It's back to the future

Uncertainty returns to binding death benefit nominations

WITH CHRISTINE SMYTH

About this time last year, succession lawyers breathed a collective legal sigh of relief.

Why? Because her Honour Bowskill J, through the decision of *Re Naruamon Pty Ltd* [2018] QSC 185, gave us a judicial Alka-Seltzer, easing our legal indigestion over the question of whether a power of attorney could, or could not, make a binding death benefit nomination (BDBN) in a superannuation fund.

Succinctly, the answer was yes. We finally had certainty! Bowskill J determined that a BDBN was a financial matter within the meaning of the *Powers of Attorney Act 1998* (Qld).[1] Accordingly, if the fund deed permitted it and there were no other prohibiting factors, such as a conflict of interest, it could be done.

Key to this conclusion was her Honour's determination that the making of a BDBN in a superannuation fund, "is not a testamentary act and so is not captured, by analogy, by the restriction against delegating to an attorney the making of a will".[2] This principle has since been relied on in the decisions of: *MZY v RYI* [2019] QSC 89; *Hartman v Nicotra* (unreported BS 11925 of 2017, Mullins J, 19 December 2017); and *Schafferius v Piper* (unreported BS 12145 of 2016, Boddice J, 8 December 2016).

All was well in succession law land until Western Australia weighed in on the debate through the recent decision of *SM* [2019] WASAT 22.[3] [4] There, District Court Judge T Sharp, sitting as Deputy President of the State Administrative Tribunal, made a contrary determination that "(t)he 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".[5] And so it seems, the best of all minds can differ on fundamental things.

SM involved an application by a trustee for an order that they, as the administrators of the represented person's estate, be authorised to execute a BDBN on their behalf. The five issues for the court's determination were:

1. Could the tribunal confer on an administrator a power to make or confirm a BDBN?
2. Could an administrator with plenary powers make a BDBN for a represented person?
3. Could 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 s71(2a) of the *Guardianship and Administration Act 1990* (WA) from making a BDBN?
5. If the tribunal had power to grant the additional function to an administrator, was it in SM's best interests that the tribunal grant that function to the applicant?

The bulk of the judgment considered the tribunal's powers under the *Guardianship and Administration Act 1990* (WA). It should be noted that a number of the relevant provisions differ from the *Guardianship and Administration Act 2000* (Qld), particularly the purpose of an administration order.[6] That discussion is beyond the scope of this article.

For this article, what is critical, is Sharp J's analysis around the question of whether a BDBN was a testamentary disposition. In reaching his conclusion that it is, Sharp J considered, at length, Bowskill J's judgment, with particular focus on the two decisions on which her Honour relied to reach her conclusion about the testamentary nature of a BDBN: *Re Application by Police Association of South Australia* [2008] SASC 299; (2008) 102 SASR 215, [75] (*Re Police*); and *McFadden v Public Trustee for Victoria* (1981) 1 NSWLR 15, 29–32 (*McFadden*).

Referring to *Re Police,* Sharp J observed that "The member had no equitable interest in the death benefit paid to the Police Association prior to death".[7] With respect to *McFadden*, Sharp J noted that that Holland J's rejection of the nomination in question there, as not constituting a testamentary act, arose out of "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."[8]

He then went on to rely on *Bird v Perpetual Executors and Trustees Association of Australia Ltd*,[9] noting: "[T]he 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."

Sharp J concluded that "[t]he purpose of a BDBN is solely to enable transmission on a person's death of their superannuation benefit".[10]

Accordingly, "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."[11] Having reached this conclusion, Sharp J noted that it was not necessary to determine the issue of the testamentary nature of a BDBN[12] but he did so anyway, because he considered it was important.

He found:

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.* (emphasis added)
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.
104. *For the above reasons the Tribunal finds that the proposed BDBN is a testamentary disposition. (emphasis added.)*

So where does this leave us? Only the ratio decidendi of a judgment binds a lower court; views in dissent on tangential matters are but mere obiter.[13]

Here we have a lower court in another jurisdiction concluding in obiter, that a BDBN is testamentary in nature. Nevertheless, Sharp J did undertake a detailed analysis of the law to reach his entirely opposite conclusion. In doing so he threw shade over the certainty of Bowskill J's finding. Some might be forgiven for thinking this is 'judicial activism' at work, taking us back to the future?

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, and Consultant at Robbins Watson Solicitors. She is an executive committee member of the Law Council Australia – Legal Practice Section, Court Appointed Estate Account Assessor, and member of the QLS Specialist Accreditation Board, Proctor Editorial Committee, QLS Succession Law Committee and STEP.

Notes

1 At [59].
2 At [71].
3 My thanks to Andrew Smyth, Managing Partner at Robbins Watson for bringing this judgment to my attention.
4 Note this decision was delivered a week after *MZY v RYI* [2019] QSC 89 was delivered
5 At[108] (4).
6 See s6 *Guardianship And Administration Act 2000* (Qld):
"This Act seeks to strike an appropriate balance between—
(a) the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making; and
(b) the adult's right to adequate and appropriate support for decision-making."
7 At [72].
8 At [80] citing Jollan J in *McFadden*.
9 At [86] citing Stake J at 144–145.
10 At [90].
11 At [92] cf s6 *Guardianship and Administration Act 2000* (Qld).
12 At [93].
13 International Academy Of Comparative Law Conference, Utrecht, The Netherlands 17 July 2006 Precedent – Report On Australia The Hon Justice Michael Kirby AC CMG citing *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, per Kirby J at 417; *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, per Mason CJ, Wilson, Dawson and Toohey JJ at 314.