SUPREME COURT OF SOUTH AUSTRALIA

(Civil)

IN THE MATTER OF AN APPLICATION BY POLICE ASSOCIATION OF SOUTH AUSTRALIA

[2008] SASC 299

Judgment of The Honourable Chief Justice Doyle

4 November 2008

PERSONAL PROPERTY - ALIENATION OF PERSONAL PROPERTY - ASSIGNMENT OF CHOSES IN ACTION GENERALLY - WHAT AMOUNTS TO AN ASSIGNMENT

Contract entered into by applicant Association and insurer entitling Association to payment of $100,000 upon the death of a member - statements of Association made to members that the $100,000 would be paid to their estates unless a "nomination form" was filled out by the member and submitted to the Association - whether completion of a nomination form by a member an assignment of a debt or other legal chose in action for purposes of s 15(1) Law of Property Act 1936 (SA).

Held: property the subject of the nomination only comes into existence upon the death of a member - the nomination only takes effect on the death of a member - no assignment of a debt or other legal chose in action during the lifetime of a member.

SUCCESSION - WILLS, PROBATE AND ADMINISTRATION - THE MAKING OF A WILL - TESTAMENTARY INSTRUMENTS - TESTAMENTARY CHARACTER - PARTICULAR DOCUMENTS

Contract entered into by application Association and insurer entitling Association to payment of $100,000 upon the death of a member - statements of Association made to members that the $100,000 would be paid to their estates unless a "nomination form" was filled out by the member and submitted to the Association - whether completion of a nomination form a testatmentary disposition requiring compliance with formalities imposed by Wills Act 1936 (SA).

Applicant: POLICE ASSOCIATION OF SOUTH AUSTRALIA Counsel: MR G EDMONDS-WILSON - Solicitor: TRELOAR & TRELOAR
Other Party: LAURENCE KARPANY Counsel: MR A DAL CIN - Solicitor: TERRENCE J REILLY
Other Party: PUBLIC TRUSTEE FOR THE STATE OF SOUTH AUSTRALIA Counsel: MR M KEITH - Solicitor: PUBLIC TRUSTEE LEGAL SERVICES

Hearing Date/s: 30/07/2008

File No/s: SCCIV-05-1473

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Held: right of nomination is a right in the nature of a power of appointment exercisable during a member's lifetime - exercise of power of appointment only takes effect upon death of member - no need for compliance with Wills Act.

EQUITY - TRUSTS AND TRUSTEES - EXPRESS TRUSTS CONSTITUTED INTER VIVOS - DECLARATION OF TRUST - SUBJECT MATTER OF TRUST

EQUITY - POWERS OF APPOINTMENT - EXERCISE GENERALLY - OPERATION OF APPOINTMENT

Contract entered into by applicant Association and insurer entitling Association to payment of $100,000 upon the death of a member - statements of Association made to members that the $100,000 would be paid to their estates unless a "nomination form" was filled out by the member and submitted to the Association - Association encouraged members to fill out nomination form whenever circumstances of member change - two members of the Association (Ms Faithfull and Mr Karpany) died intestate in a car crash - insurer made $100,000 payment to Association in respect of both deceased members - two members a de facto couple with a child - prior to de facto relationship, Ms Faithfull filled out a nomination form nominating previous husband to receive $100,000 payment, and in the event of the death of both Ms Faithfull and her husband, her child - Ms Faithfull divorced husband prior to death - prior to de facto relationship, Mr Karpany filled out a nomination form nominating brother to receive $100,000 payment - neither Mr Karpany nor Ms Faithfull filled out subsequent nomination form after change of circumstances - whether $100,000 is to be paid to the person named in the nomination form or to Public Trustee as administrator of each estate - whether Association has a discretion as to whom the money is to be paid - if discretion exists, whether a proper exercise of discretion to pay money to those entitled to estate on intestacy.

Held: based on an objective assessment of the Association's communications to members (as settlor), Association holds money on express trust for the nominees, or if no nominee, for the legal personal representative of member - not necessary that Association in fact intended that a trust arise - money paid to Association in respect of death of Mr Karpany payable to brother in accordance with nomination - nomination form completed by Ms Faithfull to be construed objectively - form to be construed in light of intention that the money payable would be for the benefit of those who succeed to the member's estate and family members - nomination form construed so that provision for payment to husband conditional on matrimonial relationship continuing at time of death - consistent with contemporary expectations as expressed in s 20A Wills Act - money paid to Association in respect of death of Ms Faithfull payable to child.

Fair Work Act 1994 (SA); *Family Relationships Act 1975* (SA); *Law of Property Act 1936* (SA) s 15(1); *Supreme Court Rules 1987* (SA) r 103.02(b); *Supreme Court Rules 2006* (SA); *Wills Act 1936* (SA) s 20A, referred to.
In the Estate of Hunter (Deceased) [1957] SASR 194; *Re Allen-Meyrick's Will Trusts* [1966] 1 All ER 740; *McFadden v Public Trustee for Victoria* [1981] 1 NSWLR 15; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; *Trident General Insurance Co Limited v McNiece Bros Proprietary Limited* (1987-1988) 165 CLR 107, applied.
Baird v Baird [1990] 2 AC 548; *In Re Danish Bacon Co Ltd Staff Pension Fund Trusts* [1971] 1 WLR 248; [1971] 1 ALL ER 486, discussed.
Nurses Memorial Centre of South Australia Inc v Beaumont (1987) 44 SASR 454; *Chiropractic and Osteopathic College of SA Inc v Struthers* (1981) 97 LSJS 49; *Re Elizabethan Theatre Trust* (1991) 102 ALR 681; *McPhail v Doulton* [1971] AC 424; *In re Vine* [1955] VLR 200, considered.

IN THE MATTER OF AN APPLICATION BY POLICE ASSOCIATION OF SOUTH AUSTRALIA
[2008] SASC 299

Civil

1 **DOYLE CJ**: The Police Association of South Australia ("the Association") is party to a Group Life Policy ("the Policy") issued by Hannover Life Re of Australasia Ltd ("Hannover Life") as insurer. The Policy provides that if a member of the Association dies, and cover under the Policy is in force in respect of the member, Hannover Life will pay the sum of $100,000.

2 Two members of the Association died. Cover under the Policy was in force in respect of each of them.

3 The Association has applied to the Court. It makes no claim to the money. The Association asks the Court to determine whether it is obliged to pay the money it has received from Hannover Life to the persons named in a form of "request" completed by each of the deceased, or to Public Trustee (who is the Administrator of the estate of each of the deceased). In the alternative, if the Association has a discretion as to whom the money is to be paid, the Association asks the Court to direct whether it would or would not be a proper exercise of that discretion to pay the money to Public Trustee or to the persons entitled to the estate of the deceased member.

Facts

4 There is no dispute about the facts. However, the facts put before me are somewhat limited. I have had to do the best I can with the limited evidence.

Findings

5 I make the following findings under the subheadings indicated.

Association Rules

6 The Association is registered under the *Fair Work Act 1994* (SA). At all material times, by virtue of its registration, it was a body corporate.

7 Its rules are the Association's constitution ("the Rules"). At all material times they were in the same form as the rules that are part of exhibit P1. I proceed on the basis that they bind members and the Association. Whether this is by virtue of the provisions of the *Fair Work Act* or by contract (see *Nurses Memorial Centre of South Australia Inc v Beaumont* (1987) 44 SASR 454 at 466 and *Chiropractic and Osteopathic College of SA Inc v Struthers* (1981) 97 LSJS 49 at 50-51) need not be decided.

8 Members of the police force of South Australia are eligible to become members of the Association.

9 The Rules of the Association were amended in November 1991 with a view to providing for a life insurance scheme for the benefit (in a general sense) of members. At that time a rule in the form of present r 7.1.3 was introduced. That rule provides:

> Membership of the Police Association of South Australia shall automatically include coverage of the Group Life Insurance Scheme.

At the same time the rules were amended to provide that the annual subscription payable would include an additional amount (the "subscribed fee") "for the group life insurance": r 7.1.1.1.

10 While r 7.1.3 assumes the existence of a Group Life Insurance Scheme, the Rules do not in terms require the Association to effect or arrange for such a scheme. Nor do they regulate or provide for entitlements under the scheme. However, by necessary implication r 7.1.3 requires the Association to effect a Group Life Insurance Scheme.

The Scheme

11 Since 1992 the Association has been a party to a Group Life Insurance Scheme ("the Scheme"). This Scheme is a policy of insurance to which the Association (and not its members) is a party; under which the insurer undertakes to pay a specified amount on the death of a member of the Association; under which the Association pays the required premium; under which the specified payment on death is paid to the Association or as it directs, and under which the Association claims no entitlement to the payment to be made on death. The Scheme is for the benefit of members of the Association.

12 In 1992 and 1993 the insurer under the Scheme was NRG Victory Australia Ltd. The only provision of its policy relating to the destination of payments was clause 9 which provided:

> All Agreed Benefits shall be paid to you [the Association] and such payment shall discharge our [the Insurers'] liability with respect to any Insured Person.

From December 1993 the insurer was Hannover Life. The only provision of its policy relating to the destination of payments is clause 4.3 which provides:

> We must pay any benefit to the Proposer [the Association] or to the person the Proposer instructs us to pay it to.
>
> When we follow the Proposer's instruction to pay a benefit to someone else, the payment to them discharges our liability just as if the payment had been made to the Proposer.

13 As I mentioned earlier, communications between the Association and its members about the Scheme are of potential significance. After I had heard submissions in the matter, I asked the parties for further information, and received some additional information.

14 I find that in January 1992, in a Journal distributed to members of the Association, the Secretary stated:

> The insurance cover, when implemented, will give a member's family or estate a $50,000 payment on the death of that member …

15 I am unable to make a finding about printed information distributed to members about the Scheme at this time. However, I find that the proposal to implement the Scheme had been publicised through the Journal, and I find that an aspect of that publicity was the prospect of a payment on death to a member's family or estate.

16 I find that in February 1992, in the same Journal, the Association stated to members:

> To ensure that the money is paid in accordance with the wishes of the Association member the $50,000 will always be paid into the estate of the deceased. The only exception to this will be where the member has provided **written directions** to the contrary to the Association Secretary. The Association will aim to ensure your wishes are met, if there is any ambiguity relating to the directions the money will be paid into the estate.
>
> This method of payment has been decided on as it provides the surest possible way for the money to be paid as the member desired. …
>
> If you are considering some alternative method of having money paid please consider carefully the need to regularly review and amend your directions when your personal circumstances change …

17 I find that in November 1993 in the same Journal, in an article publicising the Scheme, the following information (in a question and answer format) was provided to members:

> Do I have to advise the Association how I would like the money distributed?
>
> Yes – the money will be paid into the Estate of the deceased unless the Association is notified **in writing** to the contrary.

The article included a sample letter addressed to the Association, for use by members who might wish to give a written notification. It was as follows (omitting the formal parts):

> With reference to the Group Life Insurance coverage I hereby request that upon the event of my death, all insurance moneys be paid direct to my spouse … (insert name of spouse) or upon the death of myself and my spouse to be paid direct to my child/ren … (insert name/s).

18 An identical article appeared in the Journal in January 1994.

19 I find that from about 1994 the Association provided to members on request a standard printed nomination form, in substantially the same terms as the sample letter that had appeared in earlier publicity in the Journal.

20 In September 1996 further information was provided in the Journal. Referring to the payment under the policy, the Journal stated:

> To ensure that this is paid direct to your loved one(s), you need to complete an authority, nominating your beneficiaries and return it to the Association for our records. By completing this form, you ensure that the moneys are paid direct to your beneficiaries. If we do not have a record of your nominated beneficiary, the money will go to your estate and there could be lengthy delays whilst the estate is being settled.

The article went on to state that copies of the required form (nominating beneficiaries) could be obtained from the Association.

21 I find that from time to time between 1996 and 2001 statements similar to those above were made to members of the Association, and that a nomination form similar to those above was used.

22 From at least 2001 it was the practice of the Association to invite a member, on joining the Association, to complete a printed form identifying the person to whom the member wished monies payable under the Scheme to be paid in the event of the member's death.

23 I find that from 2001, when a member joined the Association, it was the practice of the Association to give to the member a document in the form of Exhibit AJD 3 to the affidavit of Mr Dunn, Exhibit P1. Under the heading "Group Life Insurance" this document states:

> Immediately on payment of your first membership subscription to the Police Association you are covered under the Association's Group Life Insurance Policy in the amount of $100,000. This amount is payable to your nominated beneficiary in the event of your death whether you are on or off duty, regardless of the cause of death.
>
> Please complete the enclosed Group Life Insurance Beneficiary Form and return it to the Association with your application for membership and direct debit request.
>
> Note: When completing the Group Life Insurance Form, you must have it witnessed by someone other than your beneficiary.

24 I find that every two years the Association sent to its members a new beneficiary form, inviting each member to complete the form and return it to the Association. Many members did not do so, and it was the Association's experience that because of changes in the personal circumstances of members, the request or nomination made by a member would often be "out of date" or unsuitable having regard to changed circumstances at the time of the death of a member.

Ms Faithfull and Mr Karpany

25 Ms Faithfull joined the Association in May 1989. Mr Karpany joined the Association in March 1999.

26 Ms Faithfull married Mr Hobby on 2 October 1993. They were divorced by order of the Family Court, the order taking effect on 20 April 1999. They had no children.

27 At some time in 2002 Ms Faithfull and Mr Karpany entered into a relationship, and began to live together.

28 Mr Karpany had a son, Christopher Karpany, born in January 1987. The mother of the son is a woman with whom he had a previous relationship. Christopher Karpany was living with his mother, and still is.

29 Ms Faithfull and Mr Karpany had a child, Jadyn Milera, born on 18 June 2003.

30 Ms Faithfull and Mr Karpany were both killed in the same road accident on 15 May 2005.

31 By order of the Family Court made on 13 December 2007, Jadyn Milera lives with Laurence Karpany, the brother of the deceased Mr Karpany. Mr Laurence Karpany has by virtue of that order, and by virtue of a further order of 3 March 2008, "parental responsibility for the major long term issues concerning" Jadyn Milera.

32 Neither Ms Faithfull nor Mr Karpany left a will. Public Trustee is the administrator of the estate of each of them, pursuant to letters of administration granted by this Court.

33 I do not have to decide the question of how their estates will be administered. The matter was argued on the basis that Ms Faithfull and Mr Karpany were each, by operation of the *Family Relationships Act 1975* (SA), to be regarded as the putative spouse of the other. The matter was argued on the further basis that Public Trustee would hold Ms Faithfull's estate for Jadyn Milera, and that Public Trustee would hold Mr Karpany's estate for Jadyn Milera and Christopher Karpany in equal shares.

Requests by Ms Faithfull and Mr Karpany

34 I find that Ms Faithfull and Mr Karpany received the Association's Journal. I am unable to make any finding on the question of whether they read the information about the Scheme that appeared in the Journal.

35 Ms Faithfull completed a beneficiary form in December 1995. Mr Karpany completed one in February 2001. The Association is now unable to say whether either of them completed a beneficiary form at an earlier time, and so cannot say

whether the form now in the Association's possession is a replacement for an earlier form. I cannot find that either of them did or did not complete an earlier beneficiary form. Neither Ms Faithfull nor Mr Karpany returned a completed form to the Association at a later date.

36 The printed beneficiary form was addressed to the Association, and read as follows:

> With reference to the NRG Victory Group Life Insurance Coverage, I hereby request that upon the event of my death, all insurance monies be paid direct to
>
> * my spouse/partner/parent …
>
> or upon the death of myself and my spouse to be paid direct to
>
> * my children/parent/named beneficiary …
>
> Yours faithfully

There was provision for the member to sign the form in the presence of a witness.

37 On the third line of the form Ms Faithfull circled the word "spouse". On the fifth line she circled the words "children" and "parent". I set out below how she completed the beneficiary form, including the circled words and omitting the words not circled:

> … all insurance monies be paid direct to my spouse Stephen Craig Hobby or upon the death of myself and my spouse to be paid direct to my children/parent in the event of our death all insurance monies to my children. If no children at time of death all monies to my parents Elizabeth Anne Faithfull John Herbert Faithfull and/or otherwise stated in my will.

38 The form completed by Mr Karpany, but not the form completed by Ms Faithfull, contained the following further statement:

> (PLEASE NOTE: Your nominated beneficiary cannot act as witness to this form.)

39 The form completed by Mr Karpany in 2001 referred to "the Hannover Life Re insurance coverage …". Mr Karpany did not circle any words on the form that he completed. Accordingly, the operative part of the form that he completed reads:

> … all insurance monies be paid direct to my spouse/partner/parent Brother, Laurence Karpany, or upon the death of myself and my spouse be paid direct to my children/parent/named beneficiary Laurence Karpany.

40 I find that some time not long after 1 July 2004 a package of information was sent by the Association to each of Ms Faithfull and Mr Karpany. The information related to income tax and to services that the Association provided to members. Included with this information was a form that is part of

exhibit MJC 3 to the affidavit of Mr Carroll, exhibit P2. The form is headed "Group Life Beneficiary Nomination Form". At the top appears a note:

> Only to be completed if you are a current employee of SAPOL and if your circumstances have changed.

This note did not appear on the beneficiary forms completed by Ms Faithfull and Mr Karpany. The form refers to the policy with Hannover Life, and is again in the form of a request for payment in the event of death. Unlike the earlier forms, this form does not purport to limit the category of persons who can be nominated. It now contemplates that the person completing a form may nominate "other nominated person", a possibility not provided for on the form that was in use earlier.

41 Neither Ms Faithfull nor Mr Karpany completed this beneficiary form.

Other matters

42 Mr Hobby has been served with the application made by the Association. He has not appeared. Mr Laurence Karpany has been served and has appeared to support his claim under the beneficiary form completed by the deceased Mr Karpany.

43 There are some aspects of the facts which are significant.

44 The Rules (r 7.1.3) contemplate that the Association will enter into a "Group Life Insurance Scheme". The Association did so. The Association makes no claim to the money paid to it by Hannover Life. The Rules do not make express provision for entitlement to monies paid under the Scheme, nor do they make express provision for a request or direction to the Association by a member.

45 Rule 6.1.4 gives the Committee of Management power to "Decide questions on which the Rules or any agreement are silent or doubtful".

46 The Association told prospective members and existing members, from time to time, that it would pay money received under the Scheme in accordance with a request or nomination form completed by a member: see exhibit AJD 3 to the affidavit exhibit P1.

47 The form completed by Ms Faithfull and Mr Karpany is a "request". On its face, it limits the choice of person to whom money is to be paid. The later beneficiary form, referred to above, differs in several respects. I repeat that this form was not completed by either of the deceased. At the top it states, perhaps misleadingly:

> Only to be completed if you are a current employee of SAPOL and if your circumstances have changed.

It is in the form of a request, but now allows the member to identify any "other nominated person". Neither form contemplates a request for the money to be shared between identified persons. The assumption behind the beneficiary form seems to be that the whole amount payable will be paid to a particular person, although I do not suggest that the form is intractable in that respect.

48 I am not able to make any finding as to the reason why neither Ms Faithfull nor Mr Karpany returned a form completed with details reflecting the change in their circumstances, and in particular in the case of Ms Faithfull her divorce from Mr Hobby, and in the case of each of them the fact that they were in a relationship and had a child. I cannot infer that this was an oversight, nor can I infer that it was intentional.

The rival contentions

49 The Association is neutral, making no submission as to the proper disposition of the money that it has received. That is subject to the point that the Association makes no claim to the money.

50 Mr Keith, counsel for Public Trustee, submits that the Association holds the money as trustee. He submits that the Association holds the money on trust for the estate of the deceased member in question, and that the effect of the nomination or request form is not that the Association holds the money on trust for the nominated person. He submits that the Association holds the money on trust for the estate of the deceased member with or subject to a power, that it need not exercise, to make payment to a person or persons named in a request form that is a current form, or alternatively, with power to pay to any person if payment to that person would satisfy the obligation of the Association to hold the money for its deceased member. That is, the money is held on trust for the estate of the deceased member, on this alternative contention, subject to a power to pay money to a person other than a person named on a request form, if payment to that person would satisfy the requirement to pay the money to the benefit of the deceased member.

51 Mr Dal Cin, counsel for Mr Laurence Karpany, submits that the Association holds the money on trust for the person or persons named in a current nomination or request form. In the alternative, the money is held by the Association on trust for the estate of the deceased member with a power or discretion to pay the money either to the estate of the deceased person or to a person named on a current request or nomination form.

Jurisdiction

52 The application by the Association is brought under r 103 of the *Supreme Court Rules 1987*. The application was filed before the commencement date of the *Supreme Court Civil Rules 2006*, and so is governed by the 1987 Rules.

53 Rule 103.02(b) provides as follows:

> 103.02 Proceedings may be brought by summons by any executor, trustee, administrator, beneficiary, next of kin, or creditor for:
>
> …
>
> (b) the determination of any question which could be determined in administration proceedings, including any question:
>
> (i) arising in the administration of an estate or in the execution of a trust;
>
> (ii) as to the composition of any class of persons having a claim against an estate or a beneficial interest in an estate or in property subject to a trust;…

54 I am satisfied that I have jurisdiction to determine the questions raised by the Association's application. I will identify those questions in a moment. The Association is a trustee of the money paid to it by Hannover Life. All parties agree on that. I agree that the Association holds the death benefits paid to it subject to a trust, the issue before me being the terms of that trust.

55 I am asked to determine the rights of the persons who have appeared as parties to the proceedings, and to do so in a binding manner. I am satisfied that I have power to do that: *In the Estate of Hunter (Deceased)* [1957] SASR 194 at 196.

56 Public Trustee has appeared as a party, as Administrator of the estate of each of the deceased members, and in the interests of their children. Mr Laurence Karpany has appeared to maintain his claim. Mr Hobby has been served with the proceedings, but has chosen not to appear. The potential claimants to the money held by the Association are before me or had the opportunity to appear before me.

57 The Association asks me to determine whether it is bound to pay the death benefit in respect of Ms Faithfull to Mr Hobby, or to Public Trustee. It also asks me to determine whether it is bound to pay the death benefit in respect of Mr Karpany to Mr Laurence Karpany, or to Public Trustee.

58 If it is not bound to make a payment to any one of those persons, the Association asks me to determine whether it has a discretion as to whom the death benefit in each case is to be paid. If it has a discretion, the Association asks me to determine whether it would be an improper exercise of the discretion to pay the death benefit either to Public Trustee or to Mr Hobby (in the case of the death benefit in respect of Ms Faithfull) or to Public Trustee or Mr Laurence Karpany (in the case of the death benefit in respect of Mr Karpany).

59 The Association does not ask the Court to exercise the discretion, if it has one. The Association asks the Court to determine no more than whether the persons identified are proper objects of the discretion vested in the Association. The Court has power to do so: *Re Allen-Meyrick's Will Trusts* [1966] 1 All ER 740 at 743.

Preliminary Matters

60 Mr Edmonds-Wilson, counsel for the Association, drew to my attention to the possibly misleading effect of the form of request provided by the Association to its members. I have touched on this topic already. The form does not invite or even appear to allow a request for the division of the death benefit between identified persons. The form completed by Ms Faithfull and Mr Karpany identifies only a limited number of potential beneficiaries. The form completed by each of them contemplates children of the member as benefiting only on the death of the member and the member's spouse. There are other odd aspects to the forms.

61 None of the parties before me submitted that any particular consequence flows from the manner in which the request or nomination forms were drafted. While the forms are unsatisfactory, I agree that the unsatisfactory aspects of the forms do not give rise to any particular right or remedy, or dictate any particular response from the Court by way of an ultimate decision.

62 No counsel submits that the provision to the Association of a completed request or nomination form operates as an assignment to the person identified on the form of "any debt or other legal chose in action" for the purposes of s 15(1) of the *Law of Property Act 1936* (SA).

63 I mention this issue because it is raised by the submissions of Mr Edmonds-Wilson.

64 If the provision of the request or nomination form operates as an immediate assignment of an interest held by the member under the Scheme, the result would seem to be that in each case the person named in the form (Mr Hobby or Mr Laurance Karpany) is entitled to payment of the relevant policy monies. However, as I said, no counsel submitted that this was the correct approach.

65 If the provision of the form amounts to the giving of notice to the Association of an absolute assignment, then the requirement that it be in writing and under the hand of the assignor is satisfied in each case.

66 In *In Re Danish Bacon Co Ltd Staff Pension Fund Trusts* [1971] 1 WLR 248; [1971] 1 All ER 486 Megarry J had to consider the position under a company staff pension fund. Benefits were payable to the personal representative of a member of the fund dying while in pensionable service unless the member appointed a nominee to receive the benefits. The rules of the fund made provision for the making of nominations, the cancelling of nominations and

the making of new nominations. Megarry J did not have to decide whether, in the particular circumstances, a purported cancellation of a nomination and substitute nomination amounted to an assignment for the purposes of the English statutory equivalent. He doubted whether it did. He said at WLR 255:

> What I am concerned with is a transaction whereby the deceased dealt with something which ex hypothesi could never be his. He was not disposing of his pension, nor of his right to the contributions and interest if he left the company's service. He was dealing merely with a state of affairs that would arise if he died while in the company's pensionable service, or after he had left it without becoming entitled to a pension. If he did this, then the contributions and interest would, by force of the rules, go either to his nominee, if he had made a valid nomination, or to his personal representatives, if he had not. If he made a nomination, it was revocable at any time before his death.
>
> The question is thus whether an instrument with this selective, contingent and defeasible quality, which takes effect only on the death of the person signing it, can fairly be said to be "a disposition of an equitable interest or trust subsisting at the time of the disposition". …

67 Although no party contended to the contrary, I should deal with the issue. If there has been an effective assignment of a member's interest under the Scheme, that would entitle Mr Hobby and Mr Laurence Karpany to succeed.

68 I consider that, properly understood, there has not been an assignment of a debt or other legal chose in action. The provision of a request or nomination form has no legal effect unless and until the member in question dies, remaining a member of the Association, and continuing to be qualified for a payment under the Scheme. I agree in general terms with the approach taken by Megarry J.

69 Nor do I consider that what has happened here amounts to an equitable assignment of equitable property rights. I consider that there is no existing equitable interest to be dealt with prior to death. It is not necessary to consider whether an equitable assignment of equitable property falls within s 15, because in any event the requirements of that provision as to form are satisfied here: as to this issue see Meagher Gummow and Lehane's *Equity, Doctrines and Remedies* (4th Ed, Butterworths Lexis Nexis 2002) at [6-020]-[6-045].

70 No counsel submits that a completed request or nomination form is a testamentary disposition requiring compliance with the formalities prescribed by the *Wills Act 1936* (SA). This possibility also is raised by Mr Edmonds-Wilson in his submission.

71 That point also is considered by Megarry J in *In Re Danish Bacon Co Ltd Staff Pension Fund Trusts*. On that point Megarry J said at WLR 256–257:

> I appreciate the force of these arguments. Non-statutory nominations are odd creatures, and the cases provide little help on their nature. I do not, however, think that a nomination under the trust deed and rules in the present case requires execution as a will. It seems to me that such a nomination operates by force of the provisions of those rules, and not as a testamentary disposition by the deceased. Further, although the nomination

> has certain testamentary characteristics, I do not think that these suffice to make the paper on which it is written a testamentary paper. Accordingly, in my judgment the requirements of the Wills Act 1837 have no application.

The same issue is considered by the Privy Council in *Baird v Baird* [1990] 2 AC 548. There, a company established a pension scheme under which the funds were vested in trustees, and the scheme was administered by a committee. By the rules of the scheme benefits were not assignable. On the death of a member while employed by the company, payment would be made to a person nominated by the member, and in default to the member's widow, widower or estate. Nominations and alterations required the consent of the committee. It can be seen that this was a more detailed scheme than the one in question now. And, I emphasise, in this case the Privy Council was concerned with a pension scheme, under which funds subject to the scheme came into existence during the lifetime of a member. Their Lordships said at 561:

> Although limitations such as the ones under consideration are a familiar feature of modern pension schemes, it would, of course, be putting it too high to say that there is a universally negative answer to the question whether the provisions of the Wills Act 1837 apply to nominations made under such schemes. The question must depend in each case on the provisions of the individual scheme. No doubt, where the effect of the particular scheme is, as it was in *In re MacInnes* [1935] 1 DLR 401, to confer upon a member a full power of disposition during his lifetime over the amount standing to his credit under the scheme, a disposition of that interest upon his death would normally constitute a testamentary disposition requiring attestation in accordance with the statutory requirements for the execution of a will. But in what is now the normal case of non-assignable interests such as that in the present case and, a fortiori, where the power of nomination and revocation requires the prior approval of the trustees or of a management committee, their Lordships see no reason to doubt the correctness of Megarry J's decision in the *Danish Bacon Co* case [1971] 1 WLR 248. The relevant authorities were carefully considered by the Court of Appeal in the instant case and that court unanimously expressed the conclusion that, in a case at least in which the funds covered by the nomination were never within the deceased's control, Megarry J's decision was applicable and should be followed. Their Lordships agree. The appeal will accordingly be dismissed.

72 The decision of Holland J in *McFadden v Public Trustee for Victoria* [1981] 1 NSWLR 15 provides helpful guidance on this point as well. The case dealt with an employee pension scheme set up by a means of a deed executed by the employer and a trustee. Employees could join the scheme by becoming contributors. Under the scheme the trustee would purchase and maintain, from funds provided by the employer and by the employee, a policy of assurance. The policy provided for a lump sum payable on the death before age 65 of a contributing employee. The rules of the scheme provided that the lump sum payable on death be held on trust for such dependant or dependants of the contributor as the contributor might have nominated in writing by a document given to the trustees.

73 Holland J held that if the subject matter of the relevant trust was the right of the trustee to recover money payable under the relevant policy, any relevant

disposition of that property occurred in the contributing employee's lifetime as a result of him becoming a party to the scheme: at 29-30. He rejected a submission that the exercise by the deceased member of the right to nominate a beneficiary was a testamentary act, holding that this right was "… of the nature of a power of appointment inter vivos reserved or given by a trust instrument to the settlor …": at 30. He held that decisions relating to nominations made by a member of a Friendly Society in respect of benefits payable on the member's death were distinguishable, because they were decided on the basis that the property in question belonged to the member up to the time of his death and that the nomination was an attempt to dispose of that member's own property on death: at 33.

74 Once again, I think that I must decide the point, although no counsel put submissions on it.

75 In my opinion, compliance with the provisions of the *Wills Act* is not required. Applying the approach of Megarry J in *In Re Danish Bacon Co Ltd Staff Pension Fund Trusts*, it may be that the Scheme does not give to a member of the Association power to dispose of anything during the member's lifetime. This is not because the member has an interest which, by the Rules, is not assignable. It is because there is no property to assign until after the member's death. However, I prefer and adopt aspects of the approach of Holland J in *McFadden*. I consider that the right of nomination is a right in the nature of a power of appointment, 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 a disposition of property, if indeed there is a disposition of property. On the approach of Holland J there may be such a disposition. On his approach, during the member's lifetime there is a trust of the right of action vested in the Association to sue for and to recover an amount that becomes payable under the relevant policy on death of the member.

76 For those reasons, compliance with the provisions of the *Wills Act* is not required.

The Terms of the Trust

77 As I have already noted, all counsel agreed that the monies now held by the Association are held on trust. The Association makes no claim to the funds.

78 The requirement and obligation to effect a group life insurance scheme arises by necessary implication from r 7.1.3. Whether that obligation could have been enforced, had the Association not established the Scheme, does not arise.

79 The Rules and the Scheme (effected by establishing the policy in question) together constitute an arrangement binding the Association and each member from time to time. The arrangement is binding because it arises under the Rules,

and the Rules bind the Association and each member. While living, a member could require the Association to establish the Scheme, if it had not done so. After a member's death, the member's legal personal representative could, in my opinion, require the Association to deal with the proceeds of a policy in respect of a deceased member as required by the arrangement. Such an action would, of course, raise the question that I have to decide. What is the arrangement (as I will call it)?

80 The matter that I have to decide is whether the arrangement includes a provision controlling the disposition of the policy proceeds or whether, because it does not include such a provision, the trust on which the proceeds are held includes, by implication of law, a provision that determines how the proceeds are to be dealt with.

81 Putting the issue another way, the issue is whether the proceeds are held on trust to be dealt with as required by the arrangement (and if so, how), or whether the proceeds are held on a trust of a kind that determines how the proceeds are to be dealt with.

82 One thing is clear, and it is that the Rules do not include an express provision (as they easily might have) determining how the proceeds are to be dealt with.

83 I consider that in deciding the issue before me I should have regard to information about the Scheme provided by the Association to its members. I do not do so on the basis that this information gives rise to a contract between the Association and its members. Giving that information contractual effect faces a number of difficulties. What is the consideration for the contract? When does the contract arise? Can there be a contract only if it is proved that the relevant member was aware of the relevant information? Does the content of the contract vary from time to time if or when different information is provided?

84 I have regard to the information on the basis that it can provide a basis for determining the terms of the trust on which the policy proceeds are held, provided that the terms so determined do not conflict with the Rules or with the Scheme.

85 Usually the existence and the terms of an express trust (I will return to this point) are decided by reference to the intentions of the suggested settlor. Sometimes it may be appropriate to look to the mutual intention of settlor and trustee: see *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681 at 693 Gummow J.

86 It is not possible in this case to analyse the situation simply as one involving a settlor, or even as one involving settlor, trustee and beneficiary. The arrangement (as I have called it) arises from the Rules of the Association, the Scheme and statements made by the Association to its members. In my opinion

it is too narrow an approach, in deciding whether there is a trust, and if so, the terms of the trust, to confine one's attention to the Rules and the Scheme alone. I can see no reason why statements made by the Association about the benefit to members from the Scheme should not be taken into account, provided that they are adequately proved and are sufficiently clear, as I consider them to be. To ignore them would be to ignore relevant information. I do not think that the failure to incorporate the statements into the Rules of the Association, or into a formal deed, is a legal impediment to the Court having regard to these statements. While I do not proceed on the basis that the information provided to members gives rise to a contract between the Association and its members, the arrangement has some similarities to a contractual arrangement. There can be no doubt that the Association held out to its members that the proceeds of a policy of insurance would be paid to their estate, or to a person or persons nominated by the member if the nomination were made.

87 I return to the information.

88 Until 2001 there was a consistent theme in the information that the Association provided to its members about the Scheme. The theme was that payment of policy proceeds would be made to the estate (or legal personal representative) of a deceased member, unless the member directed otherwise by written direction or request to the Association, in which event the Association would pay the proceeds as directed. The standard form that the Association suggested in its Journal and provided as a printed form is expressed as a request, but against the background of the information provided to members must be taken to be intended as a direction. There is no suggestion in the information that the Association has a discretion to exercise.

89 After 2001 there does not appear to have been as much emphasis on payment being made to a member's estate unless the member has directed otherwise. But the information provided to members was still to the effect that payment would be made to a "nominated beneficiary". The standard form continued to be expressed as a request.

90 The Scheme came into force some time in 1992. Ms Faithfull was already a member of the Association. The arrangement as I have described it is what was presented to members at that time. When Ms Faithfull completed the relevant beneficiary form in December 1995, the arrangement then described to members remained the same.

91 When Mr Karpany joined the Association in 1999, members were still being told that money would be paid "direct to your beneficiaries" if the request form was completed, and the Association had not done anything to suggest that its statements that proceeds of a policy would be paid to a member's estate if they did not complete a request form no longer applied. That was still the position when Mr Karpany completed his request form in February 2001.

92 At the time of the deaths of Ms Faithfull and Mr Karpany, that remained the position.

93 In light of this I consider that the arrangement that the Association promoted to its members was one under which (by operation of the Rules) membership of the Association secured for each member participation in the Scheme. The Scheme provided for a payment to the Association on the death of a member. And the Association, through its Journal and through information given to members, told its members that the Association would pay that money to their estate or in accordance with their written directions, and actively encouraged members to give such a direction. That is the essence of what I have called the arrangement.

94 I hold that the Association holds the proceeds of the relevant policies on trust for the person or persons nominated in writing by the member to the Association, and failing any valid or effective nomination, for the legal personal representative of the deceased member.

95 In so deciding I respectfully adopt the approach of Mason CJ and Dawson J in *Bahr v Nicolay [No 2]* (1987-1988) 164 CLR 604 at 618-619. They were dealing with an action against an owner of land who had acquired the land knowing of and accepting an obligation (arising from other events) to resell the land to an earlier owner of the land in certain circumstances. Issues arose in that case as to the ability of the defendant to rely upon the fact that the defendant was now the registered proprietor, and the fact that the plaintiff sought to enforce an unregistered interest. In that context their Honours said at 618-619:

> If the inference to be drawn is that the parties intended to create or protect an interest in a third party and the trust relationship is the appropriate means of creating or protecting that interest or of giving effect to the intention, then there is no reason why in a given case an intention to create a trust should not be inferred. The present is just such a case. The trust is an express, not a constructive, trust. The effect of the trust is that the second respondents hold lot 340 subject to such rights as were created in favour of the appellants by the 1980 agreement.

96 In the present case I draw the inference, without any doubt at all, that when it amended the Rules and established the Scheme, the Association intended to give each member an interest in the proceeds of the policy on the member's life, the essence of which was that a payment would be made to the estate of a deceased member or to such person or persons as the deceased member might have nominated in writing to the Association, either on the form provided by the Association, or in a manner acceptable to the Association. I consider that a trust relationship is the appropriate means of protecting or giving effect to that intention, and adopting their Honours' approach, consider that the trust is an express trust. It is not necessary that the Association in fact intended a trust to arise, or understood that one would arise. As Deane J said in *Trident General Insurance Co Limited v McNiece Bros Proprietary Limited* (1987-1988) 165 CLR 107 at 147:

> The requisite intention to create a trust of a contractual promise to benefit a third party can, however, be formed and carried into effect (either by the contract itself or some other act) by a promisee who would be bemused by the information that the chose in action constituted by the benefit of a contractual promise is property and uncomprehending of the distinction between law and equity. In that regard, the analogy of Molière's M Harpagon who unwittingly spoke poetry or "verse" would arguably have been a more instructive one than that of M Jourdain who merely spoke ordinary prose: see *In re Schebsman* [1944] Ch. 83, at 104. In the context of such a contractual promise, the requisite intention should be inferred if it clearly appears that it was the intention of the promisee that the third party should himself be entitled to insist upon performance of the promise and receipt of the benefit and if trust is, in the circumstances, the appropriate legal mechanism for giving effect to that intention. ...

In that case other members of the court made passing reference to the fact that courts will find an express trust when that is what is to be inferred from the circumstances: see Mason CJ and Wilson J at 120-121, Dawson J at 156-157 and Toohey J at 166.

97 In *Bahr v Nicolay* the other members of the Court analysed the circumstances as giving rise to a constructive trust: see Wilson and Toohey JJ at 638, Brennan J at 654. In the alternative, I am prepared to treat the relevant trust as a constructive trust, imposed by law to protect the interest of a member, or that of a member's nominee, arising by virtue of the arrangement

98 During the period in which Ms Faithfull and Mr Karpany were members, there was no relevant change in the Rules and no change in any essential aspect of the Scheme. I do not have to grapple with the problems that would arise if there had been such a change. Neither member attempted to give a direction to the Association of a kind that might not have been contemplated by the Association. I do not have to deal with that problem.

99 I do not accept Mr Keith's submissions as to the terms of the trust. I consider that the power that he submits the Association had, and the discretion that that involves, is not consistent with the scheme from which the trust is inferred. As to his alternative contention, I doubt whether a power to make payment to a person, if payment to that person would satisfy the requirement to pay the money to the benefit of the deceased member, is a valid power. First, I am not at all sure what is the scope of such a power. It seems quite uncertain to me. Second, I consider it likely that a power so described will infringe the requirement that for a trust power to be validly created, the objects of the power must be sufficiently well defined for it to be able to be said whether or not a particular individual is a member of a class: *McPhail v Doulton* [1971] AC 424. It is not necessary for me to decide this point.

The effect of the completed requests

100 It has not been suggested in submissions that there is any difficulty with the request completed by Mr Karpany. Accordingly, on my approach, the money

held by the Association as a result of the payment on the death of Mr Karpany is payable to Mr Karpany's brother, Laurence Karpany.

101 I turn to the form completed by Ms Faithfull. Ms Faithfull has requested payment to "my spouse Stephen Craig Hobby". Is that request (or direction as I consider it to be) still effective, or does the fact that Ms Faithfull and Mr Hobby were divorced in 1999 mean that the direction relating to Mr Hobby no longer takes effect?

102 The form completed by Ms Faithfull is to be read and construed objectively. I am concerned to ascertain Ms Faithfull's intention, but it is her intention as expressed in the form. A reference to her intention is not a reference to her actual intention or expectation. As it happens, the Court in any event has no relevant material before it other than the form.

103 However, there are certain matters to which the Court can have regard. One of them is that Ms Faithfull and Mr Hobby were divorced on 20 April 1999.

104 The form is to be read in the context of the arrangement. That is, it is to be read and understood in the context of an arrangement intended for the benefit of those who succeed to the member's estate, or for the benefit of nominated family members. That is the nature of the arrangement. It was only from 2004, not long before the death of Ms Faithfull, that the beneficiary form invited a wider choice. In any event, in my opinion the emphasis of the arrangement was on the prospect of a benefit for those who would inherit the member's estate, and family members.

105 The beneficiary form completed by Ms Faithfull raises the question of whether the provision for payment to Mr Hobby is conditional upon him remaining her husband at the time of death. In my opinion, it should be so construed.

106 I consider that in the context of the arrangement, a nomination expressed in this way should be understood as premised on the matrimonial relationship continuing. Upon divorce, one would expect the parties to divide their property and, so far as possible, separate their financial affairs. One would not ordinarily expect that after a divorce a member with entitlements under the arrangement would have any reason to wish to benefit a former spouse. As I have already said, the emphasis of the arrangement is on the provision of benefits for family members and those who would take under the will of the member.

107 In relation to wills, a different approach was taken. The general rule was that where in a will there was a reference to the wife or husband of the testator or testatrix, that meant the wife or husband at the time when the will was made, unless some contrary intention appeared from the construction of the will itself: see *In re Vine* [1955] VLR 200 for a relatively recent illustration of the operation of the rule. Not surprisingly, that approach came to be regarded as out of touch

with contemporary expectations. In Australia, the rule of construction in its application to wills has been reversed by legislation in most jurisdictions. In South Australia the relevant provision is now to be found in s 20A of the *Wills Act 1936* (SA). That section now relevantly provides that if after making a will, a testator's marriage is terminated, a disposition of a beneficial interest in property by the will in favour of the former spouse is revoked: s 20A(1)(a).

108 In my opinion there is no reason why, in considering the meaning of the beneficiary form, I should adopt the approach formerly taken to the construction of wills. Indeed, I consider that having regard to contemporary expectations it is appropriate to take the same approach as is taken in the provision of the *Wills Act* just referred to.

109 In a document of the kind in question a reference to "spouse" or "husband" or "wife" should be understood ordinarily to mean that the person is intended to benefit under the arrangement only while the relevant relationship exists.

110 The failure of Ms Faithfull to replace the beneficiary form with a form that does not make provision for her former husband is equivocal. First, people are notoriously inattentive in relation to matters like this. It would not be at all surprising that this was overlooked. Indeed, it is clear from the material before me that the Association is aware that this happens quite frequently. Second, Ms Faithfull might well have thought that the nomination of her former husband would not be operative after her divorce from him. For the reasons I have indicated, that is a reasonable expectation.

111 The circling by Ms Faithfull of the word "parent" after the word "children" should be read as intended to refer to Ms Faithfull's parents only if she had no children, having regard to the form as a whole. I am satisfied that that is how the form should be understood. The balance of the form makes it clear that the money would be payable to her parents only if she had no children.

112 I am satisfied that the form is to be taken as directing payment, in the events that have happened, to Ms Faithfull's child Jadyn Milera.

Conclusion

113 The monies paid to the Association upon the death of Ms Faithfull are payable to her child.

114 The monies payable to the Association on the death of Mr Karpany are payable to his brother, Mr Laurence Karpany.

115 I will hear the parties on the question of costs and on the formal orders that should be made.