

**CITATION:** R/JG [2016] QCAT 127

**PARTIES:** R/JG

**APPLICATION NUMBER:** GAA1592-16; GAA3038-16

**MATTER TYPE:** Guardianship and administration matters for adults

**HEARING DATE:** 26 May 2016

**HEARD AT:** Southport

**DECISION OF:** **Member McDonald**

**DELIVERED ON:** 2 June 2016

**DELIVERED AT:** Southport

**ORDERS MADE:**

1. **The application for an order about an Enduring Power of Attorney is dismissed.**
2. **The application for the appointment of an administrator is dismissed.**
3. **The Tribunal directs the Attorney, MT to repay \$4,800.00 to the Adult within 30 days of this order, and to file in the Tribunal evidence of this receipted payment by 1 July 2016.**

**CATCHWORDS:** GUARDIANSHIP – where application in relation to an Enduring Power of Attorney to vary the document – where allegations about misconduct of attorney not made out - where application for the appointment of an administrator dismissed

*Powers of Attorney Act 1998 (Qld) ss 88, 116, 125*  
*Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 100, 102*

**APPEARANCES:**  
MT RL, LM, TM.

**REPRESENTATIVES:**  
Nash Te Uaa for The Public Trustee of Queensland

Mr Radcliffe of Counsel, instructed by Evan Cooper of Cooper Malloy Legal, for MT

## **REASONS FOR DECISION**

- [1] RJG is an 84 year old lady living in a nursing home. She was diagnosed with dementia syndrome in April 2015. On 5 December 2014 she executed an Enduring Power of Attorney ('EPOA') making MT as her Attorney for financial, personal and health matters and appointing her grandchildren ML and TM to act jointly, in succession to MT.
- [2] The application before the Tribunal asks that this document is varied to add RL, RJG's other daughter, to the EPOA. The application make several vague claims about financial misconduct, being that the Attorney has been "embezzling" RJG's funds, taking a valuable brooch and pay-waving on items that were not required. RL requests the Tribunal to "add her to the EPA so that that she can make enquiries about these concerns for herself, and to put RJG's mind at ease." She also wants to be contacted if the RJG goes to hospital, if there are any changes in medications, to be consulted for approval on financial transactions and medical decisions and to have the RJG stay with her for a break.
- [3] MT argues the application is frivolous and the Tribunal lacks the jurisdiction to appoint her to the document, and seeks the application is dismissed. The Tribunal has initiated an application for the appointment of an Administrator in the circumstances.
- [4] In the application, RL acknowledges the enduring document of 5 December 2014 to be valid, but the material submitted to the Tribunal raises RL's questions about RJG's capacity to execute an EPOA around that time. She said she was uncertain whether RJG had the capacity to execute an EPOA then because she was in receipt of correspondence that claims that she was unable to execute an EPOA in January 2016.
- [5] At the hearing, RL claimed that she was unable to substantiate the concerns that she had raised because she had not received financial records ordered under the Tribunal's direction of 3 May 2016. MT's solicitors produced copies of correspondence identifying that this documentation was sent to RL on 19 May 2016 in compliance with the directions of the Tribunal.
- [6] RL said she based her claims upon concerns that RJG had raised with her during her contacts about MT's management of her funds. She was also concerned that she had not been informed of critical decisions made by MT including placement in nursing home, a further change of that nursing home, hospitalisation for a heart attack and an anaesthetic for a cataract operation.

## CAPACITY TO EXECUTE THE ENDURING POWER OF ATTORNEY

- [7] On 17 September 2014, Dr S provided correspondence that RJG was capable of executing an EPOA. She considered at that time she fully understood the nature and effect of the EPOA and that it is not to be invoked at this point in time. A mini mental state examination revealed no significant cognitive impairment. She was of the view that she had full capacity at that time.
- [8] Dr L certified that on 9 December 2014 RJG was mentally capable of completing the required EPOA documentation in a medical certificate completed on 18 April 2016.
- [9] On 23 December 2015, Dr L certified that RJG was capable of completing an EPOA. He retracted this statement in correspondence of 15 February 2016, noting cardiovascular disease and dementia of mixed aetiology. Noting the receipt of Dr K's diagnosis on 13 February, he certified that she did not have capacity to manage her affairs.
- [10] Psychogeriatrician, Dr K's report of 12 February 2015 indicated her diagnosis of dementia syndrome, following 4-5 years of memory decline, including disorientation, forgetfulness and word finding difficulties. Cognitive testing revealed moderate impairment. She stated the impairment to her memory is mild to moderate and affected all decision making domains.
- [11] Dr L provided a Health Professional Report dated 23 February 2015. He considered she was unable to make decisions freely and voluntarily and unable to make decisions regarding her financial affairs including withdrawal of funds and paying bills. He considered she could make simple decisions in the decision making domains. His evidence that she could understand all the elements necessary to execute an EPOA is inconsistent with his retraction of this statement on 15 February 2016.
- [12] The evidence before the Tribunal is clear that she was capable of executing the EPOA of 5 December 2014, and this document validly appoints the Attorneys. However, the balance of the evidence clearly indicates that since December 2015, she has lost capacity and is capable of only simple day to day decisions in her personal and financial affairs.

### **Allegations of Attorney's misconduct – personal matters**

- [13] The Tribunal noted concerns the applicant raised about being consulted about RJG's health and accommodation decisions. MT was questioned by the Tribunal about consultation around these decisions.
- [14] RL claimed that she had not been advised by MT of her mother's admission to a nursing home at Burleigh. MT stated that MT was present when RL rang RJG and was informed directly by RJG of the placement on 23 December 2014. RL raised the concern that she had not been informed of her subsequent movement to a Labrador nursing facility. MT presented

a text message between her and RL on 24 January 2015. The message from MT sent the facility's phone and address details, and RL replied at 8:57pm thanking her for the details. RL did not account this inconsistency.

- [15] RL claimed that the Attorney had not informed her of her mother's heart attack or the hospital. MT informed the Tribunal that she had in fact updated her at the time of the heart attack, communicating the information to RL that evening. She indicated that she had become abusive and that it had been difficult to communicate with her where she becomes argumentative. She said that she uses text to communicate due to this conflict. The Tribunal accepts that this information was communicated.
- [16] RL claimed that she was not informed of her mother's cataract operation. MT advised that this was a quick procedure that she did not consider it was necessary to alert given the low risk.
- [17] RL claims that MT has threatened through her lawyers that the nursing facility may create contact restrictions with her mother but indicated that there are no current restrictions on her contact. It is noted that the correspondence which conveys this information raises concerns that RL was sleeping in her mothers' bed at the nursing home while RJG slept in the chair, and as such was purporting to act in RJG's interest issuing such a warning.
- [18] The Attorney is under an obligation to apply the General principles of the *Powers of Attorney Act 1998 (Qld)* ('PAA'). General Principle 10 requires the Attorney to act appropriate to RJG's circumstances. It is implied that as RJG maintains a healthy loving relationship with RL that the Attorney would do all things to ensure that RL is informed of her mother's health and whereabouts. The evidence before the Tribunal is that RL has gone to effort in most matters to inform RL of significant changes, although she has not at all times. The Tribunal encourages the Attorney to continue to communicate about health and major decisions with RJG's children, in compliance with the general principles. The Tribunal has found no breach on the evidence.

### **Financial Matters**

- [19] RL's allegations of "embezzlement" were vague and based upon concerns that she stated had been raised by RJG. The Tribunal considered the transactions in RJG's bank accounts since the sale of her property. Transactions since 16 November 2014 indicate that the Nursing home bond has been paid, and the balance paid to a term deposit in February 2016, with some \$2,000.00 in an account in RJG's possession. The valuable brooch is being held in the Attorney's possession because she considers it to be unsafe to leave it in the nursing home. The Tribunal considers these to be prudent actions of the Attorney. Inspection of the accounts and questioning of the Attorney revealed in most incidences, transactions that occurred between the sale of the house and the transfer of the term deposit funds were appropriate to the RJG's circumstances and met the Attorney's obligations under the *PAA*. MT was questioned

about a number of transactions. Her responses included that Foxtel is being supplied to RJG's room in the nursing home, purchases have been made for outings for RJG and at times she will pay for a meal. Several queried purchases were advised to be purchases of clothes for RJG, and the purchase of wool for knitting, gifts for grandchildren and great grandchildren around Christmas time. Jewellery had been purchased at RJG's wish and remains in RJG's possession at the nursing home. In relation to these matters, there was nothing in MT's responses that concerned the Tribunal of any inappropriate transactions. On the contrary, the accounts demonstrated that she was providing prudent financial decisions.

[20] However, there are some gifting transactions that concern the Tribunal and represent unauthorised gifts. On 23 December 2015, MT gifted each of her two daughters \$5000.00 from RJG's funds. Section 88 of the *PAA* governs gifts made under an operative EPOA.

(1) Unless there is a contrary intention expressed in the enduring Power of Attorney, an attorney for financial matters for an individual may give away the principal's property only if—

(a) the gift is—

(i) to a relation or close friend of the principal; and  
(ii) of a seasonal nature or because of a special event (including, for example, a birth or marriage); or

(b) the gift is a donation of the nature that the principal made when the principal had capacity or that the principal might reasonably be expected to make; and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances.

[21] While the gift's timing precedes Christmas and is purported to be a Christmas present to RJG's grandchildren, the Tribunal is not satisfied that the value is reasonable given the stated pattern of gifting when RJG had capacity.

[22] The oral evidence indicates MT has outlaid more than \$1190.00 in gifts for her great grandchildren in Christmas 2015. This is in addition to the \$10,000.00 gifted to the two grandchildren. TM informed the Tribunal that it was usual for RJG to give money as a gift, stating that in addition to \$100.00 for Christmas or birthdays she would receive offers of \$50.00 here and there from time to time without occasion. RL claimed that RJG gifted both grandchildren \$1000.00 on their 18<sup>th</sup> and 21<sup>st</sup> birthdays and she considered \$5000.00 was excessive. TM argued that RJG had said that because they had mortgages, the gift should be larger to reflect their circumstances.

[23] The Tribunal considers that it was usual for RJG to offer Christmas gifts of the value of \$100.00 to her granddaughters. While RJG had a larger amount of liquid funds available following the sale of her house, the size of her estate has not increased, and she continues to have the costs of care

and medical care. RL has informed the Tribunal that RJG has expressed dissatisfaction with her funds being applied in this way, and the Tribunal relies on RL's evidence of this. The significantly larger gifts of \$5000.00 as a Christmas gift is not in keeping with what RL said RJG would have gifted when she had the capacity to make her own decisions. As such, it is an unauthorised gift in breach of s 88 (1) of the *PAA*. The Tribunal directs the Attorney to repay \$4,800.00 within thirty (30) days.

[24] Beyond this, the Tribunal considers that the Attorney is acting in compliance with the *PAA* in relation to personal and financial decisions and there is no need to remove the Attorney. RL has requested to be added to the appointment. The Tribunal's powers extend under s 116 of the *PAA* to :

- (a) remove an attorney and make a new appointment to replace the removed attorney
- (b) remove a power from an attorney and give the removed power to another attorney or to a new attorney; or
- (c) change the terms of a Power of Attorney, enduring power of attorney or advance health directive; or
- (d) revoke all or part of a document mentioned in paragraph

[25] There is no basis for removal of any power from the Attorney based on the evidence before the Tribunal. The evidence is that the document is a statement of RJG's wishes when she had the capacity to determine who managed her personal and financial affairs. The Tribunal does not intend to interfere with the EPOA, where, subject to the Tribunal's direction about gifting, the Attorney is making decisions in RJG's interest.

[26] The Tribunal does not have the jurisdiction to vary the Enduring Documents in the terms sought by RL. The Tribunal dismisses the application to vary the EPOA. There being no concerns about the ongoing management of RJG's financial affairs, the Tribunal dismisses the administration application.

[27] MT's legal representation made submissions in relations to costs, arguing that pursuant to s 125 of the *PAA*, costs followed the event. Proceedings in the QCAT jurisdiction are governed by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('*QCAT Act*'), an Act later in time to the *PAA*. Section 100 of the *QCAT Act* provides that the parties bear their own costs. This is subject to s 102 of the *QCAT Act*, where costs would be in the interests of justice. No submissions were made that the award of costs would be in the interests of justice. In any case, there were legitimate concerns arising from the unauthorised gifting that costs would not be awarded.