angela Cornford-Scott, an accredited specialist in succession law.

[5] Mr Giles' estate has become the subject of litigation, following a family provision application made by one of his adult daughters in March 2018. The estate has an estimated net value of approximately $200,000; but the benefits accrued by Mr Giles as a member of the superannuation Fund, as at the time of his death, are significantly greater (comprising an accumulation account of about $1 million and a lifetime complying pension with a value of about $3 million).

[6] Mrs Giles and Mrs Keenan were appointed as the attorneys for Mr Giles pursuant to an enduring power of attorney made on 25 January 2013 and then again on 5 June 2013.[1] They were appointed as attorneys for financial and personal/health matters, with the power as to financial matters to begin "when I am assessed by a medical professional with at least 10 years' experience that I am incapable of making my own decisions".

[7] Mrs Giles says in her affidavit that in June 2013 Mr Giles' health began to deteriorate, and his memory was getting worse. They met with Dr Chau, a geriatric psychiatrist, in August 2013. In November 2013 Dr Chau assessed Mr Giles as being totally incapable of making financial, health and lifestyle decisions.[2] From this time, Mrs Giles and Mrs Keenan acted as his attorneys on his behalf.

[8] Mrs Giles and Mrs Keenan are also both members of the Fund.

[9] As Mrs Giles explains in her affidavit, she is seeking the declarations set out in the originating application because of uncertainty as to the appropriate steps that the applicant should take in the administration of the Fund, by reason of an issue concerning the execution of a 2007 deed of variation; missing documentation in relation to the initial establishment of Mr Giles' lifetime complying pension, and her

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1 Affidavit of Mrs Narumon Giles at exhibit NKG36 (p 460) and NKG37 (p 477).

2 Affidavit of Mrs Giles at exhibits p 459.

nomination as reversionary beneficiary of that pension; and the question whether a binding death benefit nomination signed by Mr Giles' attorneys in 2016 is valid and binding.

[10] Mrs Giles was present at court, but was not separately represented. Nicholas appeared at the hearing, by his litigation guardian, and did not oppose the relief sought in the application. Each of Mr Giles' four adult children were served with the application and supporting material, but did not appear or seek to be heard in relation to it. The person appointed to administer the estate of Mr Giles, Ms Cornford-Scott, indicated she would abide the order of the Court. The matter proceeded on the basis of the material filed by the applicant, and comprehensive submissions on the applicant's behalf.

First issue – declaration as to which deed contains the current terms of the Fund

[11] The Fund was established in 1992, for the purpose of providing superannuation benefits for its sole member, Mr John Giles. At that time, the trustee was Cookley Pty Ltd. The terms of the Fund were subsequently varied in 1995 and 1999. By a Deed of Appointment of New Trustee dated 12 May 2000, Cookley Pty Ltd resigned as trustee and Narumon Pty Ltd was appointed the new trustee. The terms of the Fund were again varied in 2004, by an amending deed executed on 1 July 2004. I accept that, having regard to the matters outlined in attachment 1 to the applicant's submissions, each of these steps was valid and effective. The amendment effected in 2004 was to replace all of the existing provisions of the Fund deed with the provisions set out in the 2004 amending deed.[3]

[12] The terms of the Fund were sought to be further varied by deed made on 29 June 2007. The applicant has drawn to the court's attention an issue regarding the execution of the 2007 variation deed, which arises because it was signed on behalf of the trustee company by Mr Giles only, stating that he was signing on behalf of the company as its "authorised representative".[4] He does not state that he is signing in his capacity as director and secretary of the company (which he was). Accordingly, the applicant submits that the 2007 variation deed has not been executed as a deed by the company in accordance with s 127(1)(b) and (3) of the *Corporations Act* 2001 (Cth); and it follows that it does not constitute an effective exercise of the power to amend the Fund deed. I accept that is so.

[13] There was, however, a further amendment of the Fund deed, in 2014, by a Deed of Ratification and Variation executed on 22 August 2014. One of the reasons for doing this was to fix the problem arising from the deficiently executed 2007 deed, which had by 2014 been noticed by the Fund's new accounting adviser, Mr Brett Griffiths of Vincents.[5]

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3 Affidavit of Mrs Giles at exhibits p 265.

4 Affidavit of Mrs Giles at exhibits p 322.

5 Affidavit of Mrs Giles at [30]-[31].

[14] Although the 2014 deed purports to ratify the execution of the 2007 deed, the applicant submits that it cannot, as a matter of law, have that effect.[6] The applicant submits the 2007 deed is of no effect, due to defective execution by the trustee company, but that nevertheless the 2014 deed did take effect as a valid exercise of the power to vary the terms of the Fund, relevantly found in clause 14 of the 2004 deed.[7] Although the recitals refer to the power to vary the trust deed by reference to the clause in the 2007 deed, the operative provision (clause 2 of the 2014 deed) does not refer to any particular provision, and I accept the applicant's submission that the variation effected by clause 2 of the 2014 deed appears to constitute a valid and effective variation, according to the power as it appeared in the 2004 deed.[8] As had occurred in 2004, in 2014 the terms of the Fund were varied by replacing all of its provisions with the provisions set out in annexure A to the 2014 deed (see clause 2.1 of the 2014 deed).[9]

[15] It follows that I am satisfied it is appropriate to make the first declaration sought, in paragraph 1(a) of the originating application, that the property of the John Giles Superannuation Fund, established by deed dated 21 February 1992 is currently held by the applicant on the terms of the document entitled "Deed of Ratification and Variation" executed on 22 August 2014.

Second issue – lifetime complying pension and reversionary pension

[16] The special purpose financial statements for the Fund show that, as at Mr Giles' death, he had an accumulation account and was in receipt of a lifetime complying pension, and that his spouse, Mrs Giles, was nominated as the reversionary beneficiary of that lifetime complying pension.[10]

[17] The documentation relating to the establishment of the pension, and the nomination of Mrs Giles as reversionary beneficiary, has not been able to be located. The solicitor for the applicant, Mr Hawkins, deposes to the extensive enquiries he has made, since early June 2018, in order to try to find this documentation, with no success.[11] Prior to that, from the time of Vincents' engagement as the applicant's adviser, in 2014, Mr Griffiths had made enquiries of the applicant's former advisers, in order to try to obtain all relevant documentation. The documentation he obtained did not include any documents in relation to the establishment of the lifetime complying pension or nomination of Mrs Giles as reversionary beneficiary.[12]

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6 See p 6 of attachment 1 to the applicant's submissions.

7 Affidavit of Mrs Giles at exhibits p 299.

8 See p 5 of attachment 1 to the applicant's submissions.

9 Affidavit of Mrs Giles at exhibits pp 412-446.

10 Affidavit of Mr Brett Griffiths at [13] and [14].

11 Affidavit of Mr Alexander Hawkins at [5]-[13].

12 Affidavit of Mr Griffiths at [22].

[18] Mr Griffiths also says he conducted a thorough search of documents relating to the Fund held in archive boxes at Mrs Giles' home, but did not find anything directly relating to the establishment of the pension. He did, however find correspondence between Mr Giles and a former adviser, dating back to 2000. That correspondence includes advice given to begin a complying pension for Mr Giles upon him reaching 65 years of age, with the nominated beneficiary of the pension to be Mrs Giles;[13] and then on 6 May 2005 information about the administration and compliance procedures required to implement the complying pension;[14] followed by correspondence of 30 April 2007 containing actuarial certification of, inter alia, the Fund's complying pension payment for the 2007 financial year.[15] Having regard to this, and other material shortly to be referred to, I accept what Mr Griffiths says in his affidavit (at [25]) that the documents support both the existence of a lifetime complying pension and the fact that such pension was reversionary to Mrs Giles. Mr Griffiths further states (at [26]) that the records held by Vincents do not contain anything that indicates that Mr Giles may have changed the terms of the lifetime complying pension or the nomination of Mrs Giles as reversionary beneficiary.

[19] Mr Griffiths also exhibits the adequacy statements of opinion for the Fund, including those from 1 December 2005 to the end of the financial year 30 June 2017, which also refer to a lifetime complying pension established for Mr Giles on 1 December 2005, of which his spouse is the reversionary beneficiary.[16] Mr Hawkins deposes to enquiries he made with the entity which prepared those documents in 2005, then called Bendzulla Actuarial Pty Ltd (now Accurium Pty Ltd), which did not result in location of the actual documentation, but did produce further material confirming the establishment of the lifetime pension, reversionary to Mrs Giles.[17] The material indicates that the valuation results in those actuarial reports also support the conclusion that the pension was reversionary to Mrs Giles, as the valuations would have been significantly different if it were not.[18]

[20] I accept, as Mr Griffiths explains at [32] of his affidavit, that the 2004 amending deed (which contains the terms of the Fund as at 1 July 2004) permitted the payment of a complying pension to a member (clauses 7.1 and 7.5).[19]

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[13] See, for example, exhibits BLG1 (p 2), BLG2 (p 4), BLG3 (pp 10-11), BLG5 (p 18) to the affidavit of Mr Griffiths.

[14] Exhibit BLG6 (p 22).

[15] Exhibit BLG7 (p 24).

[16] Exhibits BLG12 to BLG24 to the affidavit of Mr Griffiths (in particular at pp 168, 175, 183, 191, 199, 207, 216, 226, 238, 249, 259 and 269).

[17] Affidavit of Mr Hawkins at [8] and [9], and exhibits AJBH2 and AJBH3.

[18] See the email from Mr Doug McBirnie, general manager of Accurium, at exhibit AJBH2 to Mr Hawkins' affidavit (p 3) and paragraphs [39]-[40] and exhibit BLG25 (p 284) to Mr Griffiths' affidavit.

[19] Exhibit NKG20 to the affidavit of Mrs Giles, commencing at p 264.

[21] In the circumstances, I accept the applicant's submission that, despite the original documentation relating to the establishment of the pension not being available, there is sufficient evidence both of the establishment of the lifetime complying pension and of the nomination of Mrs Giles as the reversionary beneficiary of it. In the circumstances, I am satisfied it is appropriate to make the declarations sought in paragraphs 1(b), (c) and (d) of the originating application, to the effect that:

> (b) a lifetime complying pension was established with effect from 1 December 2005 payable to John Terrence Giles;
>
> (c) an effective nomination was made by Mr Giles of Mrs Narumon Giles, as reversionary beneficiary in respect of that pension; and
>
> (d) as a result of the death of Mr Giles, the applicant must continue to pay the pension to Mrs Narumon Giles as the reversionary beneficiary.

Third issue – binding death benefit nominations

[22] Mr Giles made five binding death benefit nominations between 2010 and 2013.[20]

1. By notice dated 23 February 2010 he directed payment of 100% of the death benefit to his wife, Mrs Giles.

2. By notice dated 18 December 2012 he directed payment of 40% to each of Mrs Giles and Nicholas, with the remaining 20% divided equally between his sister, Mrs Keenan, his former wife, and two of his adult children, Patricia and Gregory.

3. By notice dated 31 February 2013 he directed payment of 44% to each of Mrs Giles and Nicholas, with the remaining 12% to be paid to his legal personal representative, as trustee of his estate.

4. By notice dated 26 April 2013 he directed payment of 47.5% to each of Mrs Giles and Nicholas, with the remaining 5% to be paid to Mrs Keenan.

5. The final notice signed by Mr Giles was dated 5 June 2013 and was in the same terms as the previous one, directing the trustee of the Fund, after Mr Giles' death, to pay the benefits 47.5% to Mrs Giles, 47.5% to Nicholas and 5% to Mrs Keenan. This notice stated that it would cease to have effect 3 years after the date it was signed (which would be 5 June 2016).

[23] Mrs Giles says in her affidavit that she recalls discussing this issue with Mr Griffiths in early 2016, and also discussing with Mrs Keenan "whether we would, in our capacity as John's enduring attorneys, take steps to extend the 5 June 2013 BDBN. We agreed that we should do so because, in our view, those were still John's wishes" (at [38]).

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[20] Affidavit of Mrs Giles at [34] and exhibits pp 449-457.

[24] Accordingly, on 16 March 2016 Mrs Giles and Mrs Keenan, in their capacity as the attorneys for Mr Giles, signed a document entitled "extension of binding death benefit nomination", by which the binding death benefit nomination made by Mr Giles on 5 June 2013 was confirmed and extended for a further three year period (the **2016 extension**).[21]

[25] At the same time Mrs Giles and Mrs Keenan, again in their capacity as the attorneys for Mr Giles, also signed a (new) binding death benefit nomination, which nominated Narumon Giles and Nicholas Giles to each receive 50% of the benefit payable on Mr Giles' death (the **2016 BDBN**).[22] As explained in the applicant's submissions, the reason why this document was signed is because Mrs Keenan is not a "dependant" of Mr Giles, within the meaning of the term as it appears in the Fund deed or s 10 of the *Superannuation Industry (Supervision) Act* 1993 (Cth), and therefore is not eligible to receive a benefit following death.[23]

[26] In any event, on 25 June 2018 Mrs Keenan expressly disclaimed her interest and right to the 5% proportion of the benefit payable to her under the 2013 binding death benefit nomination, or the 2016 extension.[24]

Validity of the 2013 binding death benefit notice

[27] The first matter to determine is whether the 2013 binding death benefit notice signed by Mr Giles was valid. Clause 12 of the Fund deed (in the form it was following the 2004 amendment) deals with binding death benefit nominations. This is to be read with clause 7.12.1 of the deed, which directs the trustee to pay benefits to a "Nominated Beneficiary" on the death of the member.

[28] Clauses 12.1 and 12.2 provide as follows:

> "12.1 The Trustee may accept a notice from the Member requiring the Trustee to pay the Member's Benefits on the death of the Member to a person or persons specified in the notice who are the deceased Member's Dependants or the deceased Member's legal personal representative.
>
> 12.2 The notice shall be binding on the Trustee provided the following conditions are satisfied:
>
> (i) each person nominated in the deceased Member's binding death benefit nomination [*sic*];

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[21] Affidavit of Mrs Giles at [40] and exhibits pp 494-495B.

[22] Affidavit of Mrs Giles at exhibits pp 496-497.

[23] Cf reg 6.22 of the *Superannuation Industry (Supervision) Regulations* 1994 (Cth); clause 12.1 of the 2004 deed; clause 31.4 of the 2014 deed.

[24] Affidavit of Mrs Giles at exhibits p 501.

(ii) the allocation of Benefits is clear;

(iii) the nomination is in writing;

(iv) the nomination is signed and dated by the Member in the presence of two witnesses over age 18 and who are not nominated as Dependants or a legal personal representative;

(v) the notice contains a statement that the notice was signed by the Member in the presence of the witnesses;

(vi) the notice was signed by the Member within three years of the Member's death."

[29] Clause 12.5 provides that:

> "A binding death benefit notice may be in the form set out in Schedule E to this Deed or some other form that complies with the Superannuation Law."

[30] "Superannuation Law" is defined in clause 15.1 to mean "the SISA [*Superannuation Industry (Supervision) Act* 1993], the Superannuation Industry (Supervision) Regulations, the Tax Act [also separately defined] and any other laws or regulations that the Fund must comply with to be a regulated superannuation fund".

[31] Clause 7.12.1 provides that:

> "On the death of a Member who has a Nominated Beneficiary the Trustee shall pay the balance of the deceased Member's Benefit to the Nominated Beneficiary as a Lump Sum Benefit or as a Pension Benefit as the Trustee may determine."

[32] "Nominated Beneficiary" is defined in clause 15.1 to mean "a Dependant or other person nominated in writing by the Member to the Trustee in the form specified in the Superannuation Law for the mandatory payment of Death Benefits".

[33] The 5 June 2013 document signed by Mr Giles[25] is not in the form of schedule E to the Fund deed. It does appear, on its face, to comply with the (only potentially relevant) requirements in the Superannuation Law, namely reg 6.17A(4) and (6) of the *Superannuation Industry (Supervision) Regulations* 1994. However, that regulation is not one, it seems, that the Fund "must comply with", therefore it is arguably not within the meaning of "Superannuation Law" in clause 15.1 of the deed.[26]

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[25] Which appears at pp 495A-495B of the exhibits to Mrs Giles' affidavit.

[26] See *Munro v Munro* [2015] QSC 61; (2015) 306 FLR 93 at [39].

[34] In its primary submissions at the hearing of the application the applicant submitted it was arguable the formal requirements of reg 6.17A do apply.[27] However, in supplementary submissions provided after the hearing the applicant submitted it does not. This was on the basis of *Munro v Munro* (2015) 306 FLR 93, in which Mullins J held that s 59(1A) of the *Superannuation Industry (Supervision) Act* 1993 does not apply to self-managed superannuation funds and that, accordingly, reg 6.17A, which sets out the conditions for the purposes of s 59(1A) for the payment of a death benefit after the death of a member also does not apply, by virtue of the Act or the regulations, to a self-managed superannuation fund.[28] However, the applicant submitted that the requirements in reg 6.17A(6) are *imported* into the Fund deed, as a result of the definition of "Nominated Beneficiary" in clause 15.1 of the deed (to be read with clause 7.12.1).

[35] I agree with Mullins J's conclusion in *Munro v Munro* at [35]-[36], that s 59(1A) of the Act does not apply to a self-managed superannuation fund.[29]

[36] I have considered whether reg 6.17A applies in any event, but have ultimately come to the conclusion that it does not.

[37] Section 59 of the Act provides as follows:

> "(1) Subject to subsection (1A), the governing rules of a superannuation entity other than a self managed superannuation fund must not permit a discretion under those rules that is exercisable by a person other than a trustee of the entity to be exercised unless:
>
> (a) those rules require the consent of the trustee, or the trustees, of the entity to the exercise of that discretion; or
>
> (b) if the entity is an employer-sponsored fund:
>
> (i) the exercise of the discretion relates to the contributions that an employer-sponsor will, after the discretion is exercised, be required or permitted to pay to the fund; or
>
> (ii) the exercise of the discretion relates solely to a decision to terminate the fund; or
>
> (iii) the circumstances in which the discretion was exercised are covered by regulations made for the purposes of this subparagraph.
>
> (1A) Despite subsection (1), the governing rules of a superannuation entity

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[27] Applicant's submissions at [49].

[28] Applicant's supplementary submissions at annexure 2, paragraph 2.

[29] See also *Cantor Management Services Pty Ltd v Booth* [2017] SASCFC 122; (2017) 106 ATR 615 in which Kourakis CJ (with whom Peek and Nicholson JJ) at [30] expressed agreement with the conclusion in *Munro v Munro* that s 59 of the Act and reg 6.17A do not apply to self-managed superannuation funds.

> may, subject to a trustee of the entity complying with any conditions contained in the regulations, permit a member of the entity, by notice given to a trustee of the entity in accordance with the regulations, to require a trustee of the entity to provide any benefits in respect of the member on or after the member's death to a person or persons mentioned in the notice, being the legal personal representative or a dependant or dependants of the member.
>
> (2) If the governing rules of a superannuation entity are inconsistent with subsection (1), that subsection prevails, and the governing rules are, to the extent of the inconsistency, invalid."[30]

[38] Despite the absence of the words "other than a self managed superannuation fund" in both s 59(1A) and (2), as a matter of construction those words may readily be implied: firstly, because s 59(1A), commencing with the words "despite subsection (1)" is an exception, or proviso, to s 59(1); and secondly, because sub-s (2) is clearly directed to superannuation entities other than self-managed funds (that being the class of funds captured by s 59(1)).

[39] But in practical terms, all that this means is that the restriction in s 59(1) does not apply to the governing rules of a self-managed superannuation fund. There is therefore no scope for operation of the proviso in s 59(1A) – without reference to this provision, the governing rules of a self-managed superannuation fund may permit a member, by notice to the trustee, to require the trustee to provide benefits, on or after the member's death, to the person(s) mentioned in the notice. Further, there is not, by virtue of s 59 of the Act, a requirement for the trustee of a self-managed fund to comply with any conditions contained in the regulations, before a member may be permitted to give the requisite notice.

[40] However, apart from s 59:

1. s 55A(1) of the Act provides that the governing rules of a regulated superannuation fund must not permit a fund member's benefits to be cashed after the member's death otherwise than in accordance with standards prescribed for the purposes of s 31; and

2. s 31(1) of the Act provides that the regulations may prescribe standards applicable to the operation of regulated superannuation funds and to trustees of those funds. Section 31(2) sets out a broad, but non-exhaustive list of standards that may be prescribed, including standards relating to payment of benefits.

[41] The "payment standards" are contained in part 6 of the *Superannuation Industry (Supervision) Regulations*. Division 6.2 is headed "payment of benefits", and includes regs 6.17 (restriction on payment) and 6.17A (payment of benefit on or after death of

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[30] Underlining added.

member). Division 6.3 is headed "cashing of benefits".[31] Relevantly, within that division, reg 6.22(1)(a) and (2) provide that a member's benefits in a regulated superannuation fund must not be cashed in favour of a person other than the member or the member's legal personal representative unless the member has died and the benefits are cashed in favour of either or both of the member's legal personal representative or dependant(s). Whilst this provision defines the category of persons to whom benefits can be paid after death, it imposes no operating standard in terms of how that is to occur.[32]

[42] Regulation 6.17A is in the following terms:

> "**6.17A Payment of benefit on or after death of member (Act, s 59(1A))**
>
> (1) For subsections 31(1) and 32(1) of the Act, the standard set out in subregulation (4) is applicable to the operation of regulated superannuation funds and approved deposit funds.
>
> (2) For subsection 59(1A) of the Act, the governing rules of a fund may permit a member of the fund to require the trustee to provide any benefits in respect of the member, on or after the death of the member, to the legal personal representative or a dependant of the member if the trustee gives to the member information under subregulation (3).
>
> (3) The trustee must give to the member information that the trustee reasonably believes the member reasonably needs for the purpose of understanding the right of that member to require the trustee to provide the benefits.
>
> (4) Subject to subregulation (4A), and regulations 6.17B, 7A.17 and 7A.18,[33] if the governing rules of a fund permit a member of the fund to require the trustee to provide any benefits in accordance with subregulation (2), the trustee must pay a benefit in respect of the member, on or after the death of the member, to the person or persons mentioned in a notice given to the trustee by the member if:
>
> (a) the person, or each of the persons, mentioned in the notice is the legal personal representative or a dependant of the member; and

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[31] See also the definition of "cashed" in reg 5.01 as meaning "cashed in accordance with Division 6.3".

[32] See *Asgard Capital Management Ltd v Maher* [2003] FCAFC 156; (2003) 131 FCR 196 at [6]-[13] as to the meaning of reg 6.22.

[33] Regulation 6.17B imposes a duty on the trustee, where an item of information given by a member in a notice under reg 6.17A(4) is not clear, to seek clarification from the member. Regulations 7A.17 and 7A.18 are part of division 7A.3 dealing with splittable payments (arising from arrangements under the *Family Law Act* 1975) and are not relevant here.

(b) the proportion of the benefit that will be paid to that person, or to each of those persons, is certain or readily ascertainable from the notice; and

(c) the notice is in accordance with subregulation (6); and

(d) the notice is in effect.

(4A) The trustee is not required to comply with subregulation (4) if the trustee:

(a) is subject to a court order that has the effect of restraining or prohibiting the trustee from paying a benefit in respect of the member in accordance with a notice of the kind described in that subregulation; or

(b) is aware that the member of the fund is subject to a court order that:

(i) requires the member to amend or revoke a notice of that kind that the member has given the trustee; or

(ii) has the effect of restraining or prohibiting the member from giving a notice of that kind.

(5) A member who gives notice under subregulation (4) may:

(a) confirm the notice by giving to the trustee a written notice, signed, and dated, by the member, to that effect; or

(b) amend, or revoke, the notice by giving to the trustee notice, in accordance with subregulation (6), of the amendment or revocation.

(6) For paragraphs (4)(c) and (5)(b), the notice:

(a) must be in writing; and

(b) must be signed, and dated, by the member in the presence of 2 witnesses, being persons:

(i) each of whom has turned 18; and

(ii) neither of whom is a person mentioned in the notice; and

(c) must contain a declaration signed, and dated, by the witnesses stating that the notice was signed by the member in their presence.

(7) Unless sooner revoked by the member, a notice under subregulation (4) ceases to have effect:

(a) at the end of the period of 3 years after the day it was first signed, or last confirmed or amended, by the member; or

(b) if the governing rules of the fund fix a shorter period—at the end of that period."[34]

[43] Subregulation (1) (and therefore (4) to (7)) is expressed to be made under s 31 as an operating standard applicable to regulated superannuation funds (which, as defined in s 19 of the Act, would include a self-managed superannuation fund). Subregulation (2) (and therefore (3)) is expressed to be made under s 59(1A), and defines the conditions the trustee must comply with before a member may give a notice.[35] Having regard to the express terms of reg 6.17A(1), and the requirements of ss 55A and 31 of the Act, I considered whether the object of reg 6.17A is not only to provide an operating standard for payment of benefits after a member's death for funds covered by s 59; but more broadly for all regulated funds. If this were the proper construction of reg 6.17A(1), then the notice requirements in sub-regs (4) and (6) would apply (as would the ability of a member to confirm, amend or revoke such a notice, under sub-reg (5)).

[44] But there is a tension between the express words of reg 6.17A(1) (that the operating standard in reg 6.17(4) applies to the operation of (arguably all) regulated superannuation funds) and the reference within reg 6.17(4) to the governing rules of the fund permitting a member to require the trustee to provide the benefits "in accordance with subregulation (2)". Subregulation (2) unequivocally relates only to s 59. On balance, although in my view both s 59(1A) and reg 6.17A(1) are unnecessarily and unhelpfully ambiguous, the better construction of reg 6.17A is that it applies only to the payment of benefits on or after death under the governing rules of a fund to which s 59 applies. It does not, therefore, apply to a self-managed superannuation fund. 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.[36]

[45] As to whether the notice requirements under reg 6.17A(6) are "imported" by virtue of the definition of "Nominated Beneficiary" in clause 15.1 of the deed, I prefer the reasoning of Mullins J in *Munro v Munro* at [39][37] to that of Fryberg J in *Donovan v Donovan* [2009] QSC 26 at pp 10-11.[38] The wording of the definition of

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[34] Underlining added.

[35] See the discussion by Blue J in *Retail Employees Superannuation Pty Ltd v Pain* [2016] SASC 121; (2016) 115 ACSR 1 at [494]-[515], of the ambiguities and uncertainties created by the drafting of reg 6.17A (albeit in that case in the context of a fund to which the regulation plainly did apply) and his Honour's suggestions for legislative reform (which are adopted by the Australian Law Reform Commission, in its report "Elder Abuse – A National Legal Response", recommendation 7-1).

[36] See again *Cantor Management Services Pty Ltd v Booth* at [30].

[37] That, as the "Relevant Requirements" (the equivalent term to "Superannuation Law" in the present deed) were defined as requirements only if they apply to the fund, they did not import reg 6.17A which did not apply to the fund.

[38] That the term "Statutory Requirements", in that case defined to mean "the requirements imposed under any law or by any Statutory Authority which must be satisfied by **a** superannuation fund in order to qualify for income tax concessions…" (at p 8) was one of "general import", not referring to requirements which must be

"Superannuation Law" in the deed in this case, like the wording of "Relevant Requirements" in the deed under consideration in *Munro v Munro*, refers to laws or regulations "that the Fund must comply with to be a regulated superannuation fund". Regulation 6.17A is not such a law or regulation.

[46] In any event, the nomination form signed by Mr Giles on 5 June 2013 is valid. Clause 12.5 provides that a binding death benefit notice *may* be in a certain form. The use of the word "may" suggests that, objectively, the intention of the parties to the deed was that strict compliance with a particular form was not required.[39] The relevant substantive requirements for a valid and binding notice are contained in clause 12.2.

[47] It is apparent that there are some words missing from clause 12.2(i) (see paragraph [28] above). Having regard to ss 55A and 31 of the Act, and reg 6.22(1)(a) and (2), it is appropriate to read the following words into that clause:

> "each person nominated in the deceased Member's binding death benefit nomination <u>is either the legal personal representative or a dependant of the Member</u>".[40]

[48] It may otherwise be observed that the conditions in clause 12.2 in essence reflect the requirements of reg 6.17A(4) and (6). Subject to the matter next discussed, the nomination signed by Mr Giles in June 2013 complies with clause 12.2.

[49] The one issue that arises in relation to the nomination signed by Mr Giles in June 2013 is that Mrs Keenan is not, and was not at the time of the 2013 nomination, a dependant of Mr Giles. The applicant submits that this does not affect the validity of the nomination as a whole. She was, of course, one of Mr Giles' legal personal representatives (being one of the executors of Mr Giles' estate[41]), but the nomination was not of her in this capacity. Having regard to reg 6.22 and clauses 12.1 and 12.2 of the 2004 deed, the applicant's submission seems to me to be correct. The scope of the power of a member to require the trustee to pay the member's benefits, following the member's death, is limited to requiring payment to persons who are the member's dependants or their legal personal representative. If a member gives a notice to the trustee, nominating a person who is not a dependant, or legal personal representative, 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.

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satisfied by the particular superannuation fund the subject of that case, and therefore it was plain, his Honour found, that the intent of the deed was to require a (death benefit) nomination to be in the form prescribed in reg 6.17A(6).

[39] See generally, as to the principles of construction which apply, *FSS Trustee Corporation v Eastaugh* [2017] VSCA 218 at [61] and *Re Bundaberg Sugar Superannuation Pty Ltd as trustee of the Bundaberg Sugar Ltd Superannuation Plan* [2014] QSC 118 at [8]-[10].

[40] See also schedule 1, clause 1.2 of the 1999 deed (affidavit of Mrs Giles at p 246), being the version of the deed in place prior to the 2004 deed.

[41] Affidavit of Mrs Giles at [50], referring to each of the wills made by Mr Giles.

[50] Although it could be open to construe clause 12.2(i) as having the effect that a notice given by a member is not binding on the trustee if any person nominated in it is not a dependant or (nominated in the capacity of) legal personal representative, in my view adopting a practical and purposive approach, the preferable construction of clause 12.2(i) is that the notice is binding on the trustee to the extent that the person(s) nominated in it is the deceased member's dependant or legal personal representative.

Validity of the 2016 extension and/or the 2016 BDBN

[51] The next question is whether Mrs Giles and Mrs Keenan, as attorneys for Mr Giles, had the power to make the 2016 extension (confirming the 2013 nomination) or the 2016 BDBN, for Mr Giles.

[52] For the purposes of addressing this issue it is necessary to have regard to the Fund deed as it was following the 2014 variation.

[53] The 2013 binding death benefit nomination was still operative at the time of the 2014 variation. By clause 2.4 of the 2014 deed of ratification and variation, "[a]ny binding death benefit nomination made prior to the date of this deed is still valid as though it was made using the terms of this deed".[42] The 2013 notice was, however, no longer operative at the time of Mr Giles' death (which was more than three years after he signed the notice).

[54] Whether the attorneys had power to confirm the 2013 nomination, or make a new one, depends upon consideration of the terms of the Fund deed, the statutory provisions governing an enduring power of attorney under the *Powers of Attorney Act* 1998 (Qld), and the relevant Commonwealth superannuation legislation.

[55] This is an issue that has been considered by the Australian Law Reform Commission, in its report "Elder Abuse – A National Legal Response", at section 7;[43] but I was informed by counsel for the applicant (and my own research endeavours confirm) that it has not previously been the subject of judicial consideration.[44]

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[42] Affidavit of Mrs Giles at p 407.

[43] See https://www.alrc.gov.au/sites/default/files/pdfs/publications/fr131_07_superannuation.pdf (paragraphs [7.66] to [7.86]).

[44] The applicant referred the court to one decision of the Superannuation Complaints Tribunal in which it was accepted that an enduring power of attorney permitted the attorney to complete and sign a binding death benefit nomination for the principal/member, but without any detailed discussion: D07-08\030 [2007] SCTA 93 at [34]. Cf *Re Tracey* [2016] QCA 194; [2017] 2 Qd R 35 in relation to the scope of the power of a financial administrator appointed under the *Guardianship and Administration Act* 2000 (Qld) for a person under a legal disability.

[56] The relevant terms of the 2014 deed include the following:

1. Clause 5.4 provides:

> "Any power or right given to a Member, a Pensioner or Beneficiary in this deed (including, without limiting this clause, powers and rights given to a Member under clauses 10 and 14) can be exercised by:
>
> …
>
> (b) if the person is under a legal disability, the trustee of the estate of the person, or any person who holds an enduring power of attorney from the person (in accordance with the terms of the appointment); and
>
> (c) any person who holds an enduring power of attorney from the person (in accordance with the terms of the appointment)."

2. Clauses 31.2 to 31.5 enable a member to give the trustee a document (the nomination) in which the member requires the trustee to pay a benefit payable on their death, as specified in the nomination:

> "**Binding nominations of Dependants**
>
> 31.2 Despite any provision in this deed to the contrary other than clause 29.3,[45] a Member, former Member or Beneficiary (the nominator) may give the Trustee a document (the nomination) in which the nominator requires the Trustee to pay a Benefit payable on the death of the nominator as specified in the nomination.
>
> 31.3 The nominator may stipulate that the nomination will remain in force for a particular period, but if no period is specified in the nomination, it remains in force until the nominator gives notice to the Trustee revoking the nomination.
>
> 31.4 If the Trustee has received a nomination that:
>
> (a) is signed by the nominator;
>
> (b) specifies that a Benefit is to be paid to one or more Dependants or the legal personal representative of the nominator;
>
> (c) states the nomination is binding on the Trustee; and
>
> (d) is not in breach of Relevant Requirements,[46]

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[45] Clause 29.3 deals with payment of a reversionary pension following the member's death.

[46] "Relevant Requirements" is defined in clause 4 to mean "any requirements (including provisions of the SIS Act) that the Trustee or the deed must comply with to avoid a contravention of the requirements or in order

then the Trustee must pay a Benefit payable on the death of the nominator in accordance with the nomination unless:

(e) the Trustee has received a written revocation before the death of the nominator;

(f) the nomination has lapsed either under the terms of the nomination or as a result of the operation of the Relevant Requirements;

(g) the Nominated Dependant has died before the date of payment;

(h) the Trustee considers it would be in breach of the Relevant Requirements if it pays the Benefit in accordance with the nomination;

(i) the Trustee is required to pay a Pension to a Reversionary Beneficiary under clause 29.3(b), to the extent the Trustee is required to pay the Pension to the Reversionary Beneficiary; or

(j) a Nominated Dependant disclaims the benefit under the nomination, in which case the Trustee does not need to comply with the nomination to the extent of the disclaimer.

31.5 If:

(a) the Trustee must pay a Benefit in accordance with a nomination under this clause; and

(b) the nomination specifies the form in which the Benefit is to be paid or other terms on which the Benefit is to be paid,

the Trustee must pay the Benefit in the form and on the terms specified in the nomination provided the Trustee is not prohibited from doing so."

[57] Having regard to the terms of both the 2004 deed and the 2014 deed, it seems there is no express power to "confirm" or "extend" the nomination signed by Mr Giles in June 2013. Although the 2013 notice states (at note 3 on page 2) that "[u]nless sooner revoked by [Mr Giles], this Notice ceases to have effect at the expiration of the period of 3 years after the day it was first signed, or last confirmed or amended by [Mr Giles]", there was no power, under clause 12 of the 2004 deed, to "confirm" a notice. Clause 12.2(vi) provided that one of the conditions for the notice to be binding on the trustee is "the notice was signed by the Member within three years of the Member's death".

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for the Fund to qualify for concessional Taxation treatment as a Complying Superannuation Fund, and includes Part VIIIA of the *Family Law Act 1975* and the *Family Law (Superannuation) Regulations 2001*".

Under clause 12.3, the notice could be revoked or amended, by another notice satisfying the conditions in clause 12.2. There is no reference in clause 12.3 to "confirming" or "extending" such a notice. Nor is there any such power under the 2014 deed. This may be contrasted with reg 6.17A(5)(a), which provides that a member who gives a notice under sub-reg (4) may confirm the notice by giving the trustee a written notice to that effect. But that does not apply to the Fund.

[58] But this is of limited practical consequence. The effectiveness of both the 2016 extension and the 2016 BDBN will depend, apart from the question of the power of the attorneys, upon whether the requirements of clauses 31.2 to 31.4 of the 2014 deed are met. As there is not a separate power to confirm or extend an existing nomination, in order to be valid and binding on the trustee, either document has to comply with clauses 31.2 to 31.4. The question of the attorneys' power applies to both. It is to that issue that I now turn.

Can the attorneys sign a nomination under clause 31.4 for Mr Giles?

[59] There is nothing in the Fund deed itself which would prohibit an attorney signing a nomination for the member. On the contrary, clause 5.4(b) of the 2014 deed expressly contemplates that any power or right given to a member may, if the person is under a legal disability, be exercised by a person who holds an enduring power of attorney from the person, in accordance with the terms of the appointment.

[60] Nor does there appear to be any restriction in the *Superannuation Industry (Supervision) Act* or *Regulations* which would prevent an attorney, under an enduring power of attorney, from executing such a nomination on behalf of a member (noting also that this is consistent with the conclusion reached above that it is the terms of the Fund deed which govern the exercise of the right of a member to give a binding nomination).

[61] The answer to this question therefore depends upon construction of the relevant provisions of the *Powers of Attorney Act*.

[62] Section 32 of the *Powers of Attorney Act* provides as follows:

> "**32 Enduring powers of attorney**
>
> (1) By an ***enduring power of attorney***, an adult (***principal***) may –
>
> (a) authorise 1 or more other persons who are eligible attorneys (***attorneys***) to do anything in relation to 1 or more financial matters or personal matters for the principal that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised; and

(b) provide terms or information about exercising the power.

(2) An enduring power of attorney giving power for a matter is not revoked by the principal becoming a person with impaired capacity for the matter."[47]

[63] The things that a principal could lawfully do by an attorney are constrained to some extent by the general law, principles which are reflected in the legislation. So, for example, a principal cannot delegate to an attorney a criminal act; nor can a principal delegate to an attorney an act which, by its nature, public policy, statute or contract, requires personal performance.[48] Examples of such personal acts, performance of which cannot be delegated to an attorney, can be seen in the definition of "special personal matter" in s 3 of schedule 2 to the *Powers of Attorney Act*:

(a) making or revoking the principal's will;

(b) making or revoking a power of attorney, enduring power of attorney or advance health directive of the principal;

(c) exercising the principal's right to vote in an election or referendum;

(d) consenting to adoption of a child of the principal under 18 years;

(e) consenting to marriage of the principal;

(f) & (g) consenting to the principal entering into or terminating a civil partnership;

(h) & (i) entering into a surrogacy arrangement, or consent to the making or discharge of a parentage order under the *Surrogacy Act 2010*.

[64] As s 32(1)(b) makes clear, a principal can expressly provide for terms or information about the exercise of the power of attorney conferred by them. A principal can also specify a time when, circumstance in which or occasion on which a power for a financial matter is exercisable (s 33(1)). Section 77 provides that, "[t]o the extent an enduring document does not state otherwise, an attorney is taken to have the maximum power that could be given to an attorney by the enduring document".

[65] In this case, under the enduring power of attorney executed by Mr Giles on 5 June 2013[49] he appointed Mrs Giles and Mrs Keenan, jointly, as his attorneys for financial and personal/health matters. He did specify the time when the attorneys' power to make decisions about financial matters was to begin (when he was assessed by a

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47 Underlining added.

48 G E Dal Pont, *Powers of Attorney* (Lexis Nexis, 2nd ed, 2015) at [5.20] to [5.29].

49 Affidavit of Mrs Giles, commencing at p 477 (the earlier enduring power of attorney, executed on 25 January 2013, is in the same terms, commencing at p 460).

medical professional with at least 10 years' experience as being incapable of making his own decisions). He did not otherwise specify any terms for the power so given to the attorneys.

[66] The first question is whether the execution of a binding death benefit nomination in a superannuation context is a "financial matter", authority for which may be delegated to an attorney.

[67] Financial matter is defined in s 1 of schedule 2 to the Act, as follows:

> "A ***financial matter***, for a principal, is a matter relating to the principal's financial or property matters, including, for example, a matter relating to 1 or more of the following –
>
> (a) paying maintenance and accommodation expenses for the principal and the principal's dependants, including, for example, purchasing an interest in, or making another contribution to, an establishment that will maintain or accommodate the principal or a dependant of the principal;
>
> (b) paying the principal's debts, including any fees and expenses to which an administrator is entitled under a document made by the principal or under a law;
>
> (c) receiving and recovering money payable to the principal;
>
> (d) carrying on a trade or business of the principal;
>
> (e) performing contracts entered into by the principal;
>
> (f) discharging a mortgage over the principal's property;
>
> (g) paying rates, taxes, insurance premiums or other outgoings for the principal's property;
>
> (h) insuring the principal or the principal's property;
>
> (i) otherwise preserving or improving the principal's estate;
>
> (j) investing for the principal in authorised investments;
>
> (k) continuing investments of the principal, including taking up rights to issues of new shares, or options for new shares, to which the principal becomes entitled by the principal's existing shareholding;
>
> (l) undertaking a real estate transaction for the principal;
>
> (m) dealing with land for the principal under the *Land Act 1994* or *Land Title Act 1994*;
>
> (n) undertaking a transaction for the principal involving the use of the principal's property as security (for example, for a loan or by way of a

guarantee) for an obligation the performance of which is beneficial to the principal;

(o) a legal matter relating to the principal's financial or property matters;

(p) withdrawing money from, or depositing money into, the principal's account with a financial institution."

[68] A "legal matter" for a principle is defined in s 18 of schedule 2 as follows:

"A ***legal matter***, for a principal, includes a matter relating to –

(a) use of legal services to obtain information about the principal's legal rights; and

(b) use of legal services to undertake a transaction; and

(c) use of legal services to bring or defend a proceeding before a court, tribunal or other entity, including an application under the *Succession Act 1981,* part 4 or an application for compensation arising from a compulsory acquisition; and

(d) bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding."

[69] The effect of a binding death benefit nomination, if valid, is to bind the trustee of the superannuation fund to pay benefits, following the member's death, to the nominated persons (and, if relevant, to do so in the nominated way). That does not seem to fall within any of the examples in the definition of a financial matter, including as a legal matter relating to the principal's financial matters. But the examples given are not exhaustive and do not limit the meaning of the provision.[50] It is difficult to see why the exercise of a member's right under a self-managed superannuation fund deed, to require the trustee of the fund to pay benefits, after their death, in a particular way would not be "a matter relating to the [member's] financial … matters". Given the breadth of meaning of the word "financial" (of, pertaining, or relating to finance or money matters[51]) such an act does fall within the meaning of this term.

[70] The next question is whether there is any reason, arising from the *Powers of Attorney Act* itself, or as a matter of general law, to conclude that such an act is one that must be performed personally.

[71] Although the making of a binding death benefit nomination under a superannuation fund has the effect of dealing with payment of benefits following death, it is not a

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[50] See s 14D of the *Acts Interpretation Act* 1954 (Qld); *Re Tracey* at [22].

[51] Oxford English Dictionary (online).

testamentary act,[52] and so is not captured, by analogy, by the restriction against delegating to an attorney the making of a will.

[72] There is no contractual restriction, in this Fund's deed, against delegating the exercise of such a power to an attorney. This is expressly contemplated by clause 5.4 of the 2014 deed.

[73] Relevant public policy considerations are discussed in the Australian Law Reform Commission's report in relation to "Elder Abuse", including the potential for pressure to nominate a dependant, or prefer a particular dependant over others; contriving a nomination to the estate, so that the superannuation benefits are governed by the will or intestacy; and the difficulty of proving or disproving such things, after the death of the principal.[53] The report identifies that the potential for elder abuse in the context of pressure to make a binding death benefit nomination may occur through two means: the exercise of influence to have the older person make, or alter, a death benefit nomination in the trusted person's favour; or seeking to make a death benefit nomination under the supposed authority of a power of attorney.[54] At [7.4] the report states that:

> "The ALRC considers that BDBNs should be seen to be 'will-like' in nature, and, from a policy perspective, treated similarly to wills. There is much uncertainty and ambiguity concerning BDBNs of superannuation funds, particularly whether an enduring attorney may sign a BDBN on behalf of a member. The ALRC has therefore concluded that these uncertainties and ambiguities need to be resolved in a focused review of the provisions to establish the clear ambit of the legislative provisions and their relationship to superannuation trust deeds. …"

[74] The ALRC report articulates a policy position that an attorney under an enduring power, by virtue of that power alone, should not be able to make a binding death benefit nomination for a member of a superannuation fund.[55] The report acknowledges the distinction between *making* such a nomination, as opposed to *renewing* or *confirming* a nomination previously made by the member, thus continuing "the autonomous choice of the member".

[75] In terms of the potential for abuse, there are a number of protective features within the *Powers of Attorney Act*, including: who can be an eligible attorney under an enduring power (ss 29 and 43); the requirement for the principal to have capacity and understanding of the nature and effect of an enduring power (s 41); the requirement for

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[52] *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 at [75].

[53] ALRC report at [7.35]-[7.38].

[54] ALRC report at [7.3].

[55] ALRC report at [7.67] to [7.86] and [7.94].

witnessing by an eligible witness (ss 31 and 44(3) and (4)); the prohibition, in the face of a civil penalty, on dishonestly inducing a person to make or revoke an enduring document (s 61); the obligation on an attorney to exercise the power honestly and with reasonable diligence to protect the principal's interests (s 66); and the restriction against an attorney entering into a conflict transaction, without the authorisation of the principal (s 73). In this case, there is the added protection of having appointed two attorneys, who are required to act jointly (consistently with s 78).

[76] The requirement to avoid a conflict transaction, unless authorised by the principal, is an important protective feature in the present context. In this regard, s 73 of the Act provides as follows:

> "**Avoid conflict transaction**
>
> (1) An attorney for a financial matter may enter into a conflict transaction only if the principal authorises the transaction, conflict transactions of that type or conflict transactions generally.[56]
>
> (2) A ***conflict transaction*** is a transaction in which there may be conflict, or which results in conflict, between –
>
> (a) the duty of an attorney towards the principal; and
>
> (b) either –
>
> (i) the interests of the attorney, or a relation, business associate or close friend of the attorney; or
>
> (ii) another duty of the attorney.
>
> *Examples –*
>
> 1 A conflict transaction happens if an attorney for a financial matter buys the principal's car.
>
> 2 A conflict transaction does not happen if an attorney for a financial matter is acting under section 89 to maintain the principal's dependants.
>
> (3) However, a transaction is not a conflict transaction merely because by the transaction the attorney in the attorney's own right and on behalf of the principal –
>
> (a) deals with an interest in property jointly held; or
>
> (b) acquires a joint interest in property; or
>
> (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).
>
> (4) In this section –

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[56] Underlining added.

> ***joint interest*** includes an interest as a joint tenant or tenant in common."

[77] Under the enduring power executed on 5 June 2013 Mr Giles did not authorise his attorneys to enter into a conflict transaction, of any particular kind or type, or generally.

[78] Initially, I was inclined to the view that the transaction by which the attorneys signed the 2016 documents may be a "conflict transaction" within the meaning of s 73(2) because both documents reflect a transaction in which there may be a conflict between:

1. the duty of an attorney, Mrs Giles, towards the principal, and the interests of Mrs Giles, and her son, Nicholas; and/or

2. the duty of an attorney, Mrs Keenan, towards the principal, and the interests of Mrs Keenan,

in so far as the 2016 documents authorise the payment of benefits under Mr Giles' superannuation fund, on his death, to Mrs Giles, her son and, in the case of the 2016 extension, Mrs Keenan.

[79] However, on closer consideration, for the following reasons, at least in so far as the 2016 extension is concerned, in my view there is no such conflict in the circumstances of this case.

[80] The relevant principles are summarised in *Reilly v Reilly* [2017] NSWSC 1419 at [114]-[117] where Lindsay J said:

> "114 The primary object of a power of attorney is to enable the attorney to act in the management of his or her principal's affairs; an attorney cannot, in the absence of a clear power so to do, make presents to himself or herself or to others of his or her principal's property: *Tobin v Broadbent* (1947) 75 CLR 378 at 401 (quoting *Reckitt v Barnett Pembroke and Slater Limited* [1928] 2 KB 244 at 268, approved in the House of Lords [1929] AC 176 at 183 and 195), recently applied by the Full Court of the Federal Court of Australia in *Great Investments Limited v Warner* (2016) 243 FCR 516 at 538 [85].
>
> 115 Under the general law of agency it is a breach of duty for an agent to exercise his or her authority for the purpose of conferring a benefit on himself or herself or upon some other person to the detriment of his or her principal. But, at the same time, if his or her act is otherwise within the scope of his authority it binds the principal in favour of third parties who deal with him *bona fide* and without notice of his fraud: *Richard Brady Franks Limited v Price* (1937) 58 CLR 112 at 142.

> 116 Where a fiduciary (such as an agent) exercises a power which results in his or her obtaining some incidental benefit, there may be nothing *per se* improper with his or her having that benefit if the benefit itself is, in the circumstances, an inevitable consequence of his or her properly exercising the power which produces it. A beneficiary (principal) may be able to upset such an exercise of power only if he or she can show that the fiduciary (agent) exercised it with the dominant purpose in mind of obtaining that benefit irrespective of the interests of his beneficiary (principal)…
>
> 117 These general law principles apply in the current proceedings…"[57]

[81] The applicant relied on [116] of *Reilly* in particular, submitting that the 2016 documents (or either of them) are not a conflict transaction because the reason for executing them was to ensure continuity in Mr Giles' estate planning and, to the extent possible, ensure that his wishes in respect of the distribution of the benefits continued to have effect. It was submitted the respective duties of the attorneys towards the principal, and their interests, coincide rather than conflict. In the circumstances of this case, I accept that submission.

[82] It is clear that Mr Giles had wished to avail himself of the right to bind the trustee to pay benefits payable on his death as he directed. He had completed five binding nominations over the course of the previous three to four years, prior to being assessed as lacking capacity in November 2013, with the last being in June 2013.[58] Those notices consistently nominated payment of the majority of any available benefits to Mrs Giles and her son. The terms of the June 2013 nomination are also reflected in Mr Giles' will dated 29 August 2013 (which I note is witnessed by Dr Chau and Mr Griffiths).[59]

[83] Mrs Giles and Mrs Keenan were appointed jointly as the attorneys for Mr Giles. They acted jointly, in executing the 2016 documents, in circumstances where, as can be seen from Mrs Keenan's subsequent renunciation, she did not wish to benefit from the nomination.

[84] Although Mrs Giles and her son benefit from the extension of the binding death benefit nomination executed by Mr Giles in 2013 that is not in circumstances where there is any conflict, between the interest of Mrs Giles in that regard, and the duty that she owed as attorney to Mr Giles. It is consistent with that duty that the exercise of autonomy by Mr Giles, demonstrated by his own actions up to and including in June 2013, is enabled rather than defeated. I see no reason, on the material before me, not to accept what Mrs Giles says at [38] of her affidavit, that she and Mrs Keenan agreed that

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[57] Underlining added; some references omitted.

[58] See paragraph [22] above.

[59] Affidavit of Mrs Giles at exhibits pp 553 and 555.

they should execute the 2016 documents "because, in our view, those were still John's wishes".

[85] In this case, by the 2016 extension, the attorneys did no more than confirm the nomination made by Mr Giles himself. Notwithstanding that involves a benefit conferred on one of the attorneys, Mrs Giles, and her son, in the circumstances of this case I am satisfied that is not a conflict transaction – as it is not a transaction in which there is, or may be, a conflict between the duty of the attorney towards the principal, and the interests of the attorney.

[86] Accordingly, the fact that in this case the enduring power of attorney executed by Mr Giles did not expressly authorise his attorneys to enter into conflict transactions, generally or of a specific type, does not matter.

[87] I also take into account, as noted at the outset, that the other interested parties were all served with this application and (apart from Nicholas, who appeared by a litigation guardian, and did not oppose the relief sought) they did not appear or seek to be heard.

[88] I am satisfied that the 2016 extension complies with clauses 31.2 to 31.4 of the 2014 deed. As I have found it was within the scope of the attorneys' power to sign the 2016 extension, it follows that I am satisfied it is appropriate to make an order to the effect of paragraph 1(f) of the originating application.

[89] There is a distinction between that, and the making of the 2016 BDBN, because it does represent an, albeit small, change to what Mr Giles had proposed. 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;[60] and in any event, whether the act was nevertheless one "on behalf of" and in the interests of the principal.[61]

[90] Although counsel for the applicant submitted that a transaction entered into in breach of s 73 (that is, a conflict transaction, not authorised by the principal) would not be invalid, but rather expose the attorney to personal liability for compensation, I do not accept that. In my view execution of a death benefit nomination by an attorney, in circumstances of actual or potential conflict contrary to s 73, in the absence of authorisation from the principal, could result in a declaration of invalidity of the

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[60] See *Siahos v J P Morgan Trust Australia Ltd* [2009] NSWCA 20 at [22].

[61] Cf *Smith v Glegg* [2004] QSC 443; [2005] 1 Qd R 561 at [59] and [60].

nomination.[62] If in doubt, an attorney could prospectively approach the court for directions, under s 118.[63] However, given the conclusion I have reached, in relation to the 2016 extension, it is unnecessary to address these matters further.

[91] Adopting what I regard as an appropriately conservative approach to this issue, I am not persuaded it is appropriate to make the declaration sought in paragraph 1(e) of the originating application, giving effect to the 2016 BDBN, as it could be said, in light of the change, that it is a conflict transaction for which there was no authorisation from the principal. However I do consider it appropriate to grant the relief sought, giving effect to the 2016 extension, for the reasons already articulated.

[92] The effect of this will be that the trustee will be required to act on the direction to pay any death benefits, that are not otherwise payable to Mrs Giles as a reversionary pension (see clause 31.4(i) of the 2014 deed), in accordance with Mr Giles' wishes, as expressed by him personally in the June 2013 binding death benefit nomination, and confirmed by him, by his attorneys, in the 2016 extension. Since Mrs Keenan is not a dependant, the nomination of 5% of such benefits to be paid to her will not be binding on the trustee, and it will be a matter for the trustee to deal with that 5% in accordance with clause 31.1 of the 2014 deed.

Proposed orders

[93] The orders I propose to make, subject to any further submissions as to the form of the orders (given that they vary in some minor respects from those sought in the originating application) are as follows:

1. It is declared that:

   (a) the property of the John Giles Superannuation Fund, established by deed dated 21 February 1992 (the Fund) is currently held by the applicant on the terms of the document entitled "Deed of Ratification and Variation" executed on 22 August 2014 (the 2014 Deed);

   (b) in accordance with clauses 7.1 and 7.5 of the Fund's deed of variation dated 1 July 2004 (the 2004 Deed) a lifetime complying pension (the Pension) was established with effect from 1 December 2005 payable to John Terrence Giles, a member of the Fund (the Member);

   (c) an effective nomination was made by the Member of Narumon Karnjanavaha Giles as reversionary beneficiary in respect of the Pension;

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[62] On the basis of a lack of authority; see again *Siahos v JP Morgan Trust Australia Ltd.*

[63] See, for example, *Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban* [2011] QSC 380 at [29].

(d) as a result of the death of the Member, the applicant must continue to pay the Pension to Narumon Karnjanavaha Giles as the reversionary beneficiary in accordance with clause 7.9 of the 2004 Deed and clause 29.3 of the 2014 Deed; and

(e) the document entitled "Extension of binding death benefit nomination" executed by the Member by his enduring attorneys Narumon Giles and Roslyn Keenan and dated 16 March 2016 (the 2016 Extension) constitutes, in accordance with clause 31.2 of the 2014 Deed, an effective binding nomination for the payment of the Member's benefit made in accordance with clause 31.2 of the 2014 Deed, and the applicant must:

(i) in accordance with clause 31.4 of the 2014 Deed pay in accordance with the terms of the 2016 Extension all death benefits payable in respect of the Member that are not otherwise payable to Narumon Karnjanavaha Giles as a reversionary pension, as to 47.5% thereof to Narumon Karnjanavaha Giles and as to 47.5% thereof to Nicholas Terrence Giles; and

(ii) as to the remaining 5% thereof, pay or apply that in accordance with clause 31.1 of the 2014 Deed.

[94] As to the costs of this application, I accept the applicant's submission that it is appropriate to order that:

2. The applicant's costs be paid, on the indemnity basis, from the Fund.