

SUPREME COURT OF QUEENSLAND

CITATION: *Pickersgill v Pickersgill & Ors* [2019] QSC 268

PARTIES: **KEVIN JOSEPH PICKERSGILL**
(applicant)
v
**MARGUERITE AMELIA PICKERSGILL BY HER
LITIGATION GUARDIAN VICKI JACKSON**
(first respondent)
and
JANELLE HELLENORA FORREST
(second respondent)
and
LEANNE AMELIA WINN
(third respondent)
and
GRAHAM CHARLES PICKERSGILL
(first respondent by counterclaim)
and
WILLIAM PICKERSGILL
(second respondent by counterclaim)
and
MICHAEL THOMAS PICKERSGILL
(third respondent by counterclaim)

FILE NO/S: BS No 5159 of 2019

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 5 November 2019

DELIVERED AT: Brisbane

HEARING DATE: 20 August 2019

JUDGE: Davis J

ORDER: **There be no order as to costs in favour of any party apart from the order of Mullins J made on 5 July 2019.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – FORM AND SETTLING OF COSTS ORDERS – where the original proceedings were resolved – where the parties made written submissions as to costs – where the proceeding was adversarial – whether there should be an order as to costs

Powers of Attorney Act 1998 (Qld), s 115, s 116

CAC v Secretary, Department of Family and Community Services (No 2) [2015] NSWSC 344, cited

COUNSEL: D R Cooper QC for the Applicant
C Brewer for the First Respondent
J Otto for the Second and Third Respondents
No appearance for the Respondents by counterclaim

SOLICITORS: Creevey Russell Lawyers for the Applicant
South Geldard Solicitors for the First Respondent
Grant & Simpson Lawyers for the Second and Third Respondents

[1] On 21 August 2019 the proceedings were resolved by the making of orders, which were sought by all parties who appeared,¹ in these terms:

- “1. Pursuant to section 116 of the *Powers of Attorney Act 1998 (Qld)*:
 - (a) The enduring powers of attorney made by Marguerite Amelia Pickersgill dated 15 January 2019 and 11 September 2018 are revoked;
 - (b) Kevin Joseph Pickersgill, Janelle Helenora Forrest and Leanne Amelia Winn are removed as attorneys under the enduring power of attorney made by Marguerite Amelia Pickersgill dated 22 April 2013;
 - (c) Mr Dennis Offermans and Mr Michael Brennan (who are ‘the attorneys’) are appointed severally as attorneys under the enduring power of attorney made by Marguerite Amelia Pickersgill dated 22 April 2013 (The Enduring Power of Attorney);
 - (d) Clause 4 of the Enduring Power of Attorney is deleted;
 - (e) A clause is added to The Enduring Power of Attorney: ‘Clause 4: The attorneys, being accountants, may charge reasonable fees for fulfilling their role as attorneys and may recover reasonable costs and disbursements’;”
2. Pursuant to section 115(a) of the *Powers of Attorney Act 1998 (Qld)* it is declared that the powers of attorneys under The Enduring Power of Attorney of Marguerite Amelia Pickersgill dated 22 April 2013 begin today;
3. The trial set down for hearing for five days commencing 23 September 2019 in Rockhampton is delisted;
4. The proceedings are otherwise dismissed;

¹ The respondents by counterclaim did not appear.

5. All parties, apart from the First Respondent, may make written submissions on costs by 10 September 2019;
6. The First Respondent may make written submissions on costs, if any, by 24 September 2019;
7. Any written submissions in reply by parties other than the First Respondent may be made by 1 October 2019;
8. Subject to any further order, costs are to be determined on the papers without an oral hearing;
9. All parties have liberty to apply if any party seeks an oral hearing.”

- [2] The effect of the orders was to dissolve powers of attorney given by the first respondent (Mrs Pickersgill) to various of the warring parties and to appoint independent persons as attorneys of an earlier power of attorney executed by Mrs Pickersgill in 2013. The orders are more easily understood in the context of the dispute as described below.
- [3] On 18 October 2019 I made further orders releasing the applicant’s solicitor, Mr Daniel Creevey, from an undertaking given by him over certain money held in his firm’s trust account and directing him to pay the money to Messrs Offermans and Brennan, Mrs Pickersgill’s attorneys.
- [4] Written submissions have been received in relation to costs. The positions adopted by the various parties are:
- (i) The applicant seeks his costs against the second and third respondents;
 - (ii) The second and third respondent seek their costs against the applicant;²
 - (iii) No submissions have been made by or against the respondents by counterclaim;
 - (iv) No party seeks costs against the Mrs Pickersgill;
 - (v) Mrs Pickersgill does not seek costs against any other party.

Background

- [5] Mrs Pickersgill is the widow of Alfred Pickersgill (Mr Pickersgill) who died on 18 October 2014. Mr and Mrs Pickersgill had six children, being four sons and two daughters. Those siblings have produced 15 grandchildren.
- [6] The six offspring of Mr and Mrs Pickersgill are all parties to the current litigation.
- [7] Mrs Pickersgill was born on 10 August 1934. She is now 85 years of age. Before their retirement in the late 1990’s, Mr and Mrs Pickersgill conducted business as graziers and accumulated significant wealth.
- [8] Agricultural properties were owned by Mr and Mrs Pickersgill. In particular, one called “Washpool” and another called “Brooklee”. Ultimately, Washpool was transferred to the applicant (Kevin Pickersgill) and the first and second respondents by counterclaim (Graham Pickersgill and William Pickersgill), and Brooklee was transferred to the third respondent by counterclaim (Michael Pickersgill). There appears to be some

² Apart from the costs the subject of the order of Mullins J.

disagreement as to the terms of those transfers but that is not relevant for present considerations.

- [9] Mrs Pickersgill's main assets are a house in Davison Street, Gracemere,³ and money held with the Suncorp Bank.
- [10] In September 2011, before Mr Pickersgill's death, Mrs Pickersgill executed a Will where she appointed Mr Pickersgill as executor and in the alternative, William Pickersgill,⁴ Kevin Pickersgill⁵ and Janelle Forrest⁶ as executors. By that Will, and in the event that Mr Pickersgill predeceased Mrs Pickersgill, Davison Street and Mrs Pickersgill's jewellery were left to her daughters, Janelle Forrest and Leanne Winn, the second and third respondents, with the residue to be divided between all six children.
- [11] In April 2013, while Mr Pickersgill was still alive, Mrs Pickersgill executed an Enduring Power of Attorney (the 2013 Enduring Power of Attorney) appointing Kevin,⁷ Janelle⁸ and Leanne⁹ as her attorneys for financial and health matters. The powers of the attorneys became operative upon Mrs Pickersgill becoming incapacitated and the attorneys were to exercise their powers by majority decision.
- [12] In 2015 and 2016, large sums of money were paid by cheque from Mrs Pickersgill's bank accounts to Janelle,¹⁰ Leanne¹¹ and people associated with them.
- [13] This provoked a rift between the siblings along gender lines, the four brothers being on one side and the two sisters being on the other. In turn, that led to what can only be described as an unseemly battle not only over Mrs Pickersgill's finances, but over control of Mrs Pickersgill herself. At one stage, I was asked to make orders the effect of which would have put Mrs Pickersgill in the custody of a third party to transport her to a doctor for psychiatric examination. This was thought necessary by the applicant to prevent Mrs Pickersgill from being unduly influenced by the second and third respondents. Naturally, no such order was made. On another occasion, after doubts had arisen as to Mrs Pickersgill's capacity, the applicant had her make a document seeking to terminate her instructions to her lawyers. All that was misconceived of course, because by that stage, the lawyers were acting on behalf of Mrs Pickersgill's litigation guardian whom I had appointed. There is also evidence of Mrs Pickersgill living with the second and third respondents and inferences being suggested that she was under their control and being influenced by them.
- [14] On 11 September 2018 Mrs Pickersgill executed another Enduring Power of Attorney (the 2018 Enduring Power of Attorney) and another Will. The 2018 Enduring Power of Attorney appointed her four sons as attorneys for financial matters and personal/health matters and by her Will, she left her assets to her sons. The Will contained the following:

³ A town near Rockhampton.

⁴ The second respondent by counterclaim.

⁵ The applicant.

⁶ The second respondent.

⁷ The applicant.

⁸ The second respondent.

⁹ The third respondent.

¹⁰ The second respondent.

¹¹ The third respondent.

“I have not made any further provision for my daughters Leanne Amelia Winn or Janelle Helen Forrest apart from forgiving them of the debts owed to me at the date of my death and referred to in clause 4.2 as my said daughters have already received a combined total of approximately \$950,000 in 2015 and 2016 from my personal bank account without my knowledge or consent.”

- [15] On 15 January 2019 Mrs Pickersgill executed yet another Enduring Power of Attorney (the 2019 Enduring Power of Attorney), this time appointing her daughters, Leanne and Janelle, as attorneys. Also on that day, unsurprisingly perhaps given the history of the matter, another Will was made by Mrs Pickersgill leaving Davison Street and her jewellery to her daughters and the residue equally to all her children.
- [16] On 18 January 2019 the applicant filed proceedings in the Queensland Civil and Administrative Tribunal (QCAT) seeking declarations in relation to Mrs Pickersgill’s capacity and whether the attorneys’ obligations under the 2018 Enduring Power of Attorney had been triggered.
- [17] The current proceedings were commenced on 5 March 2019. The applicant sought, amongst other things, a declaration that the 2019 Enduring Power of Attorney was invalid.
- [18] South Geldard Solicitors of Rockhampton acted for Mrs Pickersgill in the proceedings.
- [19] On 3 April 2019 I made various orders, the effect of which was to identify material to be sent to Dr Helen Siddle, who the parties agreed, was to examine Mrs Pickersgill and prepare a report as to her capacity. On 12 April 2019 I made directions for the proceeding to continue as if started by claim and for the delivery of pleadings. The matter was set down for trial to commence on 23 September 2019.
- [20] On 2 May 2019 Dr Siddle (after interviewing the first respondent) produced her report. While Dr Siddle had doubts as to her ability to make definitive assessments on the material with which she was briefed, she found “moderate cognitive impairment” and opined... “it is less likely that she had capacity in late 2018 and early 2019 than in 2011.¹² It is not possible, based on the information that is available to me, to provide a more accurate opinion than that.” She noted documented declines in Mrs Pickersgill’s cognitive capacities by September 2018.
- [21] The pleadings were then filed. The applicant sought, importantly, a declaration that the 2019 Enduring Power of Attorney was invalid. The second and third respondents sought a declaration that the 2018 Enduring Power of Attorney was invalid and that the Adult Guardian and the Public Trustee be appointed to be Mrs Pickersgill’s guardian for complex personal/health matters and her administrator for all financial matters, respectively. The second and third respondents also sought to have the matter transferred to QCAT.
- [22] Dr Siddle’s opinion was that Mrs Pickersgill currently lacked capacity to make decisions and provide instructions in relation to the current proceedings. That put South Geldard in a difficult position. On 23 May 2019, I formed the view that it was

¹² Mrs Pickersgill made a Will in 2011.

necessary for Mrs Pickersgill to be represented in the proceedings and I appointed Mrs Vicki Noeleen Jackson, a partner of South Geldard, and a very experienced solicitor, as Mrs Pickersgill's litigation guardian. South Geldard then acted as solicitors to Mrs Pickersgill's litigation guardian, Mrs Jackson.

- [23] Dr Siddle's opinion, if accepted, was likely to lead to a finding that Mrs Pickersgill did not have capacity to make either the 2018 or 2019 Enduring Powers of Attorney. If these two powers of attorney were set aside, that would then leave the 2013 Enduring Power of Attorney as the operative one. It could not though be in Mrs Pickersgill's interests, given the current dispute, that her affairs be handled by Kevin Pickersgill¹³ and Mrs Pickersgill's two daughters. They were the attorneys nominated under the 2013 Enduring Power of Attorney. They are in a bitter dispute with each other. It was therefore abundantly evident as and from the receipt of Dr Siddle's report that Mrs Pickersgill's affairs needed to be placed in the control of an independent party. This point was made by the second and third respondents' solicitors to the applicant's solicitors by letter of 20 June 2019.
- [24] On 17 and 21 June 2019 the applicant's solicitors wrote to the second and third respondents' solicitors raising difficulties with the defence and counterclaim of the second and third respondents, and asserting Mrs Pickersgill's wish to have family members involved in the management of her affairs. An application was filed in QCAT seeking the appointment of the applicant and his brothers for that purpose.
- [25] On 5 July 2019 Mullins J heard an application on behalf of the applicant to strike out particular paragraphs of the defence and counterclaim. That was successful and her Honour ordered costs against the second and third respondents. A cross application brought by the second and third respondents to have the matter transferred to QCAT was adjourned.
- [26] The applicant's application to QCAT seeking the appointment of a Mr Maundrell (the applicant's accountant) as Mrs Pickersgill's interim administrator for financial matters, and the applicant and his brothers as interim guardian for personal/health matters was heard by QCAT on 24 July 2019 and on 26 July 2019 but there was no conclusion reached.
- [27] On 29 July 2019 the second and third respondents made an offer to settle the proceedings under Chapter 9 of Part 5 of the *Uniform Civil Procedure Rules*, the effect of which was that both the 2018 and 2019 Enduring Powers of Attorney be declared invalid.
- [28] The matter came before me on 21 August 2019 and after I made some observations to the parties, the parties' proposed orders in the terms set out in paragraph 1 of these reasons were settled and all parties urged me to make the orders. I did.

The cost arguments

- [29] The applicant submits that:
- (i) He acted reasonably in bringing the proceedings given the payments of money to the second and third respondents and their family and the evidence which the

¹³ The applicant.

applicant submits shows the second and third respondents attempting to control Mrs Pickersgill;

- (ii) The second and third respondents acted unreasonably in defending the proceeding and ought to have effectively surrendered the 2019 power of attorney upon receipt of Dr Siddle's report;
 - (iii) The applicant had substantial success in the proceeding because the 2019 Enduring Power of Attorney ultimately fell.
- [30] What the applicant's submissions overlook include:
- (i) Relief could have been sought in relation to the 2019 Enduring Power of Attorney in the QCAT, a no cost jurisdiction;
 - (ii) While there might be some evidence that the second and third respondents were attempting to influence Mrs Pickersgill, there is also evidence that the applicant was attempting to do the same;
 - (iii) The application brought by the applicant sought to set aside the 2019 Enduring Power of Attorney with the result that the 2018 Enduring Power of Attorney in favour of the applicant and his brothers would take effect. Given that both powers of attorney fell, the applicant can hardly claim "substantial success".
- [31] The second and third respondents made various submissions by referring to cases concerning "the awarding of costs in the protective jurisdiction." Those cases stand as authority for the proposition that a "costs follow the event" approach is often not appropriate where an unsuccessful party has brought or defended proceedings to protect another.¹⁴
- [32] Notwithstanding the claims by the applicant and the second and third respondents that they have acted in Mrs Pickersgill's interest, I draw the inference that this was in reality a fight between the brothers on the one hand and the sisters on the other over Mrs Pickersgill's assets. This was most definitely an adversarial proceeding.
- [33] The second and third respondents submit that they should have their costs either:
- (i) From 15 May 2019 when Dr Siddle's report was received; or
 - (ii) From 20 June 2019 when their solicitors wrote seeking the cooperation of the applicant in the appointment of an independent person to manage Mrs Pickersgill's affairs; or
 - (iii) From 29 July 2019 when the second and third respondents made their offer to settle.
- [34] There is some force in the second and third respondents' submissions that the applicant acted bullishly from the time Dr Siddle's report was received. This is especially so in response to the second and third respondents' offer to settle on the appointment of an independent party to manage Mrs Pickersgill's affairs.
- [35] The offer made under the rules on 29 July 2019 is of little assistance to the second and third respondents. The offer was open for acceptance until 23 August 2019 and the

¹⁴ *CAC v Secretary, Department of Family and Community Services (No 2)* [2015] NSWSC 344 at [15] - [16].

support given by the applicant to the making of the orders made on 21 August 2019 constitutes substantive acceptance of the offer.

- [36] As already observed, once Dr Siddle's report was received, the obvious resolution was the appointment of an independent third party to attend to Mrs Pickersgill's affairs. The second and third respondents appear to have come to that realisation earlier than the applicant. However, the dispute was ignited by the applicant's concerns over the payment of large sums of money from the Suncorp account to the second and third respondents and other family members of theirs. I have not been called on to make a final determination as to the appropriateness or otherwise of those payments but Dr Siddle's report certainly raises questions as to Mrs Pickersgill's capacity to have made uninfluenced decisions to pay that money.
- [37] In all of the circumstances, it is appropriate that there be no orders as to costs in favour of any party apart from the order made by Mullins J.
- [38] I order that there be no order as to costs in favour of any party apart from the order of Mullins J made on 5 July 2019.