A Matter of Trust

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Can an administrator make a binding death benefit nomination – a discussion of the recent State Administrative Tribunal decision in SM [2019] WASAT 22

SM's mother was appointed administrator of her estate on 30 November 2016. On 30 July 2018, SM's estate received damages of approximately $5.7million and Australian Executor Trustees (AET) was appointed as trustee of such monies. AET was granted a limited administration order on 5 November 2018 for the purpose of depositing monies into superannuation for SM's benefit. During the course of the proceedings, the following additional function was sought by AET:

> *"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."*[1]

A hearing to consider the additional function was listed before a three member panel. The key considerations were whether:

1. the Tribunal can confer on an Administrator a power to make or confirm a binding death benefit nomination **(BDBN)**;
2. an Administrator with ***plenary*** powers can make a BDBN;
3. a represented person subject to an administration order can make a BDBN;
4. making or renewing a BDBN is a ***testamentary disposition***; and
5. it is in the ***best interests*** of the represented person that the Tribunal grant the additional function.[2]

What is a testamentary disposition?

A disposition includes a gift, devise, bequest or an appointment of property contained in a will.[3] A will includes a codicil and any testamentary instrument or disposition.[4] Subject to section 111A of the *Guardianship and Administration Act 1990* (WA), a plenary administrator may not make a will or other testamentary disposition on behalf of a represented person."[5] Section 111A[6] provides that a plenary guardian or administrator may make an application to the Supreme Court in accordance with section 40 of the *Wills Act 1970* (WA) for a will to be made for a person who lacks testamentary capacity. Under section 40, the Supreme Court may on the application of any person make an order authorising the making, alteration or revocation of a will on behalf of a person who lacks testamentary capacity. Therefore, if the making of a BDBN is considered to be a testamentary disposition, then arguably an administrator may be prohibited from making a BDBN.

Whether a BDBN is considered to be a testamentary disposition will depend on whether the represented person has a legal entitlement to the object of the nomination and if the nomination is binding when it is made.[7] In this instance, the proposed BDBN was found to be a testamentary disposition because SM had proprietary rights and powers over the property in the superannuation during her lifetime and any BDBN did not take effect until her death.[8] The Tribunal found it was not able to grant the order sought because it was not a permissible function of an administrator.

Can a represented person make a BDBN?

Where there is an administration order, the represented person is incapable of making any disposition of their estate, except to the extent that the

administrator authorises them to do so in writing with the consent of the Tribunal.[9] The Tribunal referred to a previous decision where it was found that "any disposition" did not include making a will because the will itself does not effect a disposition, it is the death of the will maker that creates the disposition of the will maker's property.[10] Therefore a represented person can make a testamentary disposition, as long as the above requirements are met and the person has the requisite testamentary capacity. A capacity assessment of the represented person in accordance with *Banks v Goodfellow*[11] may be of assistance to an administrator who finds themselves in a position where it may be desirable for a represented person to make a BDBN.

Can the Tribunal confer such a power?

The Tribunal found it did not have the power to grant the additional function as an administrator's role is to protect the estate of the represented person during their lifetime and the purpose of a BDBN is solely to deal with a superannuation benefit on death.[12] The appointment of an administrator ceases upon death and an administrator has no duty to protect the estate of the represented person after their death.[13] However, arguably the position may be different if the administrator is the Public Trustee, as upon the death of any person their real and personal estate is deemed to vest in the Public Trustee until a grant is made.[14]

The Tribunal found that, even if it had the power to grant the additional function, it was not in SM's best interests because if no BDBN was made, any monies left in the superannuation fund would ordinarily be paid to the Legal Personal Representative and pass under the terms of the will (if there was one) or the rules of intestacy.[15] Further, as SM lacked capacity to make a will, it was open for the administrator to make an application under section 40 of the *Wills Act 1970*.[16]

What about an attorney acting under an Enduring Power of Attorney?

In a recent Queensland decision, *Re Narumon Pty Ltd*,[17] it was held that renewing a BDBN was not a testamentary act and in accordance with Queensland legislation was considered to be a "financial matter" for which the attorney under an enduring power of attorney had the requisite power.[18]

The position in Western Australia differs from that in Queensland, as there is no similar definition of a "financial matter" as set out in the *Powers of Attorney Act 1998* (Qld). Therefore, the author submits that in Western Australia, the decision in *SM*[19] may also apply to an attorney, as their authority applies only during the lifetime of the donor. Although there is no express provision in the legislation that prohibits an attorney making a testamentary disposition, it is inherent that their power does not extend to protecting the estate on the passing of the donor. Subject to any conflict issues, an attorney could also make an application for a statutory will should the need arise.[20]

Conclusion

Whether an administrator can make a BDBN will depend on the facts of the case, particularly as to whether the proposed BDBN is a testamentary disposition, and this in turn will depend on the type of policy and whether the represented person has proprietary rights and powers over the property during their lifetime. If the represented person has testamentary capacity, a BDBN could be made with the approval of the administrator and consent of the Tribunal. Practitioners should bear in mind that any person, including a plenary administrator or an attorney, can make a section 40 application to deal with testamentary dispositions if the represented person lacks the requisite testamentary capacity.

Endnotes

1. *SM* [2019] WASAT 22 para 8 (emphasis added).
2. *SM* [2019] WASAT 22 para 36 (emphasis added).
3. Section 4 of the *Wills Act 1970*.
4. Ibid.
5. Section 71(2a) of the *Guardianship and Administration Act 1990*.
6. *Guardianship and Administration Act 1990*.
7. *SM* [2019] WASAT 22 para 97.
8. *SM* [2019] WASAT 22 paras 100 – 104.
9. Section 77(1) of the *Guardianship and Administration Act 1990*.
10. *The Full Board of the Guardianship and Administration Board* [2003] WASCA 268.
11. (1870) LR 5 QB 549.
12. *SM* [2019] WASAT 22 paras 89 and 90.
13. *SM* [2019] WASAT 22 para 91.
14. Section 9 of the *Public Trustee Act 1941*.
15. Section 14 of the *Administration Act 1903*.
16. *SM* [2019] WASAT 22 paras 106.
17. [2018] QSC 185.
18. *Re Narumon Pty Ltd* [2018] QSC 185 at para 69 and Schedule 2 Part 1 of the *Powers of Attorney Act 1998*.
19. [2019] WASAT 22.
20. Section 40 of the *Wills Act 1970*.