

CITATION: *MGC* [2016] QCAT 188

PARTIES: MGC

APPLICATION NUMBER: GAA1188-16;GAA118916

MATTER TYPE: Guardianship and administration matters for adults

HEARING DATE: 27 May 2015

HEARD AT: Southport

DECISION OF: **Member McDonald**

DELIVERED ON: 2 June 2016

DELIVERED AT: Southport

ORDERS MADE:

1. **The Public Guardian is appointed as guardian for MGC for decisions about the following personal matters:**
 - (a) Accommodation;
 - (b) Health care;
 - (d) Provision of services;
 - (e) Legal matters not relating to the adult's financial or property matters.
2. **This appointment remains current until further order of the Tribunal. It is reviewable and will be reviewed in two (2) years.**
3. **The Public Trustee of Queensland is appointed as administrator for MGC for all financial matters.**
4. **The administrator is to provide a financial management plan to the Tribunal within four (4) months.**
5. **The Tribunal requests the administrator provide accounts when requested.**
6. **This appointment remains current until further order of the Tribunal. It is reviewable and will be reviewed in two (2) years.**
7. **That before insert date 3September 2016 the administrator must:**
 - (a) **Search the records of the Registrar of Titles to identify any property registered in the adult's name.**
 - (b) **Give the registrar of titles a copy of this order and a notice to the registrar**

advising that any interest in property held by the adult is subject to this order.

- (c) Give to the Tribunal:
- (i) a copy of the “Lodgement Summary Form” from the Titles registry confirming the notice has been lodged for each property held by the adult; and
 - (ii) a copy of the current title searches.
8. If the ownership of any property of the adult changes in any way or the adult acquires an interest in another property the administrator must, within 14 days of such changes:
- (a) give a copy of this order to the Registrar of Titles and
 - (b) give a notice to the Registrar about the changes or the adult’s interest in another property.
9. The following Enduring Power of Attorney for MGC is revoked pursuant to s116(d) of the *Powers of Attorney Act 1998* and s82(2) of the *Guardianship and Administration Act 2000*:
- (a) The Enduring Power of Attorney dated 2 February 2011 appointing JD as attorney for financial, personal and health matters.

CATCHWORDS:

Guardianship and administration matters for adults - capacity to revoke power of Attorney - formal requirements for Enduring Power of Attorney for personal health matters - appointment of Guardian and appointment of Administrator - family conflict - Adult with no income - uncertain relationship status with Enduring Power of Attorney

Guardianship and Administration Act 2000 (Qld), sections 12, Schedule 1, 4.
Powers of Attorney Act 1998 (Qld), sections 44, 49, 73, 116.

APPEARANCES: MGC MR, WM, RL, BM, Dr P.

REASONS FOR DECISION

- [1] MGC is a 90 year old gentleman living on his family farm with his adult children and wife JD. In 2013 he was diagnosed with a vascular dementia and his care needs have increased since that time. Presently his needs are sought to be met by a collaboration of family members. He appointed JD to be his Enduring Power of Attorney on 2 February 2011. On 26 October 2015 he purported to revoke this appointment when she placed him in a nursing home during a period of carer respite. On 22 March 2016 he initiated an advanced health directive and purported to appoint MR, his son, as Enduring Power of Attorney for personal health matters. Conflict has ensued between the two purported Attorneys around decisions about his care. MR indicated that MGC is in financial distress and has no access to funds of his own. MGC's children are seeking to keep him out of institutional care by providing around the clock monitoring and care on the farm and allocating the responsibilities of care amongst them. Unfortunately MGC's has significant hearing loss and was unable to benefit from the Tribunal hearing loop, and consequently had difficulty engaging with the Tribunals questioning.
- [2] JD was not present at the hearing. She indicated that she would be overseas at the time of the hearing. The Tribunal Registry records note that she was invited to make an application for an adjournment. No such application was received by the Tribunal and the hearing proceeded in her absence.

Revocation of the Enduring Power of Attorney (EPA) of 2 February 2011

- [3] The Tribunal must consider whether MGC had the capacity to revoke the EPA on 26 October 2015. The Tribunal had evidence before from Dr K that MGC was diagnosed with vascular dementia in His letter notes moderately severe memory deficits.
- [4] A Medical Certificate from Dr P, MGC's GP of 2 years states he had the capacity at 27 October 2015 to decide where he wanted to reside. Dr P also provided a health professional report dated 17 March 2016 noting his history of a cva and dementia. His report stated that MGC has profound short term memory loss but has the ability to make decisions regarding matters related to his care and where he lives. He said he can make decisions around accommodation and lifestyle but will not recall them. He considered that he could make decisions freely and voluntarily. He was of the view that he could make simple and complex decisions in all the decision making domains, although presently unable to execute an enduring power of Attorney. The Tribunal was able to speak with Dr P during the hearing to clarify the apparent inconsistency in the medical evidence. Dr P was very clear that MGC understood the decisions he was making in the immediate timeframe, but was unable to remember what had occurred. He said his power to recollect is moderately to severely impaired. He emphasised that his dementia condition was not Alzheimer's in origin but vascular. He said he had a significant blockage in his artery which connects with his memory centre. He said he was confident that if it

was explained to him at the time he would be able to make a reasonable judgement. For this reason he considered that he understood the nature and consequences of the decision to revoke his Attorney in October 2015 despite his dementia diagnosis.

- [5] The Tribunal also had the copy of the ACAT assessment from 25 August 2015. The ACAT report notes the vascular dementia and stroke history. It claims that he is not always able to recognise family members and requires prompting to finish a meal. It notes constant short term memory problems and regular confusion and that he is frequently disoriented to place and occasionally to person and time. I note that the parties present at the hearing raised concerns that MGC was under the influence of sedative medication for this assessment and they considered that this outcome was strongly influenced by his unusual presentation on the assessment. It is noted that clopixal is prescribed medication noted in the health professional report.
- [6] This report must be read in conjunction with the evidence of Dr P at hearing, and the Tribunal places significant weight on Dr P's evidence, who noted that was aware of the ACAT assessment, and it had not affected his opinion.
- [7] MR explained the circumstances around how MGC revoked the document. He said that MGC had been distressed in the respite placement at the nursing home, was banging at the windows to get out when he came to see him. He said he had has hearing aid batter removed. He had understood that the decision to place him there was made by JD and he wanted to change her power to do this. MR agreed that he had typed the document for his father to sign, but it was his father's expressed wishes.
- [8] The evidence of Dr P of 27 October 2015 indicates that MGC was capable of revoking the EPA of 2 February 2011 in October 2015.
- [9] However, section 49 of the *Powers of Attorney Act* 1998 requires the document to be revoked in the approved form, and section 49(3) requires the Principals' signature to be witnessed by an eligible witness. This has not occurred. JD's appointment as Enduring Power of Attorney therefore has not been validly revoked despite it being MGC's wishes.

THE ENDURING POWER OF ATTORNEY (HEALTH) APPOINTMENT

- [10] The Advanced health Directive 23 March 2016, MGC purported to attempt to appoint MR as Enduring Power of Attorney for personal health matters. Unfortunately the document does not meet the formal requirements of the *Powers of Attorney Act* 1998 to have validly appointed MR to this role. The document was executed on 22 March 2016 and MGC's signature was witnessed by KH who has not specified which that she is an authorised witness. Under section 44 (3) (b) the document must be signed and dated by an eligible witness. KH has not identified that she is an eligible witness. This appointment is therefore invalid.

- [11] MR presented the Tribunal with a version of this document that had been amended in the witness section by a new witness, M P who identified herself as a Justice of the Peace but who had crossed out Ms KH's name and overwritten with her own name and signature.
- [12] Section 44 (4) requires the witness to witness the principal signing the document. However, the document presented with Ms P's signature as witness has Ms H's signature witnessing MGC's signature at page 20. The document does not meet the formal requirements for appointment of the Powers of Attorney Act 1998. The appointment of MR as Attorney for personal matters has not been effective. In so far as it attempts to appoint an Enduring Power of Attorney, this amended document is also invalid.

CAPACITY TO MAKE PERSONAL AND FINANCIAL DECISIONS

Financial Decisions

- [13] There is consistent evidence in the material of Dr K and Dr P of MGC's severe memory deficits. These deficits affect MGC's ability to make informed decisions. The evidence of Dr P is noted that he is capable of an immediate decision such as a decision to revoke an enduring power of Attorney. The Tribunal is not satisfied that profound memory deficits would give MGC an ability to manage his financial affairs, where foundational recollection is essential to make consistent and informed decisions. It is noted such deficits are likely to make MGC very vulnerable. The Tribunal considers that MGC does not have the capacity to manage his financial affairs, where his recollection of previous decisions affects his understanding of information necessary to make decisions.

Personal Decisions

- [14] The evidence of Doctor P indicates that he is able to make decisions in an immediate sense but is affected in recalling these decisions. The Tribunal considers that memory is a requirement to be able to operationalise his decisions, to be aware of what has gone before and to recall the information upon which it is necessary to build a decision and actions to support that decisions. The Tribunal also noted that MGC was questioned about his orientation to time and date and while able to read his watch accurately he could not identify what year it was. The Tribunal finds that on an ongoing basis he is unable to make personal decisions. While Dr P has provided the Tribunal with statement dated 27 October 2015 that MGC was able to make the decisions about where he lives, it would seem that his purported Attorneys have been acting upon the personal power of the Attorney which is only operative upon incapacity. The decision about accommodation and the level of care necessary is a complex decision where there are complex relational and financial dynamics at play that Dr P does not appear to be informed about. The Tribunal does not accept Dr P evidence that MGC is able to make decisions around the appropriate accommodation to meet his needs and circumstances at this point, because he is not able to understand the nature and consequences of this very complex decision around how his care is met. While he can express his wishes, he is reliant on family members to resolve this dilemma on his behalf.

DISCORD AROUND PERSONAL DECISIONS MADE ON BEHALF OF THE ADULT

- [15] There is apparent discord in the family about the decisions made by the Attorney to place him in respite and the appropriate way to meet his needs for care and the best environment to do that. It is evident from JD's written submission to the Tribunal that she was unable to cope with his level of care needs and had needed the support of a 24 hour nursing facility. MGC's children have objected to this and are presently supporting him in collaboration with separate shifts. They note a need for additional care support including nursing support to keep him at the farm, and need to have this funded, but have been unable to obtain the adult's funds to finance this. Negotiations conducted have successfully delivered \$1200 per month, but they consider this is insufficient to meet the. It is noted that there is a high degree of conflict between MR and JD about the decision that have been made in relation to accommodation and services
- [16] MR express concerns about health decisions made by the JD in relation to medication which has led to a sedative affect on MGC and caused a blunting of his cognitive ability. Further MR raised concerns about his dentures not being effective to incise food and claimed they should have been replaced years ago. There is apparent discord amongst the family about health decisions that have been made on the adult's behalf.
- [17] The adult has ongoing health issues, and decision need to be made in relation to where he lives, his support needs and services, health and possibly legal decisions need to be made.
- [18] The evidence suggests that the decisions made by the Attorney are not supported by family members and it is apparent to the Tribunal that his interests are not adequately protected without an appointment where this conflict exists. Because the family members cannot agree, the Tribunal considers an independent party who can consult with all members as part of its obligations is appropriate to be appointed as Guardian due to this discord.
- [19] In relation to the application for the appointment of a Guardian, the Public Guardian is appointed for decisions about accommodation, services, health and legal matters not related to finances.

CONCERNS ABOUT THE ATTORNEY'S FINANCIAL DECISIONS

- [20] MGC's children present at the proceeding objected to the decision to place MGC in a nursing home on a respite or permanent placement. When this decision was made in October 2015, MGC was removed from the nursing home and returned to the farm where he says his children collaboratively cared for him since that time. MR indicated that he had significant concerns that under JD's care and decision making authority that MGC had "been drugged" on Lorica, Mogodon on Resipiridol and locked up in a nursing home. He was very concerned that the medication had reduced is cognitive ability for the ACAT assessment that supported

placement. MR put forward that there was no need for these medications as his behaviour is not aggressive and their sole purpose was to sedate him to keep him manageable. There was strong objection to his approach amongst the siblings.

- [21] RL indicated that the children want to access funds to provide additional support for in home professional care. She claims that JD holds control over all of MGC's funds, and for a long time he has had no access to funds at all. After some negotiations presently \$1200 per month is paid by JD from a family trust distribution into MGC's account, being for \$250 care to be paid to MR and \$50 for living expenses. RL indicated that the children are seeking an appointment so that they can gain access to funds to support additional in home care to continue support him to live on the farm. RL indicated that family members need to resource additional care to be able to continue in their support and gain professional assistance. She indicated that he father has held commercial and residential property and recently the sole of the property at Tweed returned proceeds of \$1.2million dollars. She was confident that he could fund more in home care if he could access his assets.
- [22] MR raised a number of concerns about MGC's access to his funds and assets. He claimed that there three commercial leases which are producing income which are or were a short time ago, jointly owned by MGC and JD. He claimed that one of these was jointly owned until "a year ago" when JD bought MGC's shareholding for \$1.00. MR said 50c was paid. The Tribunal inspected the documentation provided to it to support the applicant claims. The Internet sales history identifies that this occurred on 16 March 2007, well before MGC lost capacity to make financial decisions, and is not affected by the *Powers of Attorney Act*.
- [23] Written documentation before the tribunal made claims that MGC had not received funds from a number of sales of properties. There were vague and unspecific handwritten statements provided about this with no documentary support. There was insufficient evidence before the Tribunal about any of these purported transactions for the Tribunal to draw any conclusions about these.
- [24] Documentation from Centrelink dated 2 December 2015 queried why he received no funds from the sale of his jointly owned Tweed property. Further documentation from Centrelink of that date concluded that he was ineligible for Age Pension because he was a member of a couple with JD.
- [25] There was documentation provide to the Tribunal which noted that On 11 May 2015 the joint mortgage for the jointly owned Tweed property was paid out in full to the bank of Queensland. A statement from the NAB noted that on 11 May 2015 \$996,457 was placed in the NAB account of JD in her sole name. This is an unauthorised conflict transaction in breach of section 73(1) of the *Powers of Attorney Act* 1998. On this basis the Tribunal considers the Attorney is in breach of the strict obligations under the Act.
- [26] The children were unable to give a clear picture to the Tribunal as to whether JD had separated from MGC. They were living together at until

October last year when after the nursing home admission, MR brought him back to the farm. At that time JD did not live at the farm but several months later returned and lived separately in the farm house, although not with MGC. A number of family members live on the property. MGC continues to live in a granny flat on the farm cared for by MR RL and other siblings, while JD lives in the house. They indicated that they believe JD thinks she is removing herself from living with MGC, needing a rest from caring for him, although there has previously been talk of divorce. The status of whether they remain in a relationship is uncertain. Where JD controls the joint finances, this appears to have relevance, and MGC's access to funds is contingent on JDs control under the family trust. The oral evidence before the Tribunal is that this is not meeting MGC's needs to fund the level of day to day care provision. There are also implications of this in terms of eligibility for income and access to his own assets.

- [27] The Tribunal considers that there is a conflict of interest in the current arrangement for MGC's finances. From the information before the Tribunal it would appear that in addition to the unauthorised conflict transaction, the current Attorney is in breach General Principal 6 where the adult does not have access to income or the benefit of his assets.
- [28] The Tribunal may make an appointment of an Administrator under section 12 of the *Guardianship and Administration Act 2000* where the adult has impaired capacity for the matter, there is a need for a decision in relation to the matter and without an appointment the adult's interest will not be adequately met. The adult has impaired capacity for financial decision making on a day to day basis arising from his profound memory loss arising from dementia. There are decisions to be made about how to fund the support of his care needs, and income entitlements, and access to his funds from the sale of his house at Tweed. Without an appointment his needs will not be adequately met where there appears to be a conflict of interest with the current Attorney.
- [29] The Tribunal notes the Attorney's breach of section 73(1) of the *Powers of Attorney Act*, and pursuant to section 116(d) of this Act, revokes the Enduring Power of Attorney of 2 February 2011. There continues to be a need for financial decisions and without an appointment of a substitute decision maker MGC's interests will not be protected. The appointment Public Trustee of Queensland is appointed as administrator to manage MGC's finances.