

SUPREME COURT OF QUEENSLAND

CITATION: *King & Ors v Fister & Anor* [2019] QSC 217

PARTIES: **BARRY DAVID KING**
(first applicant)
WENDY HELEN O'BRIEN
(second applicant)
ANDREW ROBERT KING
(third applicant)
BARRY DAVID KING, WENDY HELEN O'BRIEN AND ANDREW ROBERT KING AS LITIGATION GUARDIANS FOR ILA ELIZABETH KING
(fourth applicant)
v
KAREN AMANDA FISTER
(first respondent)
CHRISTOPHER ROBERT HALL
(third respondent)

FILE NO: BS No 7936 of 2018

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 9 September 2019

DELIVERED AT: Brisbane

HEARING DATE: 29 May 2019

JUDGE: Martin J

ORDER: **I will hear the parties as to the appropriate form of order to reflect these reasons.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PARTIES AND REPRESENTATION – LEGAL REPRESENTATION – CHANGE OF LEGAL REPRESENTATION – where the first, second and third applicants were appointed as litigation guardians for their mother – where their mother now seeks to have them removed and, in their place, her solicitor be appointed – where there is no dispute among the parties that she requires a litigation guardian – whether the litigation guardians should be removed – whether the mother’s solicitor should be appointed in

their place

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TIME AND PLACE – where the first, second and third applicants were appointed as litigation guardians for their mother – where their mother now seeks to have them removed and, in their place, her solicitor be appointed – where two of the applicants permanently reside in Victoria and the third spends most of his time in Victoria – where the mother and the respondents reside in Cairns – whether the proceedings ought to be transferred to the Supreme Court in Cairns

Power of Attorney Act 1998, s 116

Uniform Civil Procedure Rules 1999, r 39, r 93, 94, 95(2)

Berman v Schwartz [2012] ONSC 6851, cited

Legal Services Commissioner v Mellick [2012] QCAT 333, cited

Legal Services Commissioner v Mellick [2016] QCAT 155, cited

Manasse v Shine Lawyers Pty Ltd [2019] QSC 123, cited

National Mutual Holdings Pty Ltd & Ors v The Sentry Corporation & Anor (1988) 19 FCR 155, applied

COUNSEL: H Mellick as solicitor for Ila Elizabeth King
M De Waard for the fourth applicant
L Nevison for the first and third respondents

SOLICITORS: Mellick Smith & Associates for Ila Elizabeth King
Gadens Lawyers for the fourth applicant
The Will & All for the first and third respondents

- [1] In November 2018, the first (Barry King), second (Wendy O'Brien) and third (Andrew King) applicants were appointed as the litigation guardians for Ila Elizabeth King. Ila King has applied for an order to have them removed and, in the alternative, that Mr Habib Mellick Jr. be appointed to replace them.

Persons involved

- [2] It will assist if I briefly describe the main participants and their relationships to each other:
- [3] Ila King is 85 years old and lives in a nursing home in Cairns. Her husband, John, died in 2016.
- [4] Ila and John had four children:

Barry King - the first applicant,

Wendy O'Brien - the second applicant,

Andrew King - the third applicant, and

Karen Fister - the first respondent.

- [5] Karen Fister is Ila King's attorney pursuant to an Enduring Power of Attorney.
- [6] The third respondent, Christopher Hall, is Karen Fister's partner.
- [7] Mr Mellick is a solicitor practising in Cairns and is acting for Ila King in domestic violence proceedings against the first, second and third applicants in the Magistrates Court in Cairns.
- [8] I will refer to the first, second and third applicants as "the three applicants".

The matters for determination

- [9] The issues which arise in this hearing are:
 - (a) should the litigation guardians be removed?
 - (b) if so, should Mr Mellick be appointed in their place?
 - (c) if they are removed but Mr Mellick is not appointed, then what should happen?
 - (d) if the proceeding is to continue then:
 - (i) should the claim against the third respondent be struck out? and
 - (ii) should the proceeding be transferred to the Supreme Court in Cairns?

What are these proceedings about?

- [10] In July 2018, the first, second and third applicants sought an order under s 116 of the *Powers of Attorney Act 1998* that the respondents be removed as the attorneys for Ila King and replaced by an independent attorney. Other orders were sought for the provision of certain documents.
- [11] Karen Fister cross-applied for orders: to allow the second respondent to resign as an attorney (this has happened), to have the proceedings transferred to the Queensland Civil and Administrative Tribunal or to the Supreme Court sitting in Cairns, and that she be allowed to file a confidential summary of receipts and expenditure.
- [12] In November 2018, Davis J ordered that:
 - (a) the applications be adjourned,
 - (b) the applicants' application proceed as if commenced by claim,

- (c) the first, second and third applicants, be appointed as litigation guardians for Ila King, and be joined as the fourth applicant, and
- (d) a statement of claim be filed.

[13] Very little of the material relied upon on this application was before Davis J and his orders were made before the domestic violence proceedings were commenced.

[14] In the three applicants' amended statement of claim, it is alleged:

- (a) that the first and third respondents procured, through their undue influence, a transfer of certain property from Ila King to the first respondent,
- (b) the first respondent breached her fiduciary duty to Ila King, and
- (c) the first respondent failed to keep her property separate from Ila King's property.

[15] Those allegations were denied by the first and third respondents and orders were sought striking the statement of claim out.

[16] In February 2019, Ila King applied to be included as a party to these proceedings and that the first, second and third respondents be removed as litigation guardians. In the alternative, she sought that Mr Mellick be substituted as her litigation guardian.

Can Mrs King bring an application to have her litigation guardians removed?

[17] The three applicants did not object to the application on the basis that it has been brought by Mrs King. During argument, some limited consideration was given to whether Mrs King could bring this application without a litigation guardian.

[18] Rule 93 of the UCPR provides that, in these circumstances, a party under a legal incapacity can only act through that person's litigation guardian:

- “(1) A person under a legal incapacity may start or defend a proceeding only by the person's litigation guardian.
- (2) Except if these rules provide otherwise, anything in a proceeding (including a related enforcement proceeding) required or permitted by these rules to be done by a party may, if the party is a person under a legal incapacity, be done only by the party's litigation guardian.
- (3) A party's litigation guardian who is not a solicitor may act only by a solicitor.”

[19] There was insufficient argument on this point to allow for a firm conclusion to be reached about Mrs King's capacity to bring this application. Whether there is an avenue for a person under a legal incapacity to bring this type of application or whether such an application has to be brought by a third party was not explored. In any event, this is a case in which too much time and money has already been expended on what is a relatively small sum – in all about \$220,000. It is certainly not a case in which the interesting interstices of the rules concerning

litigation guardians should be explored at length and at great cost. It will be for the benefit of all if this matter can be resolved quickly. In the absence of objection, I will proceed on the basis that the application was properly brought.

- [20] If it becomes necessary, I would entertain an application to appoint Mr Mellick as Mrs King's litigation guardian *nunc pro tunc* for the limited purpose of bringing this application.

Should the litigation guardians be removed?

- [21] Rule 94 relevantly provides:

“(1) A person may be a litigation guardian of a person under a legal incapacity if the person—

- (a) is not a person under a legal incapacity; and
- (b) has no interest in the proceeding adverse to the interest in the proceeding of the person under a legal incapacity.”

- [22] Rule 95 allows for the removal of a litigation guardian:

“(2) If the interests of a party who is a person under a legal incapacity require it, the court may appoint or remove a litigation guardian or substitute another person as litigation guardian.”

- [23] In order to determine whether it is in the interests of Mrs King that her litigation guardians be removed, it is necessary:

- (a) to consider whether she is at the relevant time still under a legal incapacity, and
- (b) to determine whether there is some reason, established on the evidence, that demonstrates that removal of the litigation guardians is in her interests.

- [24] I proceed on the basis that there was evidence before Davis J which demonstrated that Ila King was under a legal incapacity at that time. No appeal was brought from the order appointing litigation guardians nor was any application made to set it aside until this application.

- [25] In April this year the first and third respondents and Ila King agreed to appoint an expert to provide a report about her ability to provide instructions or her need for a litigation guardian. They appointed Dr Edward Strivens, a geriatrician. He provided a report in which he concluded:

“Mrs King presents with mild to moderate global cognitive deficits, impacting on memory, planning and attention/concentration.

At the time of review, Mrs King presented with legal incapacity and would benefit from the appointment of [a] suitable litigation guardian.”

- [26] While there was some other evidence on this point, there was, in the light of Dr Strivens' report, no dispute among the parties that Mrs King required a litigation guardian.

- [27] It follows that no grounds have been established to justify allowing Mrs King to take part in this litigation without a litigation guardian. That leads to the next question: should the current litigation guardians be removed and someone else appointed?

Removal of the current litigation guardians?

- [28] The discretion afforded the court by r 95(2) of the UCPR to remove a litigation guardian is premised on a finding that the interests of the party require that the litigation guardian be removed. That is expressed broadly because it must be able to apply to the many different circumstances which can exist when a litigation guardian is appointed.
- [29] Matters which might give rise to circumstances which could lead to a litigation guardian being removed include:
- (a) where the litigation guardian has a conflict, for example, where the litigation guardian has an interest contrary to the person under a disability,
 - (b) where the litigation guardian is not conducting the litigation in an appropriate manner, or
 - (c) where the litigation guardian seeks orders or other relief which are not in the interests of, or for the benefit of, the person under a disability.
- [30] In this case, an additional consideration is advanced. Mrs King does not want the three applicants to remain as her litigation guardians. No affidavit was provided by Mrs King but there was other material which provides a reasonable picture of the situation.
- [31] In considering the arguments from the various parties, it must be borne in mind, that this is essentially a family dispute. The three applicants are at loggerheads with their sister, the first respondent, over her conduct as their mother's attorney and, in particular, with respect to one property transaction. They were, originally, the only applicants seeking to set aside the appointment of Karen Fister as their mother's attorney. Mrs King only became involved when a question arose about whether they had the standing to seek the orders and whether it was necessary for their mother to become a party.
- [32] There was evidence which demonstrated that Mrs King was firmly opposed to the three applicants being her litigation guardians. She made that known to a number of people. For example, after speaking to Dr Strivens he reported that she "was generally clear on the basic facts of the current court case, in terms of her wanting to remove her children [the three applicants] as well as the initial decision regarding the distribution of assets that precipitated the initial proceedings."
- [33] In his affidavit, Mr Mellick said that she was very clear in her instructions to him that she did not want the three applicants to be her litigation guardians and that she did not want them to receive anything from her. Mrs King has also expressed her desire that the three applicants not be her litigation guardians to other people including: Mr Treston (a solicitor of Mellick Smith & Associates) and Ms de Costa (a solicitor of Maurice Blackburn). Dr Sandery (her General

Practitioner) and Dr Duriaraj (a geriatrician) opine that she has the capacity to instruct solicitors and that she has a poor relationship with the three applicants, but do not record that she said to them that the three applicants should not be her litigation guardians.

- [34] Another matter which weighs heavily in the assessment of this application is that Mrs King, on 9 January 2019, filed applications for protection orders against the three applicants and members of their families. In those proceedings she alleges, among other things, that:
- (a) the three applicants have emotionally and physically bullied and threatened her.
 - (b) the three applicants have used “intimidating and controlling behaviour towards me”.
 - (c) the three applicants wish to take the “power of attorney away from my daughter Karen Fister so that she and other family members can control me and my money. I do not want this to happen and do not wish to be approached by her again.”
 - (d) the third applicant had “entered my home uninvited to bully me. He has taken me to a solicitor and told me to sign a document without warning or explanation. ... I am in a constant state of fear and anxiety as I do not know what he will do next.”

[35] These are, of course, only allegations, and the three applicants have yet to respond to them. The magistrate before whom the application was mentioned declined to make any temporary restraining orders. I do not regard the allegations, for these purposes, as evidence of the behaviour of the three applicants but as evidence of the belief and attitude of Mrs King. I accept that Mrs King does have the concerns which she has expressed in the domestic violence proceedings and in discussions she has had with lawyers and doctors.

[36] In order for proceedings which involve litigation guardians to proceed in the interests of the person under a disability there must be some reasonable level of cooperation with that person where he or she does have the capacity to cooperate. Mrs King may be under a misapprehension with respect to the matters about which she complains concerning the three applicants but a litigation guardian does not have a right to hold that position and it is for the court to determine who best will serve the person under a disability in that role. On all the material, it must be concluded that the continuation in the role of litigation guardian by the three applicants is not in the interests of Mrs King. In particular, where the substantive proceeding is a dispute between family members it is in Mrs King’s interests to have an independent and impartial person as litigation guardian. Personal indifference is an important requirement in proceedings which can become internecine.¹ The three applicants cannot possess that quality in the unhappy conditions of this case. I will make an order removing the three applicants as litigation guardians.

Who should be the litigation guardian?

¹ See, for example, *Berman v Schwartz* [2012] ONSC 6851.

[37] Mr Mellick proposes that he be appointed and says that Mrs King supports that. While that is supported by the first respondent it is trenchantly opposed by the three applicants, with good reason. They listed five reasons for not appointing him. I need only refer to one. Mr Mellick has had a chequered career which has seen him the subject of adverse findings and requirements that he be supervised.² Those matters, alone, lead me to the view that a different person, preferably a solicitor, be appointed.

[38] No other person was proposed. I will hear the parties on this.

Should the claim against the third respondent be struck out?

[39] This is a matter which should be determined (if it needs to be) after a litigation guardian is appointed for Mrs King.

Should the proceeding be transferred to Cairns?

[40] Rule 39 of the UCPR provides:

“Change of venue by court order

- (1) This rule applies if at any time a court is satisfied a proceeding can be more conveniently or fairly heard or dealt with at a place at which the court is held other than the place in which the proceeding is pending.
- (2) The court may, on its own initiative or on the application of a party to the proceeding, order that the proceeding be transferred to the other place.”

[41] In *National Mutual Holdings Pty Ltd & Ors v The Sentry Corporation & Anor*³ the Full Court of the Federal Court of Australia considered the cognate provision in the Federal Court Rules and said:⁴

“The factors which the Court is entitled to take into account in considering whether one city is more appropriate than another for interlocutory hearings or for the trial itself are numerous. The Court must weigh those factors in each case. **Residence of parties and of witnesses, expense to parties, the place where the cause of action arose and the convenience of the Court itself are some of the factors that may be relevant in particular circumstances.**

The balance of convenience will generally be a relevant consideration, but not necessarily determinative of each case. A party commences a proceeding by filing an application in a particular registry of the Court. If that party or another party wishes to have the proceeding conducted or continued in another place he may

² See *Legal Services Commissioner v Mellick* [2012] QCAT 333, *Legal Services Commissioner v Mellick* [2016] QCAT 155.

³ (1988) 19 FCR 155.

⁴ At 162.

apply to the Court for an order under s 48 or O 10, r 1(2)(f) or O 30, r 6 as the case may be. There is no onus of proof in the strict sense to be discharged by the party seeking to conduct or continue the proceedings elsewhere. It should be noted that the Court may exercise its powers under O 30, r 6 either on the application of a party or of its own motion. The Court must, however, be satisfied, after considering all relevant matters, that there is sound reason to direct that the proceeding be conducted or continued elsewhere. Its starting point is that the proceeding has been commenced at a particular place. Why should it be changed? On the one hand, if the party who commenced the proceeding chose that place capriciously the Court would be justified in giving no weight to the choice of place. At the other end of the scale, a proceeding may have continued for some time at the place of commencement with many steps having been taken there, for example, filing of pleadings and affidavits, discovery and inspection. Due weight would be given by the Court to such matters before directing that the proceeding should continue at a different place.

The balance of convenience is important, but its weight must vary from case to case. **Ultimately the test is: where can the case be conducted or continued most suitably bearing in mind the interests of all the parties, the ends of justice in the determination of the issues between them, and the most efficient administration of the Court.** It cannot and should not, in our opinion, be defined more closely or precisely.”⁵ (emphasis added)

- [42] The three applicants opposed the transfer but, with their removal, the balance of convenience has tilted. They submitted that it would be inconvenient for them if the matter were to be transferred to Cairns. The first and second applicants permanently reside in Victoria and, while Andrew King resides in Cairns, he spends most of his time in Victoria. Their position would have been of greater weight had they remained as litigation guardians. Mrs King lives in Cairns. The first respondent and her partner live in Cairns. The litigation guardian who will be appointed for Mrs King will, I expect, live in Cairns. Notwithstanding that the substantive proceedings were commenced in July 2018 and that there have been a number of interlocutory steps taken, the matter is essentially one which is associated in a majority of respects with Cairns. It is, in all respects, more suitable for the matter to be determined in the Supreme Court at Cairns.

Orders

- [43] I will hear the parties as to the appropriate form of order to reflect the reasons set out above.

⁵ Referred to with approval by Crow J in *Manasse v Shine Lawyers Pty Ltd* [2019] QSC 123.