SUPREME COURT OF QUEENSLAND

CITATION:	*Re SB; Ex parte AC* [2020] QSC 139
PARTIES:	**RE SB; EX PARTE AC**
FILE NO/S:	BS No 4753 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	29 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	15 May 2020
JUDGE:	Martin J

ORDER:

1. Pursuant to s 22 of the *Succession Act* 1981 (Qld) (the Act), leave be granted to the applicant to apply for an order authorising a will to be made on behalf of SB.

2. Pursuant to s 21 of the Act, a will be made for SB in terms of the draft will that is exhibit "ACS-01" to the affidavit of AC filed in this proceeding.

3. It is declared that upon the proper construction of:

(a) the Perpetual Super Wrap Trust Deed dated 30 September 2011; and

(b) s 33(1) of the *Guardianship and Administration Act* 2000,

NK, as administrator of SB for all financial matters except management of her settlement funds for personal injuries, may execute on her behalf a non-lapsing nomination pursuant to cl 6 of the said trust deed directing the trustee of the Perpetual Super Wrap Trust to pay 100% of SB's death benefits to her legal personal representative appointed by her last will.

4.

(a) Any copy of the court's reasons in these proceedings published on the court's judgment website or in any other publication made to, or accessible by, the general public or a section of the public, be in an anonymised form;

(b) The parties' names appearing on the court's

electronic file of these proceedings be anonymised.

5. The applicant's costs of the proceeding be paid out of the assets of SB on the indemnity basis.

SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – LOSS OR LACK OF CAPACITY AND STATUTORY WILLS – where SB was seriously injured in a motor vehicle accident in which she was left almost totally paralysed – where SB's litigation guardian seeks leave under s 22 of the *Succession Act* 1981 to apply for an order authorising the making of a will on her behalf – whether there are reasonable grounds for believing that SB does not have testamentary capacity

SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – LOSS OR LACK OF CAPACITY AND STATUTORY WILLS – where the applicant seeks an order under s 21 of the *Succession Act* 1981 that the court authorise the making of a statutory will on behalf of SB in the terms of a draft will – whether the proposed will is, or may be, one which SB would make if she had testamentary capacity

EQUITY – TRUSTS AND TRUSTEES – EXPRESS TRUSTS CONSTITUTED INTER VIVOS – CONTRACTS AND COVENANTS – where SB was awarded damages for her injuries – where part of the damages was invested in a superannuation fund – where rule 6.2 of the trust deed provides that if a non-lapsing nomination is not made, the death benefit will be paid to the member's dependants and personal representative – where the administrator of SB seeks a declaration that upon proper construction of the trust deed and s 33(2) of the *Guardianship and Administration Act* 2000, he may execute a non-lapsing nomination on her behalf – whether a non-lapsing nomination is a revocable disposition of property intended to take effect at death

Acts Interpretation Act 1954
Guardianship and Administration Act 2000
Powers of Attorney Act 1998
Succession Act 1981, s 21
Uniform Civil Procedure Rules 1999

Banks v Goodfellow (1870) LR 5 QB 549, applied
Carr v Homersham (2018) 97 NSWLR 328, applied
McFadden v Public Trustee for Victoria [1981] 1 NSWLR 15, applied
Re Application by Police Association of South Australia (2008) 102 SASR 215, applied

Re Narumon Pty Ltd [2019] 2 Qd R 247, applied

COUNSEL: R Whiteford and M Crofton for the applicant

SOLICITORS: Creevey Russell Lawyers for the applicant

[1] SB was born in Myanmar in 1970. Her first language is Rohingya. She, and her family, immigrated in 2009. In July 2015, she was seriously injured in a motor vehicle accident leaving her almost totally paralysed. Her litigation guardian seeks orders that, among other things, the court authorise the making of a will and that declarations be made allowing for the execution of a nomination under a trust deed.

[2] The main issue is whether SB is a "person without testamentary capacity" within the meaning of s 21 of the *Succession Act* 1981 (the Act).

The statutory background

[3] Power is given to the court to make a statutory will by s 21 of the Act.

[4] Leave is required before an application for such an order can be made (see s 22). Section 23 requires that certain identified information be given to the court.

[5] Section 24 provides:

> "**24 Matters court must be satisfied of before giving leave**
>
> A court may give leave under section 22 only if the court is satisfied of the following matters—
>
> (a) the applicant for leave is an appropriate person to make the application;
>
> (b) adequate steps have been taken to allow representation of all persons with a proper interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom an order under section 21 is sought;
>
> (c) there are reasonable grounds for believing that the person does not have testamentary capacity;
>
> (d) the proposed will, alteration or revocation is or may be a will, alteration or revocation that the person would make if the person were to have testamentary capacity;
>
> (e) it is or may be appropriate for an order to be made under section 21 in relation to the person."

[6] I deal in more detail with the requirements of ss 23 and 24(a) and (b) later in these reasons. The issues that need consideration are:

(a) are there reasonable grounds for believing that SB does not have testamentary capacity,

(b) is the proposed will one which SB would, or might, make if she had testamentary capacity, and

(c) is it appropriate for an order to be made under s 21?

SB's condition

[7] The motor vehicle accident in which she was injured in July 2015 left her almost totally paralysed as a consequence of a severe spinal injury. She can move her head very slightly from side to side. She cannot move her trunk and limbs. She is dependent on a ventilator via a tracheostomy. She is fed via a gastric stoma. She is dependent on carers for activities of daily living. She is unable to speak but she can mouth words and make some noises. Non-family members are unable to communicate effectively with her. It appears that some family members, especially one of her sons, is able to communicate to a limited extent with her.

[8] SB brought a claim for damages for her injuries. It was compromised for $10 million and costs.

[9] On 17 April 2018, the Queensland Civil and Administrative Tribunal appointed:

(a) Perpetual Trustee Company Limited as the administrator to manage SB's damages award, and

(b) NK, her son, as her administrator for all of her other financial matters.

[10] Perpetual Trustee used part of the damages to:

(a) buy land and have a purpose-built dwelling constructed on it,

(b) invest about $6.75 million in a superannuation fund for her, and

(c) hold the balance in cash on her behalf.

Her family

[11] SB married her husband, NH, in a Bangladesh refugee camp in 1991. She had a son, ZH, from an earlier relationship and he had a daughter, NS, also from an earlier relationship. SB and NH had three children:

(a) a son, NM,

(b) a son, NK, and

(c) a daughter, SN.

[12] Before coming to Australia, SB had had no formal education. She had commenced English studies at a TAFE before the accident. SB lives in the purpose-built home with her husband and the children of their marriage together with their daughter's husband and young child.

[13] NH has had no formal education, speaks no English, has not held employment in Australia, and has no significant assets. He and SB remain very close.

[14] NM is 27 years old. He is single with no dependants. He is currently unemployed but hopes to obtain work. He has worked as a Rohingya interpreter. He helps with his mother's care and has a particularly close relationship with her.

[15] NK is 25 years old. He is single and without dependants. He was studying nursing when SB was injured and he ceased studies to care for her. He has been her main care provider since the accident and has, since September 2018, been employed as her carer by the company retained to provide her general care.

[16] SN is 24 years old. She is married with a one year old child and is employed part-time to assist with her mother's care. She has a close relationship with her mother.

[17] SB's son from an earlier relationship, ZH, lives in a town in south-east Queensland. He is married with four children and is unemployed. He has not assisted with his mother's care and has only a distant relationship with her and the remainder of the family.

[18] Her stepdaughter, NS, is married with three children. She is unemployed and lives with her husband in rented accommodation. She is not involved in her stepmother's care and has only a distant relationship with her and the rest of the family.

Does SB have testamentary capacity?

[19] The Act does not define "testamentary capacity". The most commonly applied test comes from the decision in *Banks v Goodfellow*[1] where Cockburn CJ said, with respect to the disposition of property by a will, that:[2]

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

[20] That test was applied in circumstances where the instructions for a will and the formal will itself had been signed by the testator, thus "the question [was] whether on both or either of those days the testator was of sound mind, so as to be capable of making a will."[3] It was an assessment, then, that was made of the capacity of someone who had already made a will, not about a person's capacity to make a will.

[21] The *Banks v Goodfellow* test will be 150 years old in a matter of weeks after this decision is delivered. The language used in that well-known passage may not pass muster in light of advances in medical knowledge since then. But, for the purposes of this application, I need say no more than that I agree with the observation of Leeming JA in *Carr v Homersham*[4] where his Honour said:

> "[132] The task of the 21st-century court is not to determine whether or not the deceased was suffering from something

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1 (1870) LR 5 QB 549.
2 At 565.
3 At 551.
4 (2018) 97 NSWLR 328.

> which the Court of Queen's Bench nearly 150 years ago would have described as an 'insane delusion'. I doubt the wisdom of asking a psychiatrist to provide an expert opinion couched in such terms, or of cross-examining him on his understanding of the term, although that is what happened in this trial. The question is one of common law principle, not of construction of the words used to frame one part of an elaborate judgment in 1870. Judgments should not be read as if they were statutes."

[22] The argument advanced on behalf of the applicant is that "testamentary capacity" also involves the testator being able effectively to communicate his or her testamentary intentions. I agree. The capacity to make a will requires not only the mental acuity necessary, but also the ability to convey the testamentary intentions. SB is incapable of communicating intentions of that complexity. That incapacity has also made the task for experts of assessing her condition very difficult.

[23] She was examined by Dr S, a psychiatrist, on 11 September 2018. Before that she had been examined by occupational therapists, a speech therapist, and a rehabilitation physician. Dr S took their reports into account in forming her opinion.

[24] Dr S recounted the difficulties she had understanding SB during her examination. She noted that:

- SB "was able to draw attention to herself by smacking her lips".
- She was clearly mouthing words to her son but most of these were unable to be recognised by Dr S or the interpreter.
- Occasionally she would mouth a word in English which was recognisable.
- Her thought stream and form were not able to be assessed.
- There was no evidence of delusions, and no evidence of auditory or visual hallucinations.
- There was no evidence of cognitive impairment but objective assessment was extremely difficult due to the communication difficulties.

[25] Dr S considered SB's condition in the light of the criteria referred to in the *Banks v Goodfellow* analysis. She noted that:

- SB was unable to explain or display an adequate understanding of her assets despite evidence that she had had these explained to her in the past.
- She was not interested in knowing or learning about her financial situation.
- She was unable to explain the cost of her current care needs.

[26] Dr S came to the conclusion that it was more likely than not that SB did not have testamentary capacity. She explained her conclusion in this way:

> "The main concerns I have regarding SB's capacity are her incomplete understanding of her assets despite adequate explanation, her disinterest in learning about this and her inability to

> adequately explain her reasoning regarding her choices with respect to her will. Due to these issues I do not believe she has the qualities set out in the Banks v Goodfellows [sic] test for testamentary capacity. I was also concerned about the difficulties with communication and that despite attempts, communication was only possible through SB's son. A general requirement for capacity is that a person is able to understand the facts involved in the decision-making and the main choices, weigh up the consequences of those choices and understand how the consequences affect them and communicate their decision. Even with the assistance of her son, SB was unable to communicate to me her reasoning behind her decisions."

[27] I accept that it has been demonstrated that SB does not have the necessary capacity to make a will. Dr S's conclusions are consistent with the other evidence.

Is the proposed will one which SB would, or might, make if she had testamentary capacity?

[28] The proposed will is exhibited to the applicant's affidavit. It:

(a) appoints Perpetual Trustee Company Ltd as executor and trustee,

(b) leaves $50,000 to each of SB's surviving children and her stepdaughter,

(c) leaves the rest of her estate to her husband if he survives her for 30 days and if he predeceases her to the children of their marriage,

(d) requests that her superannuation death benefit be paid to her estate to be distributed as part of her estate, and

(e) provides that any part of her superannuation death benefit paid to a child of her marriage should be treated as if it came from her estate and the distribution of her estate is to be adjusted accordingly.

[29] There is no reliable evidence of SB's wishes. There is no previous will and no record of any expression by her at an earlier time about her wishes or intentions. During the examination by Dr S there was some indication of a desire for some provision to be made for her children.

[30] The applicant is a solicitor with substantial experience in the field of succession. She deposes that the terms of the proposed will are consistent with what a married woman might be expected to do by way of provision for a long-term spouse and the provision of some benefit to the children of her marriage to NH.

[31] The proposed will also provides for legacies of $50,000 to her son, ZH, and her stepdaughter. It was submitted that this was proposed as a means of discouraging family provision applications. It may have that effect.

[32] A consideration of all the evidence concerning SB's life since she came to Australia and what can be gathered from the expressions of her views leads me to the conclusion that this is a will which SB would, or might, make if she had testamentary capacity.

Section 23 and 24 requirements

[33] Sections 23 and 24 of the Act lists a number of items of information that must be provided to the court and the matters of which the court must be satisfied before leave can be granted. For the sake of completeness I will deal with them briefly:

(a) the reason for making the application is that if SB had testamentary capacity she would not want her estate to pass on intestacy but to those who are closest to her and who have provided her with assistance,

(b) the issue of testamentary capacity is dealt with above,

(c) there is no likelihood of her regaining testamentary capacity,

(d) the size and character of her estate is set out in the affidavit material,

(e) a draft of the proposed will is exhibited to an affidavit,

(f) so far as her wishes can be ascertained, they are referred to above,

(g) she has no known previous will,

(h) each of her husband, her children and her stepdaughter, have standing to make a family provision claim – none of them have any significant assets, and each could make a family provision claim unless adequate provision is made in her estate,

(i) there is no evidence to suggest that she intended to make any charitable gifts,

(j) the financial circumstances of those who might benefit from a will are set out above,

(k) her husband and her children, but not stepdaughter, are entitled to share her estate on intestacy,

(l) the applicant is the appropriate person to make this application because the members of the family due to, among other things, language difficulties would find it difficult to properly present the case,

(m) all persons with proper interests, that is, all members of her family, met with the applicant's solicitor who explained the application and each of them has said that they do not wish to be heard on the application,

(n) for the reasons set out above SB does not have capacity, and

(o) for the reasons set out above the proposed will is one that SB would or may have made.

[34] I am satisfied that the applicant has demonstrated that leave should be granted and that a will in the terms of the exhibit to AC's affidavit should be made.

The death benefit declaration

[35] Most of the settlement monies paid to SB (about $6 million) was invested in the Perpetual Private Person Wrap superannuation fund (PPPW). Perpetual Superannuation Ltd is the trustee of that trust.

[36] A person becomes a member of the fund by an application approved by the trustee. Upon admission, a member "is deemed to have approved of and is bound by the Rules" of the trust deed.

[37] Rule 6.2 of the trust deed provides:

> "**6.2 Death Benefits**
>
> A Member's interest in the Fund ceases immediately on his or her death and the Trustee must pay the Death Benefit as follows:
>
> (a) if the Trustee holds for the Member a Non-lapsing Nomination, in accordance with the terms of the Non-lapsing Nomination; or
>
> (b) if the Trustee does not hold a Non-lapsing Nomination for the Member, to one or more of the Member's Dependants and Personal Representative in the proportions determined by the Trustee in its absolute discretion, but having regard to any nominations made by the Member.
>
> (c) If, to the Trustee's knowledge, there is no Dependant or Personal Representative and the Trustee has a reasonable belief that there will not be a Personal Representative appointed, the Death Benefit may be paid to any other person as determined by the Trustee."

[38] It follows that, if a non-lapsing nomination is not made, then the death benefit (as defined in the trust deed) is paid to the member's dependants and personal representative in the proportions determined by the trustee.

[39] No nomination has been made by SB and, in her circumstances, none could be.

[40] The applicant seeks a declaration that, upon the proper construction of the *Guardianship and Administration Act* 2000 (GAA) and the PPPW, SB's financial administrator can execute a death benefit nomination on her behalf.

[41] NK is SB's administrator for all financial matters apart from managing the damages award. The superannuation is not part of that award. Section 33(2) of the GAA affords NK the following power:

> "Unless the tribunal orders otherwise, an administrator is authorised to do, in accordance with the terms of the administrator's appointment, anything in relation to a financial matter that the adult could have done if the adult had capacity for the matter when the power is exercised."

[42] Thus, NK could execute a non-lapsing nomination on his mother's behalf if that act comes within the term "financial matter". That term is defined in the GAA to include a "legal matter relating to the adult's financial and property matters".[5] At

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5 *Guardianship and Administration Act* 2000, sch 2, pt 1, s 1(o).

first sight, that would appear to be sufficient to include the making of a non-lapsing nomination. But "financial matter" does not include a "special personal matter" and a "special personal matter" is defined to include "making or revoking the adult's will".[6] The GAA does not define "will" and the *Acts Interpretation Act* 1954 only defines "will" to include a codicil.[7] The applicant argues that it is unlikely that Parliament would have intended the word "will" to have any meaning other than that in s 5 *Succession Act* 1981 which defines the word to include a codicil or "any other testamentary disposition". That may be so, but it is not necessary to determine that as the common law provides that, at its most basic, a will includes a revocable disposition of property intended to take effect at death.

[43] The question is: is a non-lapsing nomination a revocable disposition of property intended to take effect at death? The answer is: no.

[44] That conclusion is supported by the reasoning of:

(a) Bowskill J in *Re Narumon Pty Ltd*[8] where her Honour considered whether the making of a Death Benefit Nomination was a "financial matter" for the purposes of the *Powers of Attorney Act* 1998. There is no relevant difference between the definition of "financial matter" in that Act and in the GAA. Bowskill J said:

> "[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 analogy, by the restriction against delegating to an attorney the making of a will."

(b) Holland J in *McFadden v Public Trustee for Victoria*[9] where his Honour considered that, in similar circumstances, the exercise by the deceased of the right to nominated beneficiary was not testamentary. The right was in the nature of a power of appointment inter vivos reserved or given by a trust instrument to the settlor or some other donee. He said:

> "In my view, the act of the deceased in becoming a member of the scheme was that of entering into an immediately binding contract for the creation of a trust of future property in certain events which might not but which in fact happened. … In my opinion, the fact that it was a term of the contract that the employee/contributor could nominate the beneficiary of the trust in a prescribed manner at any time up to the date of his death did not convert the transaction from a contract into a testamentary disposition. 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]

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6 *Guardianship and Administration Act* 2000, sch 2, pt 2, s 3(a).
7 *Acts Interpretation Act* 1954, sch 1 (definition of "will").
8 [2019] 2 Qd R 247.
9 [1981] 1 NSWLR 15.
10 At 32.

(c) Doyle CJ in *Re Application by Police Association of South Australia*[11] where his Honour adopted the reasoning of Holland J and, in circumstances similar to the present case, said:

> "I consider that the right of nomination is a right in the nature of a power of appointment, and exercisable by the member during the member's lifetime. It is the exercise of that power of nomination before the member's death, the nomination remaining unrevoked at death, that has the effect of the disposition of property, if indeed there is a disposition of property."[12]

[45] Whatever interest is held by SB in the PPPW, clause 6.2 of the trust deed provides that it ceases on her death. The execution of a non-lapsing nomination is not a testamentary act. It is an act pursuant to a contract between the trustee and SB. The interest she has in the trust fund terminates on her death, and the nomination does not dispose of property but, by the exercise of a contractual right, directs the trustee how the death benefit should be dealt with.

[46] In order to give proper effect to her statutory will it is appropriate to make the declaration sought.

Orders

1. Pursuant to s 22 of the *Succession Act* 1981 (Qld) (the Act), leave be granted to the applicant to apply for an order authorising a will to be made on behalf of SB.

2. Pursuant to s 21 of the Act, a will be made for SB in terms of the draft will that is exhibit "ACS-01" to the affidavit of AC filed in this proceeding.

3. It is declared that upon the proper construction of:

   (a) the Perpetual Super Wrap Trust Deed dated 30 September 2011; and

   (b) s 33(1) of the *Guardianship and Administration Act* 2000,

   NK, as administrator of SB for all financial matters except management of her settlement funds for personal injuries, may execute on her behalf a non-lapsing nomination pursuant to cl 6 of the said trust deed directing the trustee of the Perpetual Super Wrap Trust to pay 100% of SB's death benefits to her legal personal representative appointed by her last will.

4.

   (a) Any copy of the court's reasons in these proceedings published on the court's judgment website or in any other publication made to, or accessible by, the general public or a section of the public, be in an anonymised form;

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11 (2008) 102 SASR 215.

12 At 227.

(b) The parties' names appearing on the court's electronic file of these proceedings be anonymised.

5. The applicant's costs of the proceeding be paid out of the assets of SB on the indemnity basis.