
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : GUARDIANSHIP AND ADMINISTRATION ACT
1990 (WA)

CITATION : SM [2019] WASAT 22

MEMBER : JUDGE T SHARP, PRESIDENT (ACTING)
MS P LE MIERE, MEMBER
MS C BARTON, MEMBER

HEARD : 11 FEBRUARY 2019

DELIVERED : 16 APRIL 2019

FILE NO/S : GAA 2702 of 2018

SM
Represented Person

Australian Executor Trustees Limited
Applicant

Public Trustee
Interested Party

Catchwords:

Testamentary disposition - Binding death benefit nomination - Administrator -
Guardian - Represented person - Represented person's interests

Legislation:

Guardianship and Administration Act 1990 (WA), s 4, s 4(3), s 64(1), s 64(1)(a),
s64(3)(a), s69, s 69(2), s 71, s 77, s 77(1)(a), s 78(1)(b), s 111A, Sch 1, Pt B,
cl 13

Income Tax Assessment Act 1997 (Cth), s 292-95
Life Assurance Companies Act 1889 (WA), s 33
Powers of Attorney Act 1998 (Qld)
State Administrative Tribunal Act 2004 (WA), s 38
Statutes (Repeals and Miscellaneous Amendments) Bill 2008
Superannuation Industry (Supervision) Act 1993 (Cth), s 59(1)(a), s 59(1A)
Superannuation Industry (Supervision) Regulations 1994 (Cth)
Wills Act 1936 (SA)
Wills Act 1970 (WA), s 4, s 40
Wills Amendment Act 2007 (WA)

Result:

Application dismissed

Category: B

Representation:

Counsel:

Represented Person : N/A
Applicant : Mr R Eaton
Interested Party : Ms K Sobey

Solicitors:

Represented Person : N/A
Applicant :
Interested Party :

Case(s) referred to in decision(s):

Bird v Perpetual Executors and Trustees Association of Australia Ltd
(1946) 73 CLR 140
Johnson v Staniforth [2002] WASCA 97
McFadden v Public Trustee for Victoria (1981) 1 NSWLR 15
Re Application by Police Association of South Australia [2008] SASC 299;
(2008) 102 SASR 215
Re Bubnich [1965] WAR 138

Re Narumon Pty Ltd [2018] QSC 185

Re The Full Board of the Guardianship and Administration Board
[2003] WASCA 268

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 On 16 September 2015 SM was injured in a motor vehicle accident (MVA). On 30 November 2016 SM's mother CM was appointed administrator of SM's estate (**Administration Order**) with the following function:

To seek legal advice on behalf of the represented person and to bring, and defend, actions, suits and other legal proceedings in the name of the represented person and if appropriate to settle the same.

2 On 30 July 2018 SM's claim for compensation for the injuries she received as a result of the MVA was settled by an order of the District Court of Western Australia (**District Court Order**). SM was awarded damages of \$5,745,933.

3 The District Court Order appointed Australian Executor Trustees Limited (**AET**) trustee of such money payable to SM and that such money be held on trust for SM and to be applied and invested or applied for the benefit of SM (**Fund**).

4 Pursuant to s 292 - 95 of the *Income Tax Assessment Act 1997* (Cth) SM had a 90 day period from the time the Fund was received in which to contribute to superannuation.

5 AET received the Fund on 15 August 2018, hence AET had until 12 November 2018 to deposit all or a portion of the Fund into superannuation.

6 By an application filed on 22 August 2018, AET sought a review of the Administration Order and that it be appointed administrator of SM's estate (**application**) with the limited function to enable it to deposit a portion of the Fund into superannuation for the benefit of SM.

7 The application was heard on 15 October 2018 before Member Le Miere at which time the applicant sought a further function that, if appointed administrator:

AET as limited administrator has authority to sign and renew binding death benefit nominations for any superannuation fund of which the represented person is a member.

8 This was later amended to:

AET as limited administrator has authority, in respect of any superannuation fund of which the represented person is a member, to make and renew any document which has the effect of directing or binding the superannuation trustee as to the payment of superannuation death benefits following the represented person's death.
(additional function)

9 Not having had sufficient time to consider the appropriateness of the additional function and to allow the applicant time to file submissions as to the Tribunal's jurisdiction, the Tribunal adjourned the hearing of the application to 5 November 2018.

10 On 26 October 2018 AET filed submissions in respect of the Tribunal's power to grant the applicant the additional function if AET is approved administrator.

11 Given the possible wide ranging implications of the additional function for administrators generally, the Tribunal determined that the Public Trustee ought to be given the opportunity to be heard.

12 By letter dated 31 October 2018 the Tribunal gave notice of the hearing on 5 November 2018 to the Public Trustee pursuant to Sch 1, Pt B, cl 13 of the *Guardianship and Administration Act 1990 (WA) (Act)*.

13 On 1 November 2018 the Public Trustee provided submissions to the Tribunal in respect of the additional function.

14 On 5 November 2018 the Tribunal appointed AET as administrator of SM's estate with the sole function to pay a portion of the Fund into superannuation for the benefit of SM. The question of the additional function was adjourned until 23 January 2019.

15 On 10 January 2019 the Tribunal ordered:

1. Pursuant to section 38 of the State Administrative Tribunal Act 2004 the Public Trustee is joined as a party.
2. The hearing on 23 January 2019 is vacated and is relisted before the Tribunal constituted by Acting President Sharp, Member Le Miere and Member Barton at 10.00 am on Monday 11 February 2019 for one hour.
3. By 28 January 2019 the applicant is to file at the Tribunal and serve on the Public Trustee submissions as to why it is in the represented person's best interest that the Tribunal grant the

applicant the function to make a binding death benefit nomination (BDBN).

4. By 28 January 2019 the applicant is to file with the Tribunal and serve on the Public Trustee all medical evidence upon which it relies as to the represented person's capacity to make a BDBN.
5. By 28 January 2019 the Public Trustee is to file at the Tribunal and serve on the applicant any further submissions it may wish to make.

16 On 29 January 2019 the applicant filed medical reports regarding SM's capacity to make a binding death benefit nomination in respect of superannuation death benefits (**BDBN**) together with submissions as to why it was in SM's best interests that the Tribunal make an order granting the additional function to the applicant.

17 On 31 January 2019 the Public Trustee filed further submissions.

Legislative framework

18 The Act provides for, amongst other things, the appointment of a guardian and an administrator for a person who, because of an impairment of their faculties, is in need of the protection of a decision maker and advocate.¹

19 In making a decision about whether an administrator should be appointed for a person, there are a number of steps the Tribunal needs to follow and these steps incorporate the principles of the Act which are to be found at s 4 of the Act.

- (1) In dealing with proceedings commenced under this Act the State Administrative Tribunal shall observe the principles set out in this section.
- (2) The primary concern of the State Administrative Tribunal shall be the best interests of any represented person, or of a person in respect of whom an application is made.
- (3) Every person shall be presumed to be capable of -
 - (a) looking after his own health and safety;
 - (b) making reasonable judgments in respect of matters relating to his person;

¹ *Re The Full Board of the Guardianship and Administration Board* [2003] WASCA 268, [43] (*Full Board Decision*).

- (c) managing his own affairs; and
- (d) making reasonable judgments in respect of matters relating to his estate,

until the contrary is proved to the satisfaction of the State Administrative Tribunal.

- (4) A guardianship or administration order shall not be made if the needs of the person in respect of whom an application for such an order is made could, in the opinion of the State Administrative Tribunal, be met by other means less restrictive of the person's freedom of decision and action.
- (5) A plenary guardian shall not be appointed under section 43(1) or (2a) if the appointment of a limited guardian under that section would be sufficient, in the opinion of the State Administrative Tribunal, to meet the needs of the person in respect of whom the application is made.
- (6) An order appointing a limited guardian or an administrator for a person shall be in terms that, in the opinion of the State Administrative Tribunal, impose the least restrictions possible in the circumstances on the person's freedom of decision and action.
- (7) In considering any matter relating to a represented person or a person in respect of whom an application is made the State Administrative Tribunal shall, as far as possible, seek to ascertain the views and wishes of the person concerned as expressed, in whatever manner, at the time, or as gathered from the person's previous actions.

20 The Tribunal can only appoint an administrator if, as set out in s 64(1)(a) of the Act:

- (1) Subject to section 4, where the State Administrative Tribunal is satisfied that a person in respect of whom an application for an administration order is made under section 40 -
 - (a) is unable, by reason of a mental disability, to make reasonable judgments in respect of matters relating to all or any part of his estate[.]

21 That is, before making an administration order, the Tribunal must be satisfied that the presumption of capacity (s 4(3) of the Act) has been rebutted.

22 If the Tribunal is satisfied that the presumption of capacity has been rebutted, then consideration needs to be given as to whether there is a need for an administrator.

23 If the Tribunal determines that an administrator is needed, it must then decide who should be appointed administrator and what role (function(s)) is given to the administrator.

24 Section 64(3)(a) of the Act provides that an appointment of an administrator under s 64(1) may be made subject to such conditions and instructions as the Tribunal thinks fit.

25 Section 69 of the Act sets out the authority of an administrator:

- (1) Subject to section 64(3)(a), the administrator has, or the joint administrators have, in respect of the estate of the represented person, such of the functions provided for by this Act as the State Administrative Tribunal vests in him or them, or directs him or them to perform, in the administration order.
- (2) An administrator may on behalf of a represented person execute all such documents and do all such things as are necessary for the performance of the functions vested in him.
- (3) An action taken, decision made, consent given or other thing done by an administrator in the performance of the functions vested in him has effect as if it had been taken, made, given or done by the represented person and he were of full legal capacity.
- (4) Nothing in this Act vests the estate of a represented person in an administrator.

26 Section 71(1) of the Act authorises the Tribunal to vest plenary functions in an administrator and s 71(2) stipulates what an administrator with plenary powers may do:

- (1) The State Administrative Tribunal may, under section 69, vest plenary functions in the administrator of the estate of a represented person.
- (2) Where plenary functions are vested in an administrator he may perform, or refrain from performing, in relation to the estate of the represented person, or any part of the estate, any function that the represented person could himself perform, or refrain from performing, if he were of full legal capacity.

27 Sections 71(3) - 71(5) provide for the functions that may be given to an administrator who is not given plenary powers:

- (3) Where the State Administrative Tribunal does not under section 69 vest plenary functions in an administrator, it may, under that section, authorise the administrator to perform any specified function, including one or more of those set out in Part A of Schedule 2.
- (4) The State Administrative Tribunal may require a function to be performed by an administrator and may give directions as to the time, manner or circumstances of the performance.
- (5) In exercising its jurisdiction under this Part the State Administrative Tribunal may take a liberal view of the best interests of the represented person as mentioned in section 4(2), and in particular may, if the circumstances so require, empower an administrator to make a payment or enter into a transaction of a kind described in section 72(3) on behalf of the represented person.

28 Section 71(2a), which was added by the *Wills Amendment Act 2007* (WA) (**Wills Amendment Act**), provides:

Despite subsection (2), a plenary administrator may not make a will or other testamentary disposition on behalf of a represented person, but this subsection does not affect the operation of section 111A.

29 Section 111A of the Act, also added by the *Wills Amendment Act*, provides:

Subject to sections 43(3) and 64(3)(a), a plenary guardian or a plenary administrator may, in accordance with Part XI of the *Wills Act 1970*, make an application to the Supreme Court for an order under section 40 of that Act if the plenary guardian or the plenary administrator considers that the represented person lacks testamentary capacity.

30 Section 77(1) deals with a represented person's ability to dispose of his or her estate:

So long as there is in force a declaration by the State Administrative Tribunal under section 64(1) that a person is in need of an administrator of his estate, that person is –

- (a) incapable of entering into any contract or making any disposition in respect of his estate or any part thereof or interest therein; or
- (b) subject to Part 9, appointing or conferring any power on an agent or attorney in respect thereof,

except to the extent that the administrator, with the consent of the Tribunal, in writing authorises him to do so.

31 Section 40 of the *Wills Act 1970* (WA) (**Wills Act**), allows for an application to be made to the Supreme Court of Western Australia to make, alter or revoke a will:

- (1) The Court may, on application made by any person, make an order authorising -
 - (a) the making or alteration of a will in specific terms approved by the Court; or
 - (b) the revocation of the whole or any part of a will,on behalf of a person who lacks testamentary capacity (the *person concerned*).
- (2) The Court is not to make an order under subsection (1) unless, at the time when the order is made, the person concerned -
 - (a) is living; and
 - (b) has reached the age of 18 years.
- (3) An order under subsection (1) may authorise -
 - (a) the making or alteration of a will that deals with the whole, or with only part, of the property of the person concerned; or
 - (b) the alteration of only part of the person's will.
- (4) A will or instrument authorised under subsection (1) must be signed by the Principal Registrar and sealed with the seal of the Court.

32 Section 4 of the *Wills Act* as amended by the *Will Amendment Act*, defines a will and a testamentary disposition:

disposition includes a gift, devise, bequest or an appointment of property contained in a will; and

will includes a codicil and any testamentary instrument or disposition.

33 Section 33 of the *Life Assurance Companies Act 1889* (WA) (**LAC Act**), which was amended in 2007 by the *Wills Amendment Act* and repealed in 2009 prohibited moneys payable to the assured on his or her death being:

... applied or made available in payment of his debts except by any judgment, order, or process of any court, or in any other manner whatsoever, except by virtue of a contract or charge made by the assured

in his lifetime, or by virtue of an express direction contained in his will or other instrument having testamentary effect in respect of his estate, that the moneys arising from the policy shall be so applied.

34 The Explanatory Memorandum to the Statutes (Repeals and Miscellaneous Amendments) Bill 2008, which repealed the LAC Act, stated that it was to be repealed because, among other reasons, the insurance industry was then regulated by Commonwealth legislation.

35 The *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**Superannuation Regulations**) regulate how and when a member of a superannuation fund may nominate to whom a member's benefits may be paid.

The issues

36 There are five main issues:

- 1) Can the Tribunal confer on an administrator a power to make or confirm a BDBN?
- 2) Can an administrator with plenary powers make a BDBN for a represented person?
- 3) Can a represented person subject to an administration order make a BDBN themselves?
- 4) Is a BDBN a 'testamentary disposition' and thus a plenary administrator prohibited by s 71(2a) of the Act from making a BDBN?
- 5) If the Tribunal has power to grant the additional function to an administrator is it in SM's best interests that the Tribunal grant that function to the applicant?

Submissions

Applicant's submissions

37 The applicant's submissions of 26 October 2018 submit that the Tribunal is not prohibited from granting the additional function to it as the making of a BDBN is not a testamentary disposition.

38 The applicant relies upon a decision of the Supreme Court of Queensland in *Re Narumon Pty Ltd*² as authority for its submissions that BDBN is not a 'testamentary disposition'.

39 On 29 January 2019 the applicant filed further submissions in the Tribunal as to why it considered it was in SM's best interests that the applicant be granted the additional function.

40 The applicant says that 97.5% of the Fund had been placed into IOOF Portfolio Service Superannuation Fund (**Superannuation Fund**). The applicant notes that it is giving consideration to purchasing a residence for SM that might result in funds being drawn down from the Superannuation Fund.

41 It also informed the Tribunal that following SM's death her superannuation death benefits are payable in the following order of priority (referring specifically to rules 18.1.1 - 18.1.4 of the rules for the Superannuation Fund, and referencing terms defined in clause 28.1 of the Superannuation Fund trust deed):

- in accordance with any valid BDBN or non-lapsing nominations;
- where there is no BDBN but a non-binding nomination exists, then to such as SM's dependents and/or her legal personal representative, and in such proportions, as the superannuation trustee in its absolute discretion considers appropriate;
- where no nomination exists, then to SM's legal personal representative.

42 The applicant confirmed that where no BDBN or nomination exists, as is the case currently, SM's interest in the Superannuation Fund will be paid to her estate.

43 The Superannuation Fund trust deed only permits SM to make a BDBN in favour of a dependent as defined in the superannuation fund trust deed.

44 According to the medical report filed by the applicant also on 29 January 2019, SM expressed the wish to the doctor assessing her capacity to make a BDBN that she wished her whole estate to pass to her mother and then to her brothers.

² *Re Narumon Pty Ltd* [2018] QSC 185 (*Re Narumon*).

45 Provided SM's personal circumstances do not change, on intestacy her mother would receive the first \$6,000 absolutely and one half of the residuary estate. Her brothers would share the remainder of the residuary estate equally.

46 The applicant submits that it is in SM's interests for it to be granted the power to make a nomination for SM's superannuation death benefits because:

- the existence or non-existence of a nomination will have a significant impact on the ultimate recipient for her substantial superannuation death benefits;
- SM is capable of entering into a de facto relationship or marriage and having children, and thus the category of her dependents for superannuation purposes is not closed;
- it is unclear whether SM has testamentary capacity, and thus be able to control how her estate is distributed between her family;
- SM is particularly vulnerable to exploitation owing to her cognitive issues resulting from her injuries;
- SM may not appreciate the technicalities required to make a valid superannuation nomination, or even if she were to do so she may not then continue to monitor when her personal circumstances change or when her nomination lapses such that she would need to update her nomination;
- SM could (owing to her cognitive issues) end up taking no action to make a nomination, or will set out to make a nomination and end up making one that is entirely invalid;
- to adequately address SM succession needs, her administrator must be able to deal with her superannuation death benefits; and
- the applicant is already responsible for managing SM's interests in the Superannuation Fund and her general household expenditure; it is therefore placed to

ensure that appropriate consideration is given to all competing claims to her superannuation death benefits, balanced with SM's own views and wishes.

Public Trustee's submissions

47 The Public Trustee is of the view that an administrator with plenary powers pursuant to s 71(2) of the Act or an administrator with broad but limited powers regarding investment, drawdowns and pension requests can make a BDBN.

48 The Public Trustee comes to this view because it considers a represented person's interests in a superannuation fund is part of the estate of the represented person for the purposes of s 69 of the Act and that the making of a BDBN on behalf of a represented person is an 'action taken, decision made, consent given or other thing done' that could have been 'taken, made, given or done by the represented person' if the represented person 'were of full legal capacity'.

49 In its further submissions filed in the Tribunal on 31 January 2019 the Public Trustee expressed reservations as to whether the terms of a limited administration order pursuant to s 71 of the Act would apply to exclude a represented person from making a BDBN without the written authority of the administrator and the consent of the Tribunal.

Analysis of the law

50 The payment of the superannuation funds of a member on the member's death is a matter that is determined by the governing rules of the relevant superannuation fund. As a matter of trust law, a trustee is not able to delegate the exercise of their powers under the trust, except to the extent permitted under the trust instrument itself, by virtue of legislation. Similarly, as a general rule, the beneficiaries cannot direct the trustee how to exercise a discretionary power.

51 There are five different death benefit arrangements allowed for in the Superannuation Regulations, each with its own requirements and consequences:

- automatic reversionary benefits to the member's estate (where the trustee exercises no discretion);
- a non-binding nomination (where there is full trustee discretion);

- a binding nomination (under s 59(1A) of the SIS Act);
- a non-lapsing nomination (under s 59(1)(a) of the SIS Act); or
- complete discretion of the trustee if none of these nominations has been made and the reversionary benefit is not applicable.

Authority of an administrator under the Act

52 The Full Court of the Supreme Court of Western Australia in the ***Full Board Decision*** held that s 77(1) of the Act does not apply to the making of any will or testamentary instrument made by a represented person because a declaration pursuant to s 64(1) of the Act ends on a represented person's death.³

53 The Court determined that a will did not act as a disposition in respect of a person's estate because:

... it is the death which effects the transmission of the property although the law provides mechanisms for the deceased, during his or her lifetime, to direct, if he or she should choose to do so, how the estate is to be distributed after death.⁴

That it is the death of the testator which effects the disposition of his or her property and not the making of a will during the testator's lifetime, becomes even more plain when one considers a person who, during his or her lifetime, makes a series of valid wills each revoking all earlier wills. None of those earlier wills effected any disposition of the testator's property ... Nothing in them transferred any interest in property or conferred any right or title upon a nominated beneficiary ... Again, this shows that it is the death which effects the disposition of property in accordance with terms and trusts of the will or any grant of administration.⁵

54 Justice Heenan in the ***Full Board Decision*** referred to the dissenting judgment of Roberts-Smith J in ***Johnson v Staniforth***⁶ where his Honour recognised a series of graduations in impairment which might justify the appointment of an administrator of the estate of the impaired person but which were not necessarily inconsistent with the exercise of testamentary capacity generally or at a particular time for an individual testator.

³ ***Full Board Decision*** [21].

⁴ ***Full Board Decision*** [48].

⁵ ***Full Board Decision*** [50].

⁶ ***Johnson v Staniforth*** [2002] WASCA 97.

55 In *Full Board Decision* his Honour Justice Heenan made the point at [57] that:

The purposes of conserving the estate of a person under administration during his lifetime for his own advantage and benefit, which is so obvious in the *Guardianship and Administration Act*, cannot be regarded as extending to the conservation and preservation of the estate after death, where a person the subject of protection has ceased to have any mortal needs. This is expressly recognised in the Act by section 78(1)(b) which provides that the authority of an administrator of the estate of a represented person ceases on the death of the represented person.

56 His Honour at [69] said:

... that the grant of a power to make a will or testamentary disposition for or on behalf of a represented person is not an action or step necessary for the administration or protection of that person's affairs during his or her lifetime.

57 His Honour then said at [74]:

The conferral of a power on some other person to make a will or other testamentary instrument for or on behalf of a person would constitute such a fundamental change in the law that it could only be accomplished by express legislation to such effect.

58 His Honour specifically found at [81] that:

... the making of a will or other testamentary instrument does not constitute any disposition of the testator's property, and that the eventual devolution and distribution of the testator's property, if any, which will take place on his death in accordance with the terms of that will and, if they apply, the laws relating to intestate distribution, is not a distribution of property or estate to which s 77(1) of the Act applies.

59 Notably these comments were made by his Honour in 2003. In 2007 the Act was amended. At the same time the Wills Act was amended to allow for the Supreme Court of Western Australia to make a statutory will.

60 The Wills Act was also amended at this time by adding 'or disposition' after the word instrument.

61 The Explanatory Memorandum says that the amending of the definition of will by the adding of the word 'disposition' was because '... there are some testamentary provisions which might not be a 'disposition' as defined in the present Act. An example is the direction

by will that is authorised by section 33 of the *Life Assurance Companies Act 1889*.⁷

Cases Law - testamentary dispositions

62 In *Narumon*, Narumon Pty Ltd, the trustee of a self-managed superannuation fund applied to the Supreme Court of Queensland seeking declarations and orders regarding the validity of two BDBN's made in 2016 by attorneys acting on behalf of an incapacitated principal member of his superannuation fund.

63 The first nomination was a confirmation or extension of a BDBN previously made by the incapacitated principal member of his superannuation fund in June 2013 and the second was the making by the attorneys of a new BDBN.

64 In inquiring into the validity of the 2016 extension of the BDBN, the court was required for various reasons to consider the validity of the 2013 BDBN made by the principal member when he had capacity.

65 Having found that the 2013 BDBN was valid to the extent that the persons nominated were eligible under the relevant superannuation trust deed, the court went on to consider the validity of the 2016 extension of that BDBN.

66 To determine whether the attorneys had the power to make a BDBN under the *Powers of Attorney Act 1998 (QLD)* (**Powers of Attorney Act**) the court looked to whether the execution of a BDBN in a superannuation context was a 'financial matter' for which the attorneys would have authority or power to act upon.

67 In finding that the definition of a financial matter was broad enough to confer power on an attorney to make a BDBN the court turned to the question as to whether there was 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 cannot be performed by an attorney.

68 In concluding that there was no reason, the court stated at [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 testamentary act, and so is not captured, by

⁷ Explanatory Memorandum, Wills Amendment Bill 2006 (WA) 2.

analogy, by the restriction against delegation to an attorney the making of a will.

69 In making this statement, Bowskill J referred to the decision of His Honour Chief Justice Doyle of the Supreme Court of South Australia in *Re Application by Police Association of South Australia*.⁸

70 Bowskill J essentially relied upon the decisions of *Re Police Association* and *McFadden v Public Trustee for Victoria*⁹ as authority for his position that a BDBN was not a testamentary act.

71 In *Re Police Association* the Police Association received insurance money following the death of two members of the Police Association and applied to the Supreme Court of South Australia for direction as to whom it should pay that money. The two deceased members had specified on a 'nomination form' to whom death benefits should be paid.

72 The court held the provision of the 'nomination form' had no legal effect until the member in question died, remaining a member of the Police Association and continued to be qualified for payment under the scheme. The member had no equitable interest in the death benefit paid to the Police Association prior to death.

73 Further, it found the completed 'nomination form' was not a testamentary disposition requiring compliance with the *Wills Act 1936* (SA).

74 *McFadden* concerned an application by trustees of a pension scheme for direction as to whom payments of funds they were holding on behalf of the deceased should be paid. The trustees of the pension scheme took the view that the funds they were holding should be paid to the deceased's next of kin, who (it was not contested) were his brother and four sisters.

75 The deceased had purported to nominate his brother and one of his sisters as the beneficiaries of the funds held by the trustees of the pension scheme. However, it was agreed that as his brother and one sister were not dependants of the deceased they were not, according to the rules of the pension scheme, eligible to be nominated.

⁸ *Re Application by Police Association of South Australia* [2008] SASC 299; (2008) 102 SASR 215, [75] (*Re Police Association*).

⁹ *McFadden v Public Trustee for Victoria* (1981) 1 NSWLR 15, 29 - 32 (*McFadden*).

76 The trustees determined that as the nomination was not effective they were, according to the rules of the pension scheme, obliged to pay the funds to the deceased's next of kin, namely his brother and sisters.

77 The executor of the deceased's will maintained that the moneys held by the trustees should be paid to the deceased's estate. The deceased's will left nothing to two of his sisters.

78 The executor of the deceased's estate argued that, as the pension scheme deed reserved a right to the deceased to nominate a beneficiary of the funds held by the pension scheme, the execution of the deed or the signing of the deed was a testamentary act and therefore for the pension scheme to be valid it needed to be executed as a valid will.

79 The executor's alternative argument was that the nomination of a beneficiary by the deceased was a separate testamentary act which was ineffective because it was not executed and attested as required for a valid will.

80 His Honour Justice Holland in *McFadden* rejected the argument that entering into the deed was a testamentary act. He found that the deceased's act of joining the pension scheme was an act of participation in the setting up of the trust inter vivos as to the subject property. Therefore, the deceased did not have to execute the deed in the manner required for a valid will to make the deed effective.

81 His Honour also rejected the submission that the nomination of beneficiaries under the pension scheme was a testamentary act. He found as follows:

A nomination of the beneficiary to take under the trust is in the present context, in my opinion, the exercise of a contractual right not a testamentary power. Any dispositive effect that the nomination may have derives from the contract and the exercise of contractual rights inter vivos and not from the death of the contributor.¹⁰

82 Justice Holland went on to distinguish a number of cases that reached a contrary conclusion. He did so on the basis that those cases dealt with situations where the beneficiaries of the schemes, unlike the one he was concerned with, had proprietary rights and powers over the subject property during their lifetime which amounted to a beneficial interest in the property until death.

¹⁰ *McFadden* 32 [E].

83 His Honour referred to a number of what he called the 'friendly society cases'¹¹ as being distinguishable upon the basis that the property in question belonged to the member up to the time of death and that the nomination was an attempt to dispose of the deceased's own property on death. He also discussed the 'nominee insurance policy cases' where the courts found the nomination of a beneficiary to receive the policy moneys on the insured's death was a testamentary disposition.

84 The court decided that the pension scheme entered into was a binding contract for the creation of a trust of future property and that the trustees were bound in law to hold the funds on trust for the five siblings of the deceased in equal shares as the deceased's next of kin.

85 In *Re Police Association* Doyle CJ adopted aspects of the approach of Holland J in *McFadden*. In applying Holland J's approach he found that '... during the member's lifetime there is a trust of the right of action vested in the Police Association to sue for and to recover an amount that becomes payable under the relevant policy on death of the member'.¹²

86 In *Bird v Perpetual Executors and Trustees Association of Australia Ltd*¹³ the High Court distinguished a testamentary document from a binding agreement as:

A document made to depend upon the event of death for its vigour and effect and as necessary to consummate it is a testamentary document.

But a document is not testamentary if it takes effect immediately upon its execution through the enjoyment of the benefits conferred thereby be postponed until after the donor's death.

(citations omitted)

87 In *Re Bubnich*¹⁴ the Full Court of the Supreme Court of Western Australia found that a term in the partnership agreement which provided that 'if a partner died during the continuance of the partnership the other partner should succeed to the interest of the deceased partner' was a covenant creating an immediately binding obligation. Further, as it was an immediate binding obligation it was not therefore in the nature of a testamentary transaction or document.

¹¹ *Mc Fadden* 33 [D] – [E].

¹² *Re Police Association* [75].

¹³ *Bird v Perpetual Executors and Trustees Association of Australia Ltd* (1946) 73 CLR 140, 144 – 145 (Starke J) (*Bird*).

¹⁴ *Re Bubnich* [1965] WAR 138 (*Bubnich*).

Does the Tribunal have power to grant the function or authority to an administrator to make a BDBN?

88 Section 69(2) of the Act permits an administrator (with limited or plenary powers) to do only those things as are necessary for the performance of the functions invested in him or her.

89 The purpose of an administration order is for the conservation of the estate of a person under administration during his or her lifetime for his or her own advantage and benefit, and does not extend to the conservation and preservation of his or her estate after death, where a person the subject of protection has ceased to have any needs.¹⁵

90 The purpose of a BDBN is solely to enable transmission on a person's death of their superannuation benefit.

91 An administrator's authority ends upon a person's death¹⁶ as does their duty and obligation to the person the subject of the administration order.

92 The Tribunal finds the making a BDBN is not for the purpose of carrying out his or her purpose as an administrator namely the conservation of the estate of a person under an administration order for his or her own advantage and benefit. On this basis the Tribunal does not have power to grant the additional function to a limited or plenary administrator.

93 Having found that the Tribunal does not have power to grant the additional function to the applicant it is not necessary for the Tribunal to determine whether a BDBN is a testamentary act. However given the importance of this question the Tribunal will continue to determine some of the other issues in the matter.

Is a BDBN a testamentary disposition under the Act?

94 As referred to previously, Bowskill J in *Narumon* based his view of a BDBN not being a testamentary disposition on *McFadden* and *Re Police Association*.

95 In *McFadden* his Honour Justice Holland distinguished those cases where the beneficiaries of the schemes, unlike the one he was concerned with, had proprietary rights and powers over the subject property during

¹⁵ *Full Board Decision* [80].

¹⁶ Section 78(1)(b) of the Act.

their lifetime which amounted to a beneficial interest in the property until death.

96 In *Re Police Association* Doyle CJ specifically found that the member who had made the nominations had no existing equitable interest to be dealt with prior to death.¹⁷ Further, the parties did not argue that the completed request or nomination form was a testamentary disposition.¹⁸

97 The distinguishing factors that the authorities have relied upon to determine if a nomination in a document is or is not a testamentary act or disposition is whether there is a legal entitlement to the object of the nomination and whether the nomination is binding when it is made.

98 The 'friendly society cases' and the 'nominee insurance policy cases' support the proposition that a BDBN is a testamentary disposition. In these cases, where a BDBN is made in respect of funds in which the superannuation member has a beneficial interest up to the time of death, and is not made further to a contractual right, the nomination of a beneficiary to receive the funds on the member's death is considered to be a testamentary disposition.

99 The Tribunal finds that the authorities support a finding that a BDBN is a testamentary disposition where the member of a pension/superannuation fund has a present equitable entitlement to the money in the pension/superannuation fund and the BDBN was not made further to a contractual right.

100 SM has a beneficial interest in the money from the Fund being paid into the Superannuation Fund.

101 The BDBN can be changed at any time up until SM's death, subject to her capacity, and does not take effect until the death of SM.

102 Therefore it follows SM has proprietary rights and powers over the subject property during her lifetime which amounts to a beneficial interest in the property until her death.

103 Any BDBN she is able to make does not take effect until her death.

¹⁷ *Re Police Association* [69].

¹⁸ *Re Police Association* [70].

104 For the above reasons the Tribunal finds that the proposed BDBN is a testamentary disposition.

If the Tribunal has power to grant the additional function to an administrator is it in the SM's best interests that the Tribunal grant that function to the applicant?

105 The applicant has confirmed that if SM makes no nomination or does not make a BDBN then any money left in the Superannuation Fund on her death will be paid to her legal personal representative.

106 If SM has made a will then her superannuation benefit can be paid to her executor. If she dies intestate then it can be paid to her legal personal representative. Additionally, if the applicant considers it to be in the best interests of SM that she have a will to deal with her benefit in the Superannuation Fund, the applicant may (subject to the necessary powers being included in the administration order) apply to the Supreme Court for a statutory will pursuant to s 111A of the Act.

107 In the event the Tribunal had the power to grant the additional function to the applicant it does not consider it is in SM's best interests to do so and would refuse to grant the function to the applicant.

Conclusion

108 For the reasons set out above the Tribunal finds:

- 1) The Tribunal does not have power to grant to an administrator the function to make and renew any document which has the effect of directing or binding a superannuation trustee as to the payment of a superannuation death benefit following SM's death as it is not a function for the purpose of conserving SM's estate for her benefit.
- 2) An administrator with plenary powers cannot make a BDBN for a represented person as it is not a function for the purpose of conserving the estate of a represented person for his or her benefit.
- 3) The making of a BDBN where the represented person has a beneficial interest in the funds the subject of the BDBN is a testamentary act or disposition.

- 4) In any event, the Tribunal does not consider it would be in SM's best interest to grant the additional function to the applicant even if it had the power to do so.
- 5) SM, being a person the subject to an administration order, is not prohibited by reason of s 77(1)(a) of the Act from making or renewing any document which has the effect of directing or binding a superannuation trustee as to the payment of a superannuation death benefit following SM's death.

Orders

1. The application is dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

JUDGE T SHARP, PRESIDENT (ACTING)

16 APRIL 2019