SUPREME COURT OF QUEENSLAND

CITATION:	*Donovan v Donovan* [2009] QSC 26
PARTIES:	**LYNDA JANE DONOVAN (AS EXECUTOR OF THE ESTATE OF RONALD JOSEPH DONOVAN)** (applicant/cross-respondent) **v** **HELGA DONOVAN (AS EXECUTOR OF THE ESTATE OF RONALD JOSEPH DONOVAN)** (respondent/cross-appellant)
FILE NO/S:	11565 of 2008 11886 of 2008
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	16 February 2009
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2009
JUDGE:	Fryberg J
ORDER:	**1) Answers to questions in order made on 20 November 2008:** **(a) unnecessary to answer;** **(b) the requirements of r 6.17A(6) of the *Superannuation Industry (Supervision) Regulations* 1994 apply to the Helron Superannuation Fund;** **(c) the deceased's letter of 10 April 2006 is a non-binding death benefit nomination.** **2) Costs of both parties be assessed on the indemnity basis and paid out of the estate.**
CATCHWORDS:	Superannuation – Benefits – Matters affecting entitlement to and payment of – Other matters – Payment of benefit upon death – non-binding death nomination

Superannuation Industry (Supervision) Act 1993 (Cth) s 51(1A)
Superannuation Industry (Supervision) Regulations 1994 (Cth) r 6.17A

McFadden v Public Trustee for Victoria [1981] 1 NSWLR 15 contrasted

COUNSEL: Applicant/cross-respondent: D Thomae
Respondent/cross-applicant: M Amerena

SOLICITORS: Applicant/cross-respondent: McCowans Solicitors
Respondent/cross-applicant: Geoff Williams and Associates

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

[2009] QSC 26

FRYBERG J

No 11565 of 2008

LYNDA JANE DONOVAN (AS EXECUTOR OF THE ESTATE OF RONALD JOSEPH DONOVAN) — Applicant

and

HELGA DONOVAN (AS EXECUTOR OF THE ESTATE OF RONALD JOSEPH DONOVAN) — Respondent

No 11886 of 2008

HELGA DONOVAN (AS EXECUTOR OF THE ESTATE OF RONALD JOSEPH DONOVAN) — Applicant

And

LYNDA JANE DONOVAN (AS EXECUTOR OF THE ESTATE OF RONALD JOSEPH DONOVAN) — Respondent

BRISBANE

..DATE 16/02/2009

JUDGMENT

HIS HONOUR: The parties are the executors of the Will of Ronald Joseph Donovan, whom I shall call Ronald, who died on 18 June 2007. His death left the respondent, Helga, his widow after some 29 years of marriage. The applicant, Lynda, is his daughter by his first marriage. Mr Donovan established a superannuation fund in 1991 called the Helron Superannuation Fund. The trustee was Villaricci Pty Ltd and Ronald was a member at all material times. In November 2000 Villaricci amended the trust deed so that the rules took the form in issue in these proceedings. Ronald and Helga were director and secretary of Villaricci at that time. I infer that the deed was amended by reason of and to comply with changes made to superannuation legislation in and about 1999.

Clause 11.4 of the deed provides that in respect of payment of a death benefit:

> (a) A Member may designate a Dependant or legal personal representative of the Member as the person entitled to payment of the Death Benefit in writing to the Trustee in such form as the Trustee may from time to time approve;
>
> (b) A Member may make a binding death benefit nomination in the form required to satisfy the Statutory Requirements;
>
> (c) A Member may revoke a nomination by completing a new form in the case of a non-binding nomination or in the method set out in the Statutory Requirements in the case of a binding death benefit nomination.

Clauses 11.5 and 11.6 provided:

> 11.5 Where a Member has made a valid binding death benefit nomination in accordance with **Rule 11.4** the Trustee must pay the Death Benefit to the nominated legal personal representative or Dependant of the Member.
>
> 11.6 Where a Member does not have a binding death benefit nomination in force, any Death Benefit shall be paid as the Trustee in its absolute discretion decides to

such one or more of the nominated beneficiaries (if any) or other Dependants or legal personal representative of the Member.

The ultimate question in the present litigation is whether the trustee must dispose of the death benefit which by a chain of definitions means the net amount standing to Ronald's account, plus the value at the time of his death of any insurance policy in respect of him, in accordance with clause 11.5 or clause 11.6.

By letter dated 10 April 2006 Ronald wrote to the directors of Villaricci as follows:

"46 Martingale Circuit, Clear Island Waters, Qld, 4226

Tel/Fax 07 9953 2896

(All correspondence to P O Box 569 Robina DC, QLD 4226)

10/4/06

The Directors,
Villaricci Pty Ltd
Trustee Helron Superannuation Fund
PO Box 569
Robina DC
Robina
QLD 4226

RE ENTITLEMENTS IN THE Helron Superannuation Fund

Account Ronald Joseph Donovan

I hereby advise that it is my wish that the balance of any amounts standing in my name in the above named superannuation fund, on my demise, be paid to my Legal Personal Representative for inclusion in my estate assets.

Yours faithfully,
(signed)
R.J. Donovan"

On 20 November last year a Judge ordered that the following questions be heard and determined in advance of all other

questions in the proceedings:

"(a) Section 59(1A) of the *Superannuation Industry (Supervision) Act* 1993 (Cth) and Reg 6.17A of the *Superannuation Industry (Supervision) Regulations* 1993 apply to self managed superannuation funds;

(b) Section 59(1A) of the *Superannuation Industry (Supervision) Act* (1993) (Cth) and Reg 6.17A of the *Superannuation Industry (Supervision) Regulations* 1993 apply to the Helron Superannuation Fund by force of statute and further or alternatively because such statutory requirements are incorporated in the rules of the Helron Superannuation Fund;

(c) The letter of 10 April 2006 from Ronald Joseph Donovan (deceased) to Villaricci Pty Ltd as trustee of the Helron Superannuation Fund is a binding or non-binding death benefit nomination."

It is convenient to deal with the third question first. In doing so I point out that the parties have approached the case on the basis that it is to be resolved simply on the documents. The only evidence before me is the letter of 10 April 2006, the trust deed and rules, a draft determination of the Commissioner of Taxation dated 10 September 2008, and a letter evidencing the dispute between the parties.

Lynda relies on clause 11.4 as the source of Ronald's right to make a binding nomination of the person entitled to the death benefit. She does not contend that any right to make such a nomination existed under the general law. She submits that on its face the letter was sufficient to designate a legal personal representative under clause 11.4(a), and to constitute a binding death benefit nomination within the meaning of those words in clause 11.4(b). I will leave aside for the moment the question of form in relation to the statutory requirements. Alternatively, she submits that clause 11.4(b) may be read alone as having the result for

which she contends.

Helga did not challenge the idea that the letter was adequate as a designation of the legal personal representative. In the course of the argument, I raised with counsel whether there was any evidence that the letter was in a form which the trustee had approved, and if not what was the consequence of this. Neither side seemed interested in pursuing this question. If the question fell for decision I would infer that at the time the letter was written no such approval had been given. I shall proceed on the assumption that the trustee may still give such an approval retrospectively and that no issue of non-compliance with this part of clause 11.4(a) arises between the parties.

Helga submitted that the language of the letter was insufficient to convey the notion that Ronald was nominating his legal personal representative in a binding way. She submitted that the word "wish" can sometimes in context be a command, but more often was merely a request or indication of desire, and that one would have expected clear words such as "I direct" or "I require". I would not accept the last part of that submission, but it is not necessary to do so in order to find, as I do, that the letter did not manifest an intention to make a binding death benefit nomination.

Whatever effect is given to that part of sub-clause (b) specifying that the nomination be in the form required to satisfy the statutory requirements, the letter simply does not indicate whether it is to be binding or non-binding. It was

written to the trustee, and so may be assumed to have been referable to the trust deed, but that document envisages both sorts of nomination. The letter makes no attempt to follow any particular form. Even if Lynda is correct in submitting that it is not obliged to follow any particular form, it could hardly be expected that Ronald would have known that. There is in my judgment nothing in rule 11.10 which detracts from this result.

Were I of a different opinion it might have been necessary to consider whether the letter could validly operate as a Will to dispose of property after death. Contrast McFadden v Public Trustee for Victoria [1981] 1 NSWLR 15. If it could be revoked at any time (sub-clause (c)), it is unlikely to be construed as making a present disposition of an interest in property.

Strictly speaking, that is sufficient to resolve the dispute between the parties and it is unnecessary to answer the other questions. I shall, however, deal in part at least with the second question as it relates to the question of form in a way which reinforces the interpretation of the letter. The rules required a binding nomination to be in the form required to satisfy the statutory requirements. "Statutory requirements" was defined to mean:

> **"Statutory Requirements"** means 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 provided that where the Member's Application indicates that the pension is taken out to comply with the requirements of the Social Security Act 1991 of the Veteran's Entitlements Act 1986, the term shall include those acts."

The only requirements arguably capable of satisfying that definition were those in regulation 6.17A of the Superannuation Industry (Supervision) Regulations 1994. So far as material, those regulations provided:

> "(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.
>
> (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."

Lynda accepts that the nomination was not in the form required to satisfy that provision. Helga submits that the regulation requires the use of such a form by reason of its operation in conjunction with section 59(1A) of the Superannuation Industry (Supervision) Act 1993, or alternatively because its requirements have been incorporated into the rules by reference.

Lynda submits that by reason of the words "which must be satisfied by a superannuation fund in order to qualify for income tax concessions" in the definition, no particular form need be used because there is no legislative requirement which applies to this particular fund. That raises the first question of those reserved for consideration. However, let it be assumed for the moment that there was no statutory obligation for Ronald to use a particular form to make a binding death benefit nomination, nor, perhaps more relevantly, for the nomination to be in a particular form so as to permit or require a payment under clause 11.5.

Lynda's submission is in my judgment inconsistent with the words of the definition of "statutory requirements" in the deed. Those words do not refer to requirements which must be satisfied by this particular superannuation fund in order to qualify for income tax concessions, though they easily could have done so. They are of general import. In my judgment it

is quite plain that the intent of the deed is to require the nomination to be in the form described in regulation 6.17A(6).

There are two reasons for this conclusion. First, were it otherwise, the requirements of clause 11.4(b) as to form would be meaningless. Second, such an interpretation makes sense in the context of a superannuation deed. The legislation governing superannuation in Australia is notoriously convoluted and is reminiscent of the legendary oomidoodle bird. It is very easy for trustees and members to make a mistake about the requirements applicable in their particular case. It is very understandable that a deed should specify a requirement in effect to comply with the form described in regulation 6.17A(6) out of an abundance of caution. The alternative would be to require the trustees or the member to take legal advice about the answer to the first question posed to me, and to run the risk that their advice might turn out to be incorrect. Such an approach is uncommercial and unlikely. Interestingly, requiring conformity with that regulation also eliminates any argument about whether the disposition is a testamentary disposition which fails to meet the requirements of a will.

For these reasons I answer the questions in the order made on 20 November 2008: (a), unnecessary to answer; (b), the requirements of regulation 6.17A(6) of the Superannuation Industry Supervision Regulations, 1994, apply to rule 11.4(b) of the rules of the Helron Superannuation Fund; (c), the letter of 10 April 2006 sent from Ronald Joseph Donovan to

Villaricci Pty Ltd as trustee of the Helron Superannuation Fund, is a non-binding death benefit nomination.

....

HIS HONOUR: I order that the costs of both parties be assessed on the indemnity basis and paid out of the estate of Ronald Joseph Donovan.
