9. Wills

Contents

Summary

9.1 Pressuring older people to change their wills and to make superannuation death benefit nominations in ways to benefit those exerting that influence are examples given of financial abuse, both in general guidelines on elder abuse and raised by stakeholders in this Inquiry. This chapter considers how best to prevent and respond to such examples of abuse.

Pressure to change wills and financial abuse

9.2 A number of guidelines about elder abuse in Australia include the use of pressure to make or change a will as an example of financial abuse. For example, the Department of Family & Community Services (NSW) published an interagency policy that included the following definition of financial abuse:

> Financial abuse is the illegal or improper use of an older person's property or finances. This includes misuse of a power of attorney, forcing or coercing an older person to change their will, taking control of a person's finances against their wishes and denying them access to their own money.[1]

1 Department of Family and Community Services (NSW), *Preventing and Responding to Abuse of Older People: NSW Interagency Policy* (2014).

9.3 The Financial Ombudsman Service Australia provided an extensive list of examples of financial abuse of vulnerable older people and included '[g]etting an older person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence'.[2]

9.4 Is this elder abuse? Although there is no deprivation to the older person through a change in their will, if the pressure to change a will occurs within a relationship of trust and causes 'harm or distress' to the older person, such action fits within the WHO description of elder abuse.[3] If descriptions or definitions of elder abuse are narrower, for example defining abuse in terms of 'harm' or 'risk of harm', and not including the element of 'distress', there may be arguments about whether to include pressure to change a will as 'elder abuse'. Whether or not pressure to change a will is identified and tracked within the data collection on elder abuse is a matter that will need to be considered as part of prevalence studies.[4]

9.5 State Trustees Victoria urged that concepts like 'harm' 'should not be viewed narrowly':

> Unauthorised interference with an older person's estate planning arrangements (such as their will), even if there is no direct loss to the older person, is harm to that person's 'legacy', and represents an infringement of their rights. For example, if a child of an older person exercises undue influence in getting the older person to change their will in the child's favour, and the older person dies soon afterwards, the older person may suffer no direct financial or other loss from the child's actions, but the older person's intended legacy will be harmed, as their actual testamentary intentions will not be able to be fulfilled.[5]

9.6 Stakeholders provided a number of examples where controlling conduct exerted over an older person included pressure to change a will. Some were personal stories;[6] others were case studies or examples provided by advocacy groups and other non-government bodies.[7] The Queensland Law Society, for example, provided the following case study that had been supplied to it:

> In 2013 V, in her 70s, was brought to our office by her 'partner' to make a new Will. The partner was adamant that he wanted to be present for the meeting and was very keen to tell the writer what V 'wanted'. After insisting that we could not see V with him present he reluctantly waited in our reception area. Within a very short time frame it became apparent that V would not have the capacity to make a Will, did not know why she had been brought to the appointment, did not know her date of birth, had no idea about her assets and although she could name her family members

---

2 Financial Ombudsman Service Australia, *Banking & Finance—Bulletin 56*, (December 2007) 6.

3 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002) ch 1.

4 See ch 2, prop 2-2.

5 State Trustees Victoria, *Submission 138.*

6 See, eg, Name Withheld, *Submission 181*; Name Withheld, *Submission 144*; Name Withheld, *Submission 25*. A number of confidential submissions also included changes to wills in the examples of financial abuse.

7 See, eg, Association of Financial Advisers, *Submission 175*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; ARAS, *Submission 166*; University of Newcastle Legal Centre, *Submission 44*.

> (children) had no idea about their ages, relationship status or their children's name and ages. V also kept changing her mind about what it was that she wanted to do (when she could remain focused on the discussion).[8]

9.7 An additional reason for seeking to lock in testamentary benefit through changes to a will may be the possibility of an enlarged estate through unspent funds under 'consumer directed care' arrangements. Aged and Community Services Australia (ACSA) reported concerns of some aged care providers about the 'rising risk of financial abuse for vulnerable older Australians and an unintended consequence of consumer directed care that is now becoming more evident'.

> A risk that will need to be managed is the change from February 2017 requiring unspent funds contributed by older people to be returned back to them or their estate, as it may also provide motivation for some family members to limit home care package spending.
>
> Ensuring that there is a requirement for regular and timely planned reviews of a Home Care Package by the provider, even when a family member or representative is self-managing the package, would allow some level of external oversight to minimise the risk of abuse going unobserved.[9]

The law's response

9.8 The law does not ignore coerced transactions. Transactions which involve undue pressure may be rendered void or voidable through doctrines of equity and probate. With respect to lifetime transactions, the equitable doctrine of undue influence places the emphasis on the person who seeks to gain under particular transactions to demonstrate that they were not the result of undue influence.[10] Probate also has a doctrine of undue influence, but it is different from the equitable doctrine.[11] Probate law also scrutinises closely wills that benefit 'strangers'—those unrelated to the testator.

Undue influence

9.9 The probate law doctrine of undue influence requires more than just pressure, nor is it presumed in any particular relationship. Professor Gino dal Pont and Ken Mackie summarise the probate doctrine in this way:

---

8 Queensland Law Society, *Submission 159*.

9 Aged and Community Services Australia, *Submission 102*.

10 For a detailed discussion of the inter vivos doctrine of undue influence, see Anthony Duggan, 'Undue Influence' in *The Principles of Equity* (Thomson Lawbook Co, 2nd ed, 2003) 393. The doctrine in relation to lifetime transactions is noted in ch 8 on family agreements.

11 For a consideration of the topic generally, see: Fiona R Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28 *University of New South Wales Law Journal* 145; Fiona Burns, 'The Elderly and Undue Influence Inter Vivos' (2003) 23(2) *Legal Studies* 251; Fiona Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26(3) *Melbourne University Law Review* 499; Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617; Matthew Tyson, 'An Analysis of the Differences Between the Doctrine of Undue Influence with Respect to Testamentary and Inter Vivos Dispositions' (1997) 5 *Australian Property Law Journal* 38.

> Only actual coercion will invalidate a will. Persuasion, influence or indeed importunity is not sufficient—after all, a testator is ordinarily free to accept or reject persuasion—unless the testator is thereby prevented from exercising a free will.[12]

9.10 In the leading case of *Wingrove v Wingrove*, endorsed by Australian courts, Sir James Hannen P explained in his direction to the jury about the different kinds of coercion, in terms that may be particularly pertinent to older persons:

> The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may become so weak and feeble that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage or illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion though not actual violence.[13]

9.11 Undue influence is a difficult matter to establish in the probate context, particularly as the onus of proof lies upon the person who alleges undue influence.[14] In its 2013 report, *Succession Laws*, the Victorian Law Reform Commission (VLRC) observed:

> The main problem with probate undue influence is that it has been too difficult to prove. This may lead to the Court upholding a will that does not in fact reflect the will-maker's true intentions. This is particularly concerning given the ageing population and increasing vulnerability of older people making wills. As the population ages, there may be an increasing number of people who, despite having testamentary capacity, are vulnerable to pressure from relatives, caregivers and others.[15]

9.12 In *Nicholson v Knaggs*, Vickery J made observations about the degree and nature of pressure, particularly as it relates to the 'vulnerability and susceptibility' of the individual.

> The key concept is that of 'influence'. The influence moves from being benign and becomes undue at the point where it can no longer be said that in making the testamentary instrument the exercise represents the free, independence and voluntary will of the testator. It is the effect rather than the means which is the focus of the principle.[16]

9.13 Vickery J also commented about the standard of proof:

> The test to be applied may be simply stated: in cases where testamentary undue influence is alleged and where the Court is called upon to draw an inference from circumstantial evidence in favour of what is alleged, in order to be satisfied that the allegation has been made out, the Court must be satisfied that the circumstances raise

---

12 Gino Del Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [2.39].

13 *Wingrove v Wingrove* (1885) LR 11 PD 81, 82–3. See Del Pont and Mackie, above n 12, 54 n 151.

14 In 1992 Phillip Hallen reported that in 50 years in New South Wales there had been no successful plea of influence with respect to a will: Phillip Hallen, 'Undue Influence—What Constitutes?' (1992) 66(8) *Australian Law Journal* 538. Since then, there have been a handful of cases: see Victorian Law Reform Commission, *Succession Laws*, Report (2013) 16.

15 Victorian Law Reform Commission, *Succession Laws*, Report (2013) 15.

16 *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [150].

> a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole.[17]

9.14 The VLRC suggested that, following *Nicholson v Knaggs*, undue influence may now be easier to prove in Victoria.[18] Dal Pont and Mackie also point to New Zealand authority where the facts did not show 'coercion in the accepted sense of the word', which, together with *Nicholson v Knaggs*, may represent 'the developing trajectory of judicial opinion' and 'herald some (limited) convergence between common law and equitable concepts of undue influence'.[19]

Suspicious circumstances

9.15 The requirement of knowledge and approval of the contents of a will is a separate probate element from establishing that a person had the requisite 'testamentary capacity'. It must be established that the testator knows that the document being signed is their will and that it deals with their property. Where a will benefits someone completely unrelated to the testator, probate calls for greater scrutiny to ensure that the testator had the appropriate knowledge and approval of the contents of the will. Justice Hallen explained that where knowledge and approval of a will is challenged, there is generally a two-stage process:

> The first stage is to ask whether the circumstances are such as to 'excite suspicion' on the part of the court. If so, the burden is on the propounder of the will to establish that the deceased knew and approved the contents of that will. If the circumstances do not 'excite suspicion', then the court presumes knowledge and approval in the case of a will that has been duly executed by the deceased who had testamentary capacity.[20]

9.16 The kinds of matters that 'excite suspicion' include:

> the circumstances surrounding the preparation of the propounded will; whether a beneficiary was instrumental in the preparation of the propounded will; the extent of physical and mental impairment, if any, of the deceased; whether the will in question constitutes a significant change from a prior will; and whether the will, generally, seems to make testamentary sense.[21]

9.17 While circumstances that may be raised to suggest undue influence do not satisfy the probate doctrine of undue influence, they may point to a lack of knowledge and approval. However, as Dal Pont and Mackie state, 'this does not mean that undue influence is to be subsumed into suspicious circumstances; it is a separate issue that, where relevant, must be specifically pleaded'.[22]

---

17 Ibid [127].
18 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.67].
19 Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [2.45]. Citing *Carey v Norton* [1998] 1 NZLR 661.
20 *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275 (17 November 2011) [258].
21 Ibid [259].
22 Gino Dal Pont and Ken Mackie, above n 19, [2.46].

Reform suggestions

Proposal 9–1 The Law Council of Australia, together with state and territory law societies, should review the guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they cover matters such as:

(a) common risk factors associated with undue influence;

(b) the importance of taking detailed instructions from the person alone;

(c) the importance of ensuring that the person understands the nature of the document and knows and approves of its contents, particularly in circumstances where an unrelated person benefits; and

(d) the need to keep detailed file notes and make inquiries regarding previous wills and advance planning documents.

Guidelines for legal practitioners

9.18 The formalities for wills, including the requirement of witnessing, serve a number of purposes, one of which is to protect a testator from being forced to sign a document they do not wish to sign.[23] However, as the VLRC observed,

> increasing concern that older and vulnerable will-makers are being subjected to pressure about their wills has led some judges and commentators to suggest other ways of reducing the risk of undue influence in the will-making process. The key suggestion in this area is to ensure that legal practitioners take greater care when making wills.[24]

9.19 Lawyers have a key role to play in safeguarding against coerced will-making. The VLRC recommended that, to minimise the risk of undue influence, the Law Institute of Victoria, as the professional body of Victorian legal practitioners, should prepare best practice guidelines 'on the detection and prevention of undue influence when preparing a will'.[25]

9.20 With respect to the doctrine of knowledge and approval, the VLRC commented that, while no changes in the law were necessary to 'this well settled area of the law', a constructive contribution would be for the Law Institute of Victoria to include discussion of knowledge and approval and suspicious circumstances in the recommended guidelines on undue influence.[26] Proposal 9–1 is modelled on the VLRC recommendations.

---

23 See, eg, Andrew Lang, 'Formality v Intention—Wills in an Australian Supermarket' (1985) 15 *Melbourne University Law Review* 82; Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [7.4].

24 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.45].

25 Ibid rec 1. These are reflected in prop 9-1.

26 Ibid [2.95].

Align probate and equitable doctrines

9.21 The VLRC also considered as a reform option the legislative change in British Columbia, which commenced in 2014, to introduce into the probate context the equitable doctrine of undue influence.[27] Stakeholders to the VLRC inquiry were divided in responding to this suggestion: some 'saw advantages in such a change, while others were concerned that the equitable doctrine is not appropriate to the probate context'.[28]

9.22 The VLRC concluded that the British Columbia provision was 'groundbreaking' and could suggest a reform direction for Australia to follow. But the VLRC also pointed to the decision of Vickery J in *Nicholson v Knaggs*, which 'appear to have made undue influence easier to prove', which may mean that legislative change is unnecessary.[29] The final recommendation was that Victoria should review the effect of the British Columbia legislation in practice, to consider whether a similar provision should then be introduced.[30]

9.23 The ALRC considers that the emphasis of the proposed law reforms in this Inquiry should be on the role that lawyers can play in assisting older persons in their estate planning and the instruments to give effect to such plans; and the community education strategies that may be developed and enhanced through the National Plan discussed in Chapter 2.

Amend forfeiture rule

9.24 In succession law, a person who causes the death of another is not permitted to benefit from the person's estate as a result of that killing. Known as the 'forfeiture rule', it is a common law rule of public policy.[31] Two stakeholders suggested amending the forfeiture rule in response to elder abuse. The New South Wales Trustee & Guardian referred to amendments in the United States:

> Several states in the USA have expanded their forfeiture legislation as it applies to an unlawful killing to disqualify persons from inheriting if they have been involved in abuse or financial exploitation of the deceased. Elder abuse is often linked to the abuser's right to inherit; the term inheritance impatience has been coined. The reason for expanding the forfeiture legislation in the USA to financial abuse cases is to help prevent and reduce elder abuse. Family members often stand to inherit from the victim and by recognising elder abuse as a matter of succession law, the aim is to deter elder abuse by those who are likely to gain from the death of an elderly person. The introduction of such measures in Australia are worthy of investigation and evaluation.[32]

---

27 *Wills, Estates and Succession Act*, SBC 2009, c 13, s 52.
28 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.76].
29 Ibid [2.81].
30 Ibid rec 2.
31 Details of the rule are set out in Gino Dal Pont and Ken Mackie, above n 19, [7.47]–[7.67]. See also Victorian Law Reform Commission, *The Forfeiture Rule*, Report (2014) ch 2.
32 NSW Trustee and Guardian, *Submission 120*. Citing Barbara Hamilton, 'Be Nice to Your Parents: Or Else!' (2006) 8 *Elder Law Review* Article 8. See also P Johnson, *Submission 70*.

9.25 The ALRC considers that the other strategies identified in this Discussion Paper for preventing and responding to elder abuse should be considered and evaluated, before consideration is given to amending the forfeiture rule in the way noted above.

Community education

9.26 The Hume River Community Legal Service (HRCLS) provided an example of community education as a strategy to make older persons less vulnerable to financial abuse. They cited wills workshops conducted especially for Aboriginal clients:

> Over a two day period in the years 2015 and 2016, Gilbert and Tobin (a private law firm) assisted HRCLS on a pro bono basis with the running of a free Wills, Power of Attorney and Guardianship workshop for Aboriginal people in the Albury Wodonga region. On Day 1, Gilbert and Tobin provided education about legal planning and focused on issues particularly relevant to Aboriginal people. In the afternoon of Day 1, lawyers began taking instructions from people attending the workshop. On Day 2, lawyers drafted wills and power of attorney documents, and returned the completed documents for clients to sign and take home. The workshop in 2015 was held at Albury Wodonga Aboriginal Health Service and the workshop in 2016 was held at the Mungabareena Aboriginal Corporation in Wodonga.
>
> This initiative was taken to address the low numbers of Aboriginal people who have wills or power of attorney documents. By delivering a workshop in partnership with the local Aboriginal Health Service, the workshop was culturally appropriate and also well promoted within the local Aboriginal community. As a result of having wills and power of attorney documents in place, elderly people are less likely to be exposed to elder abuse.[33]

9.27 The ALRC commends such initiatives as supportive of older persons in exercising their rights. They provide illustrations of best practice approaches that can inform the education and awareness strategies developed through the National Plan.

Superannuation

9.28 In Chapter 7, the increase in wealth held under superannuation funds is noted. This makes superannuation held by individuals a potential target for financial abuse, where a trusted person seeks to access the older person's superannuation for their own benefit. As the Law Council of Australia observed, '[g]iven the value of many members' death benefits there is an unfortunate incentive to manipulate a member's nomination'.[34]

9.29 Two means are considered: the exercise of influence to have the older person make, or alter, a death benefit nomination in the trusted person's favour; and seeking to make the death benefit nomination under the supposed authority of a power of attorney.

---

33 Hume Riverina CLS, *Submission 186*.
34 Law Council of Australia, *Submission 61*.

Death benefit nominations

Proposal 9–2 The witnessing requirements for binding death benefit nominations in the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be equivalent to those for wills.

9.30 Superannuation funds commonly make provision for funds held by a member to be paid on the person's death in accordance with a nomination of the member. The *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations) provide mechanisms to allow superannuation fund rules to permit a member of the superannuation fund to complete a binding death benefit nomination of a beneficiary.[35] Such a nomination must:

- be in writing;
- be signed and dated by the member in the presence of two witnesses, each of whom have turned 18 and neither of whom is mentioned in the nomination; and
- contain a declaration signed and dated by the witness stating that the notice was signed by the member.[36]

9.31 A member can nominate a legal personal representative, or a dependant or dependants as their beneficiary.[37] The potential for manipulation of the nomination in a person's favour is therefore limited to this group. The Law Council pointed out that 'the restriction on the persons who are eligible to receive the death benefit will somewhat limit the prospects on that abuse'.[38]

9.32 Nominations are generally only binding for three years, but can be renewed.[39] On or after the member's death, the trustee of the fund must then provide the member's

---

35 *Superannuation Industry (Supervision) Act 1993* (Cth) s 59(1A); *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A. A binding death nomination is distinct from a reversionary pension which is an income stream superannuation benefit paid to a superannuation member. Upon the member's death the pension continues to be paid to a nominated reversionary beneficiary.

36 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A(6).

37 Superannuation law restricts who is an eligible dependant to receive a death benefit payment to a spouse (including same-sex and de facto), child, or person with whom the member has an interdependency relationship: *Superannuation Industry (Supervision) Act 1993* (Cth) ss 10, 10A. 'Legal personal representative' is defined under the SIS Act to mean 'the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person': s 10(1).

38 Law Council of Australia, *Submission 61*.

39 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A(7). When a binding nomination lapses the nomination becomes non-binding. In addition to a binding death nomination, some superannuation funds also permit a member to make a non-lapsing binding death nomination. This nomination is made under s 59(1)(a) of the SIS Act. Unlike a binding death nomination, a non-lapsing binding death nomination may only be made if permitted by the trust deed and with the active consent of the trustee which may or may not be granted.

benefits to the person or people mentioned in the notice.[40] Binding death nominations are often made in the context of broader estate planning and, in particular, a desire to ensure the most tax-effective structure for succession and to limit any potential claims on the deceased's estate.

9.33 Because of the relationship between the payment of funds and the member's death, binding death benefit nominations are will-like in character.[41] The Law Council of Australia commented that, given the value of many members' death benefits 'there is an unfortunate incentive to manipulate a member's nomination'.[42] Pressure to make a will may also include pressure to make a binding death benefit nomination, as evident in a case study provided to the Queensland Law Society (QLS), part of which was quoted above. Although the relevant solicitors no longer acted for 'V' they were aware of circumstances concerning her superannuation and pressure by her partner:

> it became apparent through our discussions that V had made a binding death benefit nomination in relation to her superannuation to her 'partner'. Her superannuation, as far as we could tell was her largest asset. V had a copy of the nomination with her (given to her by her partner to bring into our meeting). The nomination had been made within the two weeks prior to our meeting. This concerned me as although the capacity to make a binding death benefit nomination is the ability to enter into a contract, and not the same as making a will, it was doubtful that V had the capacity to understand the nature and effect of that decision. Further it was probable that she was told to sign the nomination by her partner in front of the two witnesses.[43]

9.34 State Trustees Victoria described as 'insidious', 'where a third party manipulates a person into nominating them as a binding death benefit nominee'.

> It is unclear to what extent this happens but it should be considered a potential issue to be managed. Given that the binding death benefit nomination only takes effect after the death of the principal, disproving that the nomination was not valid would be very difficult.[44]

9.35 The Law Council of Australia observed that the validity of the nomination is an issue that regularly arises in relation to death benefit nominations.

> There can be disputes around whether the nomination was validly made, whether the nomination is binding, has lapsed or has ceased to have effect for any other reason. It is rare for validity to be contested on the basis that it was involuntary, although a recent example is *D15-16\112* [2016] SCTA 214 [The allegation was made but not substantiated]. It is unusual for validity to be contested on the basis of lack of mental capacity, although an example is *D14-15\172* [2015] SCTA 31.[45]

---

40 This is subject to a trustee of the entity complying with any conditions contained in the regulations, and the member's notice being given in accordance with the regulations. See *Superannuation Industry (Supervision) Act 1993* (Cth) s 59(1A).

41 See, eg, Croucher and Vines, above n 23, [3.10]–[3.12].

42 Law Council of Australia, *Submission 61*.

43 Queensland Law Society, *Submission 159*.

44 State Trustees Victoria, *Submission 138*.

45 Law Council of Australia, *Submission 61*.

9.36 State Trustees Victoria suggested that this risk of misuse of binding nominations could be minimised by requiring there are witnesses 'to verify that the person appeared to have capacity when the nomination was made'.[46] The QLS also suggested that:

> Given the ease with which binding death benefit nominations can be made and the risk to that asset, it might be worthwhile requiring that prior to any superannuation nomination being made the member obtain a certificate of independent legal advice.[47]

9.37 Given the similarity in effect of binding death benefit nominations and wills it would seem appropriate to align the witnessing requirements with those otherwise applicable to the making of wills.[48] The Law Council commented that while solicitors are often involved with the preparation of wills, this is much less the case in the preparation of nominations. Abuse could be reduced, the Council suggested, 'if a solicitor is involved and the direction of the death benefit is to the estate.[49] In such cases, the guidelines proposed in Proposal 9–1 could also include binding death benefit nominations as well as wills.

Death benefit nominations and substitute decision makers

Proposal 9–3 The *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) should make it clear that a person appointed under an enduring power of attorney cannot make a binding death benefit nomination on behalf of a member.

9.38 A further matter of contention in relation to binding death benefit nominations is whether, when a member of a superannuation fund has appointed a state or territory decision maker, that decision maker may be able to nominate a beneficiary on behalf of the member.

9.39 In the 2007 report, *Older People and the Law*, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that the SIS Act be amended 'to enable a substitute decision maker to renew, or if required to do so, to make a binding death benefit nomination',[50] adopting a suggestion made to the Committee by Brian Herd.[51] There were no other submissions referred to on this point.

9.40 The legal position on this issue was considered in the ALRC Report, *Equality, Capacity and Disability in Commonwealth Laws*,[52] where it was pointed out that, as a

---

46 State Trustees Victoria, *Submission 138*.

47 Queensland Law Society, *Submission 159*.

48 While this may ensure a greater measure of protection against pressure to make a nomination, a further issue may be the impact of the 'dispensing powers'. See, eg, Croucher and Vines, above n 23, ch 8.

49 Law Council of Australia, *Submission 61*. With respect to capacity issues, the Law Council referred to *D14-15\172* [2015] SCTA 31.

50 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) rec 15.

51 Ibid [2.200]–[2.202].

52 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [11.55]–[11.65].

matter of law, there does not appear to be any restriction in the SIS Act or SIS Regulations themselves that would prevent a person acting under a power of attorney from completing and signing a binding death benefit nomination.

9.41 In *Determination D07–08\030*, the Superannuation Complaints Tribunal stated that, in principle, an enduring power of attorney would permit an attorney to complete and sign a binding death nomination on behalf of the member. As the Tribunal did not decide the matter on the basis of the binding nomination, however, its comments are not of direct application. Hence, the Law Council of Australia observed that '[w]hether the scope of an attorney's authority extends to making a nomination remains a matter of debate'.[53]

9.42 In the *Equality, Capacity and Disability* Inquiry, the Law Council of Australia pointed to the different practices of funds:

> some funds accept a nomination by a person holding an enduring power of attorney granted by the member, generally without inquiring as to the wishes of the member. Some funds do not accept a nomination by a person holding an enduring power of attorney, with the result that binding nominations cannot be made by these members.[54]

9.43 The Law Council suggested that superannuation funds would adopt a more consistent approach if there were greater clarity in legislative provisions governing superannuation death benefits.[55]

9.44 As explained in the *Equality, Capacity and Disability* Report, the policy issue is a difficult one, given the difference between a nomination, as a lifetime act, and its effect, which is will-like in nature—as it affects property after the death of the member. Given the uncertainty about whether a person holding an enduring power of attorney could exercise a death benefit nomination on behalf of the member, the ALRC asked whether such person should be restricted from nominating a beneficiary on behalf of the person for whom they were acting—assuming that such action was not prevented by the power of attorney itself.[56]

9.45 The Law Council agreed with the ALRC that the main issue concerning binding death benefit nominations is that there is currently no clear policy position on whether a nomination should be considered similar to a will or simply a lifetime instruction in relation to a person's assets. The Council also agreed with the ALRC's analysis that nominations are will-like in nature and they should be treated in policy terms 'similarly to wills'.[57]

---

53 Law Council of Australia, *Submission 61*.

54 Quoted in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [11.60].

55 Ibid [11.60].

56 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) question 11-3.

57 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [11.63], citing Law Council of Australia *Submission 142*.

9.46 A basic principle of wills formalities is that a person is required to have testamentary capacity when making a will. If a person was regarded as no longer having capacity, any will made by such person would be void.[58] Now, however, under strict conditions, wills can be authorised by the court in all Australian states and territories where a person is regarded as having lost, or never having had, legal capacity.[59] In the succession context it is a relatively new jurisdiction for the court to be able to approve these 'statutory wills'. It is exercised cautiously, given the importance accorded to testamentary freedom as a valued property right.[60]

9.47 Applying this approach to the question of whether a person holding an enduring power of attorney should be able to sign a binding death benefit nomination on behalf of the member, the ALRC concluded that this should not be permitted. As the role of an enduring attorney is one focused on the lifetime transactions and needs of the person, the ALRC concluded that it was not appropriate for such a person to make a binding death benefit nomination that was will-like in effect. The Law Council agreed with this approach and submitted that the SIS Act and SIS Regulations could be amended to make this clear so that a nomination 'generally cannot be made on behalf of a member by a person exercising powers under an EPA'.[61]

9.48 If a member dies then any superannuation balance is paid in accordance with the rules of the fund. That balance may well form part of the member's estate in due course. A person who holds an enduring power of attorney may apply for a statutory will on behalf of the member during the member's lifetime, but that is an entirely different matter from seeking to use the power of attorney to make the death benefit nomination on behalf of the member. The application for a statutory will would be subject to the strict scrutiny of the court.

9.49 In the Terms of Reference for this Inquiry the ALRC was directed to have regard to the recommendations in the *Older People and the Law* report, as well as to those in the ALRC's more recent *Equality, Capacity and Disability* Report. As explained above, the ALRC's consideration of the authority of an enduring attorney with respect to the making of a binding death benefit nomination for a member of a superannuation fund was different from that in the *Older People and the Law* report.

9.50 The ALRC acknowledges that the proposal to prohibit an attorney, acting under an enduring power, from making a binding death nomination does raise policy challenges in the context of the three-year limit on nominations.[62]

---

58 See, eg, Croucher and Vines, above n 23, ch 6.

59 *Succession Act 2006* (NSW) ss 18–26; *Succession Act 1981* (Qld) ss 21–28; *Wills Act 1936* (SA) s 7; *Wills Act 2008* (Tas) ss 21–28; *Wills Act 1997* (Vic) ss 21–30; *Wills Act 1970* (WA) s 40; *Wills Act 1968* (ACT) ss 16A–16I; *Wills Act 2000* (NT) ss 19–26.

60 See, eg, Croucher and Vines, above n 23, [6.11]–[6.20].

61 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [11.65], citing Law Council of Australia *Submission 142*.

62 *Superannuation Industry (Supervision) Act 1993* (Cth) s 59(1A); *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A.

9.51 For example, a member may make a binding death nomination and then subsequently lose legal capacity. If the attorney does not have the power to renew the binding death nomination when it lapses after three years, on death, the principal's superannuation funds may be distributed:

- in a way that the member had not intended;
- in a manner less ideal for tax purposes when compared with the lapsed binding death nomination; or
- in a manner that results in the funds forming part of the estate of the member which may be subject to certain creditors' claims.[63]

9.52 Another challenge is that a binding death benefit nomination does not have the flexibility to take into account a change in circumstances. A member may make a binding death benefit nomination in favour of their spouse and then subsequently lose legal capacity. The marriage may thereafter break down, but the death benefit nomination will remain in place notwithstanding the change in circumstances.

9.53 The ALRC considers that the SIS Act and SIS Regulations should be amended in line with the conclusions that the ALRC reached in the *Equality, Capacity and Disability* Report. Nevertheless, the ALRC recognises that the implementation of this proposal requires a broader consideration of the consequences of prohibiting a person appointed under an enduring power of attorney from making a binding death benefit nomination on behalf of a member, particularly in terms of a person's estate planning goals. The ALRC seeks input from stakeholders regarding the consequential changes to laws and legal frameworks that would be required if the proposal were implemented.

63 Superannuation funds are protected in part by s 116(2)(d) of the *Bankruptcy Act 1966* (Cth). Keeping the superannuation death benefit out of the estate by paying direct to a beneficiary may increase protections against creditor claims.