SUPREME COURT OF QUEENSLAND

CITATION:	*In the Will of Bob Wild Deceased* [2002] QSC 200
PARTIES:	**IN THE WILL of BOB WILD DECEASED** (applicant)
FILE NO/S:	SC No. 3783 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	17 July 2002
DELIVERED AT:	Brisbane
HEARING DATE:	10 July 2002
JUDGE:	White J
ORDER:	**The answer to the Registrar's Reference is a grant of probate may be given to the attorney of the executrix in the circumstances set out in the Reference subject to the limitation that should the executrix become capable the grant of probate to the attorney be surrendered.**
CATCHWORDS:	CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – CREATION OF RELATIONSHIP OF AGENCY – FORMATION AND PROOF OF AGENCY – POWERS OF ATTORNEY – FORMALITIES – whether duty as executor of a will may be exercised by duly appointed attorney SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION – TO WHOM PROBATE GRANTED – EXPRESSLY APPOINTED EXECUTORS – IN GENERAL – where executor suffers from incapacity, whether duly appointed attorney is able to obtain a grant of probate *Powers of Attorney Act* 1998 *Property Law Act* 1974 *Succession Act* 1981 *Trusts Act* 1973 *Uniform Civil Procedure Rules*
COUNSEL:	Mr G Young, solicitor for the applicant Deputy Registrar J MacNamara for the Registrar

SOLICITORS: Winchester Young & Madden for the applicant

[1] This is a Reference by the Registrar to the court for a ruling as to whether an attorney appointed under an enduring power of attorney given under s 175A of the *Property Law Act* 1974 can apply for a grant of probate on behalf of a sole executrix and sole beneficiary. The grantor of the enduring power of attorney and executrix of the will of Bob Wild deceased suffers from dementia and is incapable of managing her own affairs and will not, on the present state of medical science, recover from this condition.

[2] The Registrar is empowered to make a grant pursuant to Chapter 15 of the *Uniform Civil Procedure Rules* 1999 ("*UCPR"*) but may not do so in two circumstances not here relevant or if the court otherwise directs by practice direction. There is no relevant practice direction. By r 601(2) the Registrar may refer any application for a grant of probate to the court.

[3] The deceased, who died at the Gold Coast on 20 January 2002, by his will appointed his wife, Jean Minnie Wild, to be the sole executrix and trustee and beneficiary of his will. Should she not have survived him for 30 days he appointed the applicant as his executor and trustee and devised the whole of his estate on trust for his children, the applicant and Christine Helen Hulme-Cross in equal shares.

[4] Jean Minnie Wild gave an enduring power of attorney to the applicant dated 22 May 1991 pursuant to s 175A of the *Property Law Act* 1974 which was recorded in the Power of Attorney Register held by the Registrar of Titles on 24 June 1991. Since granting the power of attorney Jean Minnie Wild has been afflicted with and suffers from dementia and according to a medical certificate signed by Dr Peter Lewis is unable to manage her own affairs. The enduring power of attorney provides that the attorney may do on the principal's behalf anything that she "may lawfully authorise an attorney to do" and is to continue to operate and have full force and effect notwithstanding that she might subsequently become incapable.

[5] The applicant deposes that until the death of his father his parents resided together and his father handled their affairs. The applicant had no cause to exercise his power as an attorney during this period on behalf of his mother but after his father's death he was concerned that she was not able to manage her affairs. He gives as example an occasion when his mother wrote a cheque, cashed it and then re-banked the money. The applicant consulted with Dr Lewis whom I infer to be the family physician. In the applicant's opinion his mother is incapable of collecting and getting in the deceased's estate or of administering it according to law.

[6] The applicant has, in a limited way, intermeddled in the estate in so far as he has arranged the burial of his father and protected the assets of the estate.

[7] The applicant has complied in all respects with the requirements of the rules for a grant of probate. He is prepared to exhibit on oath a full inventory of the estate and

to render an account of the administration of the estate to the court, to deliver up the grant of probate, if necessary, and to distribute the estate promptly. He will continue to manage his mother's financial and personal affairs as her attorney.

[8] The concern of the Registrar is that the *Trusts Act* 1973 in s 56(1) gives only a limited power to a trustee to delegate predicated on a temporary inability on the part of the trustee to attend to his or her duties as trustee. There is no reasonable expectation that the executrix will ever be able to undertake her duties as a trustee of her late husband's estate.

[9] Notwithstanding the existence of a valid enduring power of attorney the executrix holds the estate of her late husband in that capacity. Section 45(1) of the *Succession Act* 1981 provides:

> "The property to which a deceased person was entitled for an interest not ceasing on his or her death (other than property of which the deceased person was trustee) shall on his or her death and notwithstanding any testamentary disposition devolve to and vest in his or her executor and if more than 1 as joint tenants, or, if there is no executor or executor able and willing to act, the public trustee."

If the court grants probate of a will or letters of administration of the estate to someone other than the named executor or public trustee the property vested in the executor or the public trustee by virtue of s 45(1) devolves to and vest in the person to whom the grant is made, s 45(2).

[10] The provisions of the *Trusts Act* apply to personal representatives. Section 4(1) stipulates that the Act "applies to every trust, as defined in section 5 …". Section 5 extends "trust" to the "duties incidental to the office of a personal representative". While s 12 makes provision for the appointment of a new trustee without the intervention of the court in circumstances where a trustee is, *inter alia,* unfit to act or is incapable of acting, it is of no assistance. The power of new appointment is given only to any surviving or continuing trustee "or the personal representative of the last surviving or continuing trustee" and by s 12(9) "trustee" does "not include a personal representative as such".

[11] Section 80 of the *Trusts Act* gives the court power to appoint a new trustee if it is found inexpedient, difficult or impracticable to do so without its assistance. However sub-section (4) specifically excludes jurisdiction to appoint an executor or administrator of an estate. I accept the submission of Mr G Young, solicitor for the applicant, which is supported by the Registrar, that there appears to be no power in the *Trusts Act* which allows the applicant to seek a grant of probate. If there is any entitlement to do so then it must be on the basis of his appointment as the attorney of the executrix. The *Powers of Attorney Act* 1998 must be examined to ascertain if it can support the application notwithstanding the limitations in the *Trusts Act*.

[12] The enduring power of attorney was granted under the *Property Law Act* 1974. By s 163 of the *Powers of Attorney Act* it is taken to be made under the *Powers of Attorney Act* having been in full force and effect immediately prior to the

commencement of s 163. The *Powers of Attorney Act* was introduced after the Queensland Law Reform Commission had presented its report no. 49 in June 1996 on *Assisted and Substituted Decisions*. Earlier reports had considered other aspects of the Reference. As the long title states the purpose of the Act is, *inter alia*, to consolidate, amend and reform the law about powers of attorney. A significant advance on the general law occurred in 1990 when enduring powers of attorney were created under the *Property Law Act* 1974 which meant that an attorney could continue to act after the principal had suffered from an event which deprived him or her of the capacity to manage their affairs. Enduring powers of attorney given under the *Property Law Act* suffered from a number of limitations including that they related only to financial matters.

[13] The *Powers of Attorney Act* is a comprehensive legislative scheme which provides a set of principles required to be observed by attorneys and others when dealing with people with a decision making disability, see Schedule 1. It provides, *inter alia*, for the appointment of a person or persons to act as an attorney to make financial, personal and/or health care decisions for the principal in the event that the principal loses the capacity to do so.

[14] Chapter 5 Part 2 of the Act concerns attorneys under an enduring document (and statutory health attorneys). An exercise of power as an attorney for an adult who has impaired capacity must conform with the general principles in Schedule 1. Those principles relate to concepts of respect for the impaired principal and need not be more particularly elaborated. So long as the instrument does not state to the contrary, "an attorney is taken to have the maximum power that could be given to the attorney by the enduring document", s 77.

[15] Chapter 3 Part 2 of the Act concerns provisions about an enduring power of attorney. Section 32(1) provides:

> "By an 'enduring power of attorney', an adult ('principal') may –
>
> (a) authorise 1 or more other persons who are eligible attorneys ("attorneys") to do anything in relation to 1 or more financial matters or personal matters for the principal that the principal could lawfully do by an attorney if the adult had capacity for the matter when the power is exercised …".

An enduring power of attorney giving power for a matter is not revoked by the principal becoming a person with impaired capacity for the matter, s 32(2).

[16] The first consideration is whether an application for a grant of probate could lawfully be brought by an attorney if the principal had capacity at the time. Although s 56 of the *Trusts Act* cannot be a source of power for the application it does assist in considering if an application for a grant of probate by an applicant exercising a power of attorney "could lawfully be done by an attorney". Section 56(1) provides relevantly:

> "A trustee who … is … temporarily incapable of performing all duties as a trustee may, subject to the provisions of this section, and

> notwithstanding any rule of law or equity to the contrary, by power of attorney executed as a deed, delegate to any person resident in the State the execution or exercise during the trustee's incapacity … of all trusts … vested in the trustee as such trustee … ."

[17] And s 56(4) provides that:

> "All jurisdictions and powers of any court apply to the donee of a power of attorney given under this section … as if the donee were acting … in the same capacity as the donor of the power."

[18] Although the power of attorney referred to in s 56(1) "does not come into operation unless and until the donor … is incapable of performing all the donor's duties as a trustee …" this does not defeat the argument that s 56 enables an executrix to delegate the whole of her executorial and trustee powers, albeit temporarily. It merely relates to the time when the power might be exercised. Accordingly, subject to matters which I am about to consider, an application for a grant of probate could lawfully be made by an attorney for a principal. No other relevant prohibition has been identified.

[19] As s 32(1) of the Act provides, an attorney may do anything in relation to "financial" or "personal" matters. What is encompassed in the description "financial matters" is set out in s 1 of Schedule 2. Relevantly it provides:

> "A "financial matter" for a principal, is a matter relating to the principal's financial or property matters, including, for example, a matter relating to 1 or more of the following –
>
> …
>
> (q) a legal matter relating to the principal's financial or property matters."

Section 2 of Schedule 1 provides that:

> "A "personal matter", for a principal, is a matter, other than a special personal matter or special health matter, relating to the principal's care, including the principal's health care, or welfare, including, for example, a matter relating to 1 or more of the following –
>
> …
>
> (h) a legal matter not relating to the principal's financial or property matters."

[20] By s 3 of Schedule 1 certain "special personal matters" may not be the subject of power to an attorney. They are:

> "(a) making or revoking the principal's will;
>
> (b) making or revoking a power of attorney, enduring power of attorney or advance health directive of the principal;

(c) exercising the principal's right to vote in a Commonwealth, State or local government election or referendum;

(d) consenting to adoption of a child of the principal under 18 years;

(e) consenting to marriage of the principal."

As is immediately apparent, carrying out executorial functions including an application for a grant of probate is not excluded.

[21] Section 18 of Schedule 2 defines "legal matter" for a principal and

"… includes a matter relating to-

…

(c) use of legal services to bring or defend a proceeding before a court, tribunal or other entity, including an application under the *Succession Act 1981*, Part 4 or an application for compensation arising from a compulsory acquisition; and

(d) bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding."

[22] The *UCPR* apply to civil proceedings, *inter alia*, in the Supreme Court, r 3(1). A proceeding starts when the originating process is issued by the court, r 8(1). An application may commence an originating process, r 8(2). A proceeding for a grant of probate must be started by application, r 597. Therefore an application for a grant of probate is a legal matter which the holder of an enduring power of attorney has power to bring.

[23] It remains to consider whether the conclusion that the holder of an enduring power of attorney may bring an application for a grant of probate as attorney for the principal/executrix is contrary to any underlying prohibition in any rule of law or statute. The *Trusts Act* purports to consolidate and amend the law relating to trusts. The legislature recognised in s 12 that there are circumstances where a trustee may be unable, unwilling or incapable of acting, and provision is made for the appointment of a new trustee by nomination separately from the power given to the court to do so in s 80. Section 56 has already been considered. The *Succession Act* recognises the devolution of executorial representation in s 46. Finally, the *Powers of Attorney Act* is comprehensive in its description of the powers of an attorney under an enduring document and those powers are apt to include an application for a grant of probate. The exclusion of special personal matters which does not include a grant of probate strengthens this conclusion.

[24] The rejection of this approach would require letters of administration to be taken out either by the holder of the power of attorney or some other qualified person with the

extra expense which that would entail and which the legislature, in recent years, has been at pains to avoid.

[25] The answer to the Registrar's Reference is a grant of probate may be given to the attorney of the executrix in the circumstances set out in the Reference subject to the limitation that should the executrix become capable the grant of probate to the attorney be surrendered.