[2003] QSC 051

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No 611 of 2003

WILLIAM ROBERT BRUCE SMALL	First Applicant
and	
COLLAS MORO ROSS a firm	Second Applicant
and	
CHRISTA RENATE SMALL	Third Applicant
and	
DEBORAH ANNE SMALL	Respondent

BRISBANE

..DATE 24/01/2003

JUDGMENT

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HIS HONOUR: This application arises from a dispute in the Small family. The third applicant is the wife of the first, living separately from him, and the respondent is the first applicant's daughter and the third applicant's step-daughter. The second applicants are the first applicant's solicitors.

The first applicant is eighty-one years old and is ill. He resides in a nursing home. By an enduring power of attorney dated 28 June 2002, he appointed the third applicant his attorney. On 2 January 2003 he executed an enduring power of attorney in which he sought to appoint as his attorneys the third applicant, Mr Gino Moro solicitor, and the respondent.

On 16 January 2003 the applicants began this proceeding by an originating application. In it they sought four declarations including one as to the capacity of the first applicant and other ancillary orders. But by the time application came on for hearing yesterday, the applicants had refined the principal relief they seek down to the following two-part declaration, that:

a) a condition of the enduring power of attorney dated 2 January 2003 taking effect is that it be accepted by the third applicant and Mr Gino Moro;

b) the enduring power of attorney dated 28 June 2002 remains effective and the third applicant remains the first applicant's attorney pursuant to it.

There was no challenge before me to the validity or effectiveness of the earlier enduring power of attorney up to the time of the first applicant's executing the later document, but on behalf of the respondent it was argued that when the first applicant executed the later document the earlier enduring power of attorney was revoked. On behalf of the applicants it was argued, however, that the earlier enduring power of attorney had not been revoked and continues to be effective.

An enduring power of attorney may be revoked in writing by a principal provided he or she has the requisite capacity, the capacity necessary to make an enduring power of attorney giving the same power: s.47(1) of the Powers of Attorney Act 1998. It was not contended before me that the first applicant had revoked the earlier enduring power of attorney in that way. Another way in which a principal may revoke an enduring power of attorney is by a later enduring power of attorney. Section 50(1) of the Act provides that a principal's enduring power of attorney is revoked, to the extent of an inconsistency, by "a later enduring document of the principal". The argument for the respondent was advanced in reliance on that provision.

There was a fundamental inconsistency between the earlier and later enduring powers of attorney in that whereas the earlier one provided that the third applicant was the only attorney in the later one Mr Moro, the third applicant, and the respondent were to act neither severally nor jointly but as a majority.

If the effect of the first applicant's executing the later enduring power of attorney on 2 January 2003 was to make it effective as a revocation of the earlier enduring power of attorney it would have revoked the earlier enduring power of attorney in its entirety, such was the extent of the inconsistency. But was the later enduring power of attorney effective as a revocation of the earlier one on 2 January 2003?

On behalf of the applicants, it was argued that it was not so effective, because although the respondent signified her acceptance of her appointment as attorney by signing the document on 2 January 2003, Mr Moro and the third applicant have not. Section 44(8) of the Act provides that an enduring document is effective in relation to an attorney only if the attorney has accepted the appointment by signing the enduring document. It follows, the applicants argued, that as the later enduring power of attorney had yet to become effective as such it could have no effect in revoking the earlier enduring power of attorney, that the reference to a later enduring document of the principal in s.50(1) is to an effective later enduring document.

I see no reason in principle to conclude that the reference to a later enduring document of a principal is to other than an effective later enduring document. It would seem to me to be extremely odd to conclude that an enduring document could become effective for any purpose until it becomes effective for its essential purpose. Nothing in the Act or the document

itself supports that construction. The scheme of the Act shows that a principal who wishes to dispense with an attorney without replacing him or her may do so by revoking an enduring power of attorney in writing, or, if an attorney is to be replaced altogether by another or others, or, as in this case, by adding other attorneys, the transition can be effected by the execution of a further enduring power of attorney. The latter procedure allows for a transfer without interruption. If the construction contended for on behalf of the respondent were correct, then there would be an interruption of indeterminate length from when the principal executed the enduring document to when it became effective as such. The legislation cannot, I think, have been intended to bring about such uncertainty in the affairs of a principal.

I therefore conclude that the applicants are entitled to the relief they seek.

I should add that I reject the submission made on behalf of the respondent that all questions arising on this application ought to be referred to the Guardianship and Administration Tribunal. There may have been some merit in that submission when the question of the first applicant's capacity was in issue, but as the relief sought by the applicants was refined to raise a question of construction it appears to me that there is no proper basis for concluding that the application should be referred to the Tribunal.

...

HIS HONOUR: It is not an easy decision to make on the question of costs. What I shall do is to allow the applicants one third of their costs in recognition of their succeeding, but also accepting the argument about the change in the issues; so, I shall alter the second order in the draft that was handed to me to read: "The respondent pay the applicants one third of their costs of the application".

...

HIS HONOUR: Well, I make the order as in the initialled draft.
