

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *HDG* [2020] QCAT 106

PARTIES: **In applications about matters concerning *HDG***

APPLICATION NO/S: GAA3476-19; GAA3478-19; GAA6945-19; GAA1678-20

MATTER TYPE: Guardianship and administration matters for adults

DELIVERED ON: 9 April 2020

HEARING DATE: 25 March 2020

HEARD AT: Southport

DECISION OF: Member Mc Donald

ORDERS:

- 1. The Guardianship Order made by the Tribunal on 17 June 2019 is changed by appointing the Public Guardian as Guardian for *HDG* for the following matters:**
 - (a) Health care.**
- 2. This appointment remains current until further order of the Tribunal. It is reviewable and will be reviewed in five (5) years.**
- 3. The Public Trustee of Queensland is appointed as administrator for *HDG* for all financial matters.**
- 4. The administrator is to provide a financial management plan to the Tribunal within four (4) months.**
- 5. The Tribunal directs the administrator to provide accounts when requested.**
- 6. This appointment of the Public Trustee of Queensland remains current until further order of the Tribunal.**
- 7. Before 25 June 2020, the administrator must:**
 - (a) Record the appointment as administrator on any property registered in the adult's name with the Registrar of Titles by lodging the appropriate notice with a copy of the Tribunal's appointment decision; and**
 - (b) Provide confirmation to the Tribunal that this has been completed by providing:**

- (i) A copy of the title search conducted identifying the adult's property; and
 - (ii) A copy of the Title registry's 'lodgement Summary Form' confirming that the notice has been lodged for each property held by the adult.
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 fourteen (14) days of such changes:
- (a) Give a copy of this order to the Registrar of Titles; and
 - (b) Give notice to the Registrar of Titles about the changes or the adult's interest in another property.
9. The Tribunal directs that RAG pay HDG the sum of \$450,000.00. This amount is to be deposited in a bank account nominated by the appointed administrator within 30 days of this order.
10. The following Enduring Powers of Attorney for HDG are overtaken by the making of these appointments and can no longer be acted upon to the extent that these appointments have been made:
- (a) The Enduring Power of Attorney dated 20 November 2015 appointing RAG as attorney for personal and health matters; and
 - (b) The Enduring Power of Attorney dated 29 October 2009 appointing RAG as attorney for financial matters.

HEALTH LAW – GUARDIANSHIP, MANAGEMENT AND ADMINISTRATION OF PROPERTY OF PERSONS WITH IMPAIRED CAPACITY – where attorney appointed under New South Wales appointments for personal and financial decisions – where adult was relocated to Queensland against medical advice – where adult's funds transferred to attorney's account

Guardianship and Administration Act 2000 (Qld), s 12, s 106, s 129, s 138, Schedule 1, Schedule 4
Powers of Attorney Act 1998 (Qld), s 34, s 66, s 73, s 87, Schedule 1, Schedule 3

Powers of Attorney Act 2003 (NSW), s 12, Schedule 3(2)

**APPEARANCES &
REPRESENTATION:**

Adult:	HDG, represented by M Miller, on 17 June 2019 and 6 February 2020.
Applicant/s:	PG – the adult’s son
Proposed Guardian/s:	PG – the adult’s son; and PPG – the adult’s grandson
Proposed Administrator/s:	PG – the adult’s son; and PPG – the adult’s grandson
Current Attorney/s:	RAG – the adult’s son
Public Guardian:	Sally Christensen
Public Trustee:	Nash Te Ua
Interested Person/s:	KM
APPEARANCES:	This matter was heard finally on 25 March 2020 determined on the papers pursuant to s 32 of the <i>Queensland Civil and Administrative Tribunal Act 2009</i> (Qld)

REASONS FOR DECISION

Relevant Background

- [1] HDG is a 95-year-old woman with two adult sons, RAG and PG. HDG appointed her son RAG under New South Wales authority as Enduring Guardian on 20 November 2015. This document gave RAG decision making authority should HDG lose decision-making capacity for personal matters. HDG had signed an Enduring document on 29 October 2009 giving her husband, who is now deceased, and RAG financial authority to do anything in her power subject to specific instructions, and this power was effective upon the attorney accepting appointments. The document expressly authorised the attorneys to confer benefits on the attorney to meet the attorney’s reasonable living and medical expenses within the meaning of s 12 of the *Powers of Attorney Act 2003* (NSW). RAG accepted that appointment on 29 October 2009.
- [2] PG filed an application seeking the appointment of a Guardian and administrator for HDG on 29 March 2019, proposing himself in these roles. Subsequently, he sought and was granted leave to amend this application to propose himself and his son PPG as co-administrators.
- [3] The application raised objections to actions of RAG in relation to financial and personal matters on behalf of HDG. The applicant seeks replacement of the substituted decision-making arrangements with his appointment, jointly and severally with his son PPG, to make all personal and financial decision on HDG’s behalf.
- [4] In summary, his concerns around personal decisions taken by the appointed enduring guardian essentially argue that HDG was removed from her home circumstances in Sydney and moved to Queensland in disregard of her treating

medical practitioner's advice. The Public Guardian was appointed as Guardian at a hearing on 17 June 2019 for accommodation and service decisions where it was established on the evidence that there was, at that time, ongoing conflict between family members about the appropriateness of the decision to relocate HDG from her supports and medical treatment in New South Wales. The administration application was adjourned with directions for filing of further material after being partly heard.

- [5] In summary, the applicant's concerns about RAG acting as appointed Enduring Power of Attorney raise concerns that \$450,000 of HDG's money was transferred into RAG's account, on 11 September 2017 after HDG had been diagnosed with dementia in 2016. He argues that HDG was unlikely to have had the capacity to authorise this transaction and seeks that this amount is repaid to HDG.
- [6] In submissions filed in the Tribunal on 22 March 2020, the applicant also argues that RAG has caused HDG to transfer her B Class shareholding in Halard Pty Ltd on 17 May 2018 during a period of convalescence from a heart attack where she may have been affected by medication and lacked the capacity to consent to the transfer.

Procedural Matters

- [7] During the hearing of 17 June 2019, objection was raised by PG and PPG to the independence of HDG's representation, Ms Miller. Ms Miller identified that she acted for HDG, and took all instructions in private. The applicants also raised repeated concerns about the adult being strongly influenced in her decisions by RAG. The Tribunal noted that evidence of Dr I in her report of 11 February 2019, indicated that she was 'easily manipulated in relation to financial matters' and had indicated uncertainty around a change of location from New South Wales to the Gold Coast. The Tribunal was satisfied that it was necessary in these circumstances to speak to HDG without others present. HDG indicated that she had no concerns with this process and all parties present supported her evidence being obtained in this way. The Tribunal was satisfied pursuant to section 106 of the *Guardianship and Administration Act 2000 (Qld)* ('Guardianship and Administration Act'), that it was necessary to make an adult evidence order to obtain relevant information the Tribunal would not otherwise receive, and made an adult evidence order to obtain relevant information from the adult concerned in the matter at a hearing in the absence of anyone else. The Tribunal spoke privately with HDG and reported her comments back to all parties when the full hearing resumed.
- [8] The Tribunal determined the guardianship application on 17 June 2019 having found HDG did not have the capacity for personal matters relating to her accommodation and supports, and appointed the Public Guardian as Guardian for decisions about HDG's accommodation and service and overtook these elements of the Enduring Guardian's role in relation to these specific matters by virtue of that appointment. The appointment was until further order and was to be reviewed in six months.
- [9] The hearing of the administration application on 17 June 2019 was adjourned with directions for the filing of the loan agreement and financial documentation outlining HDG's financial position, and future plans, together with bank statements from 1 December 2018 to 6 June 2019.
- [10] Ms Miller failed to attend the adjourned proceeding, and HDG was unable to be present for health reasons. The applicant sought an adjournment on the basis that he needed to consider the voluminous capacity documentation produced to the Tribunal at that date. Given the volume of the material and limited time allocated for the

proceeding, the hearing listed for 2 September 2019 was adjourned for these reasons.

- [11] The hearing scheduled for 18 October 2019 was adjourned at the request of the applicant with the consent of all parties because of a death in the family.
- [12] The adjourned hearing was not able to be listed until 6 February 2020. At that hearing, the telephone lines caused the hearing to be disbanded in circumstances where three parties were not able to be reconnected to the hearing due to a phone fault.
- [13] The applicants further raised objections about HDG's capacity to instruct her solicitor Ms Miller at the hearing of 6 February 2020 and argued that a separate representative needed to be appointed in these circumstances. They provided correspondence that ADA, (aged and disability advocates), had visited Mrs Miller on their request but were not able to obtain her views and wishes.
- [14] At the hearing of 6 February 2020, Ms Miller was questioned about her instructions in relation to HDG's financial position, which had included details that she held 'a half a million dollars in her Credit union account'. She indicated that she had obtained information from HDG and sought further information from JD, a solicitor involved with HDG. This information proved to be significantly incorrect in light of bank statements submitted in accordance with the direction of 17 June 2020, and provided a false sense of HDG's current financial position in relation to her available liquid assets, and an inaccurate picture of the impact of the transfer of \$450,000 on 11 September 2017.
- [15] The Tribunal concluded that the misinformation provided to the Tribunal on this important point suggested that the adult did not have the capacity to instruct her solicitor, who was acting on her direct instructions rather than in a position of personal representative. The Tribunal also heard evidence that substantial legal fees had been generated throughout this matter.
- [16] The Public Guardian provided submissions on this issue that it considered that there did need to be independent representation, but that it and the Public Trustee could provide this detail to the Tribunal. It urged the Tribunal to note that the costs of maintaining two residences and the stress the proceedings placed upon HDG were issues which needed to be addressed with urgency, and delaying further for a personal representative to be appointed would be problematic.
- [17] A regrettable and significant technical failure of the telephone lines caused three parties, PG, PPG and the Public Guardian, to be disconnected from that hearing at a critical time in the proceeding. These parties were unable to be reconnected despite several attempts. Accordingly, this proceeding was unable to be completed at that date.
- [18] The Tribunal accepted the submission of the Public Guardian in relation to representation and urgency and directed that it provide written submissions to the Tribunal and initiate an application for an interim order pursuant to s 129 of the Guardianship and Administration Act.
- [19] The Tribunal considered the evidence which indicated that despite the financial powers of the Enduring Power of Attorney not having been overtaken by the Tribunal during the course of the proceedings, and a decision for HDG to remain in

permanent care at her Gold Coast residential care facility, the appointed attorney had not been acting to make decisions in relation to the termination of New South Wales accommodation expenses.

- [20] RAG indicated when questioned that funds of approximately \$3,500 were being debited from her Credit Union account each month to pay for these costs and that balance was now nominal. Given this, the Tribunal considered that there were reasonable grounds to consider that there is an immediate risk of harm to the property of the adult.
- [21] Section 129(2) of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to make an interim order in the proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of this Act, including section 118. On this basis the Tribunal appointed the Public Trustee of Queensland as Administrator on an interim basis, overtaking the appointment of the Enduring Power of Attorney for three months or until further order.
- [22] The Tribunal also noted the Public Guardian's representative's concerns that delay in these proceedings was causing 95-year-old HDG distress.
- [23] The Tribunal is empowered to make directions by section 138 of the *Guardianship and Administration Act*: 'Once an application about a matter has been made to the tribunal, the tribunal may... give... directions about the matter it considers appropriate'. In light of difficulties finding a hearing date for the finalisation of the matter within an urgent timeframe, the Tribunal made orders for the matter to be finalised on the papers, and made directions for the Public Guardian to provide written representation on these issues to on HDG's behalf, and all other parties to have an opportunity to provide submissions to the Tribunal and submissions in reply, so that the matter could finally be determined with urgency. Submissions were received from PG and PPG, the Public Guardian, RAG and the Public Trustee of Queensland.

The Substantive Applications

- [24] HDG appointed her son RAG as her substitute decision-maker by virtue of the New South Wales Enduring Guardian appointment in relation to personal and health matters, and the Enduring Power of Attorney in relation to financial matters.

Relevant Law

- [25] Section 34 of the *Powers of Attorney Act 1998* (Qld) states:
- If an enduring power of attorney is made in another State and complies with the requirements in the other State, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Act, the enduring power of attorney must be treated as if it were an enduring power of attorney made under, and in compliance with, this Act.
- [26] Section 65(c) of the *Powers of Attorney Act* extends the obligations of Part 5 of this Act to a power of attorney made otherwise than under this Act. These obligations contained in Part 5 of the Act include that the attorney exercise decision-making in compliance with the General Principles and Health Care Principles at Schedule 1 of the Act (section 76), as well as obligations to act honestly and with reasonable diligence, (section 66), and to avoid conflict transactions (section 73). It also gives

rise to s 87, the presumption of undue influence where an attorney enters into a transaction with the principal.

[27] The attorney's compliance with these obligations needs to be considered as a starting point. The extent to which the attorney was authorised to enter the transaction by the enduring document must also be considered. If the Tribunal finds the attorney has not complied with the statutory obligations, the Tribunal may consider appointing a Guardian or administrator.

[28] Pursuant to section 12 of the Guardianship and Administration Act, before it appoints either a guardian or administrator the Tribunal must be satisfied that:

- (a) the adult has impaired capacity for the matter; and
- (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
- (c) without an appointment—
 - (i) the adult's needs will not be adequately met; or
 - (ii) the adult's interests will not be adequately protected.
- (2) The appointment may be on terms considered appropriate by the tribunal.
- (3) The tribunal may make the order on its own initiative or on the application of the adult, the public guardian or an interested person.

[29] The Tribunal must have regard to the considerations stated in s 15(1) of the Guardianship and Administration Act in appointing a Guardian or Administrator:

- (a) the general principles and whether the person is likely to apply them;
- (b) if the appointment is for a health matter—the health care principle and whether the person is likely to apply it;
- (c) the extent to which the adult's and person's interests are likely to conflict;
- (d) whether the adult and person are compatible including, for example, whether the person has appropriate communication skills or appropriate cultural or social knowledge or experience, to be compatible with the adult;
- (e) if more than 1 person is to be appointed—whether the persons are compatible;
- (f) whether the person would be available and accessible to the adult;
- (g) the person's appropriateness and competence to perform functions and exercise powers under an appointment order.

[30] Issues for the Tribunal are:

- (a) Has the attorney acted in compliance with his obligations in relation to the specific impugned personal and financial decisions?
- (b) Did the enduring document authorise the \$450,000 transfer?

- (c) Is the presumption of undue influence rebutted in relation to the transfer?
- (d) If not, is the presumption of capacity rebutted in relation to personal health and/or financial affairs?
- (e) Is there a need for decisions to be made which require a guardian or administrator to ensure HDG's needs are met or interests adequately protected?
- (f) If so, who is appropriate for appointment?

Personal decision making

[31] As Enduring Guardian, RAG has made a decision to relocate HDG from her home in Sydney to the Gold Coast. The applicant's evidence is that a family meeting with HDG's General Practitioner Dr I was held on 12 February 2019, where RAG expressed a desire to take HDG to Queensland for a visit, HDG expressed uncertainty, and Dr I expressed her view that there were medical risks associated with her travelling.

[32] Dr I documented these concerns in correspondence dated 12 February 2019 and further on 15 February 2019. The applicant states that on the following day, RAG relocated HDG to Queensland. Dr I's open letter of 15 February notes that HDG:

...was uncertain that she wanted to go to Queensland. She preferred to go later when the weather was hot... [HDG] is not aware of her heart or bladder symptoms and needs constant review from carers visitors and doctors. She has slipped into delirium in the past. I had some medical concerns for her to move to Queensland for a visit and needed to explain the medical side to [RAG].

...

All efforts being made to allow [HDG] to live in her current residence and not go into a nursing home I have made several efforts to contact [HDG]'s geriatrician Dr H for review of capacity and medical issues but to date have not yet received a report.

[33] Dr I's report of 11 February 2019 indicates that in that she has been diagnosed with Alzheimer's and Cerebrovascular Dementia since 2014. (The report of Dr H indicates that this was diagnosed in 2016, and the Tribunal accepts the diagnosis to be that stated by her Geriatrician who diagnosed this in 2016). However, Dr I indicated that she had been HDG's General Practitioner for four years, seeing her every month. She identified this condition as moderate and progressing slowly. She stated this condition affected HDG's decision-making where she had no insight into decisions about her accommodation and care and service, with worsening dementia and poor self-care. She indicated that she needs full supervision to take her medication and was easily manipulated with no understanding of financial decisions due to her poor memory, noting her cognitive ability was assessed by her Geriatrician Dr H on 17 July 20218 through a MOCA, with a score of 20/30. She added that her dementia can suddenly worsen with delirium develop with a minor bladder infection.

[34] Schedule 4 of the Guardianship and Administration Act states the definition of capacity:

capacity, for a person for a matter, means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

- [35] The evidence of capacity from HDG's current Geriatrician Dr SB of 28 November 2019, subsequently filed in the Tribunal indicates that HDG now has moderate vascular associated dementia. In correspondence of 16 September 2019 he noted a MOCA score of 11/30 and stated his opinion that HDG was not presently capable of complex decision in relation to her finances and health.
- [36] In light of Dr I's evidence of personal decisions which was before the Tribunal on 17 June 2019, the Tribunal found the medical evidence available to it indicated that the first two limbs of the test of capacity had not been met and that the presumption of capacity had been rebutted for personal matters
- [37] The applicant's evidence is that prior to HDG being moved to Queensland, he had been supporting his mother with close involvement of services and medical supports to remain living in the community as long as possible. PG identified himself as her carer, assisting her with medications and attending medical appointments. He indicated concern at that time that she had an upcoming ophthalmologist appointment, and had been isolated from her social supports and family. He informed the Tribunal that RAG had not provided him with requested details of HDG's address. The Tribunal issued directions on 27 March 2019 requiring information about HDG's current address, and medical practitioners.
- [38] The undisputed evidence indicates that HDG initially lived with RAG, and on 2 April 2019 was admitted to hospital after fainting in a public space. In correspondence of 5 April 2019, RAG informed the Tribunal that she would be discharged into a nursing facility, and he advised PG of this plan by email on 10 April and the intended facility. On discharge, she entered respite care in a nursing facility on the Gold Coast, and this placement has since become permanent. Family members are now all in agreement, including the applicant, that it is not in her best interests to return to her former home in New South Wales. Her wishes in relation to remaining in her current accommodation on the Gold Coast are very clear.
- [39] HDG's oral evidence to the Tribunal, has been that she has had longstanding co-residence on the Gold Coast and she has been a regular visitor here each year for several months. She said she was confused about where she was living as it keeps changing, and she wasn't sure what was happening, however, she is happy and settled here in her new home and prefers the warmer weather of Queensland. While her accommodation was a matter in dispute at the point of appointment, it is no longer a matter in dispute and she now resides permanently on the Gold Coast, in accordance with her wishes. While there has been some conflict between family members and difficulties in communication around HDG's relocation process, there appears now to be no ongoing issue around her residence. The Public Guardian's submissions confirm this and PG's submission of 22 March 2020 confirm he accepts that it would not be in HDG's interest to move her given her health.
- [40] RAG's evidence is that he did make attempts to communicate with PG in relation to his mother's health and provided copies of email correspondence of 10, 13, 15, 17 and 18 April 2019 which update PG around HDG's transition from Pindara Hospital and entry to nursing care. It is noted these have come after the applications to the

Tribunal and involvement of New South Wales Police. There was a period through February and March where communication was non-existent, necessitating the application and intervention of the Tribunal.

- [41] At the hearing of 17 June 2019, the Tribunal found that given HDG's stated uncertainty around her accommodation and the conflict between the parties together with poor communication of the Enduring Guardian around these decisions, there was a need for decisions to be made around accommodation and support services. The Tribunal notes that RAG as appointed substitute decision-maker for personal matters had not made decisions in compliance with the General Principles and Health Care Principles at Schedule 1 of the *Powers of Attorney Act 1998* (Qld). Given the lack of transparency in these decisions, the Tribunal considered that without a guardian for decisions for these matter, HDG's interests would not be adequately protected.
- [42] The evidence before the Tribunal now is that while there are no accommodation decisions to be made, HDG's health has become increasingly fragile. The Tribunal has concerns about the attorney's decision-making which ignored the medical advice of her treating general practitioner and disregarded the family input.
- [43] The evidence of family discussions with her longstanding general practitioner suggests that the consensus appeared to have been reached, HDG's views disregarded, and actions taken in contradiction to discussed outcomes at the family meeting. It is very clear that HDG's treating practitioner expressed medical concerns around the move and that substantial support attempts had been used to support HDG to live in her home. The decision to act in contradiction to this advice dislocated her from her supportive personal and professional relationships. RAG chose to highlight the importance of having regard to medical advice about in his correspondence to the Tribunal only after he had disregarded the advice of her doctor which clearly emphasised concerns around her going to Queensland.
- [44] The applicant argues communication from the appointed Guardian was very difficult.
- [45] RAG argues that he continues to be appropriate as Enduring Guardian and denies the substance of allegations made by PG, stating in correspondence to the Tribunal of 24 March 2020:

The accusation that I abducted Mum is false.

The accusation that I do not communicate with my brother is false.

The accusation that I am withholding proper medical care from Mum is false.

The accusation that I stole money from Mum's account is false.

The accusation that I am not helping her financially is false.

The accusation that Mum was incapable of making a decision in 2017 is false.

- [46] Circumstances around the move from New South Wales demonstrated very poor consultation with other key family members who were actively providing direct care for HDG, and was taken in disregard of HDG's longstanding general practitioner's advice. It is apparent that her condition progressed requiring residential care placement very shortly after her relocation.

- [47] RAG's actions were inconsistent with General Principle 8 of Schedule 1 of the *Powers of Attorney Act 1998* (Qld), which requires decision-makers to maintain existing supportive relationships, and apply the Health Care Principle to consider medical advice when making health decisions. While it is clear that HDG now likes living in Queensland, and her accommodation remains appropriate to her needs, it is not evident to the Tribunal that RAG kept other family members informed or acted on the medical advice of her treating doctor. The lack of openness around these critical decisions and the lack of consultation with HDG's only other son led to significant uncertainty and anxiety for family members who were active in her network and were integral to maintaining her existing supportive relationships.
- [48] The Tribunal notes that health decisions will need to be made as HDG's health has deteriorated. The Public Guardian in its submissions of 23 March 2020, notes that there is ongoing conflict between PG and RAG, and PG claims that until recently RAG has not kept him informed about decisions he makes for HDG. The Public Guardian notes that PG had expressed concerns that his views were not sought in health matters and was concerned that RAG was leaving health decisions to HDG when PG considered she was not capable of this. The Public Guardian notes that a decision about a pacemaker may be needed. It notes conflict between PG and RAG and that conflict around the decision-making arrangements is causing HDG stress.
- [49] RAG considers that he has acted to inform PG about matters relating to HDG. The Tribunal notes that since the direction of QCAT, email correspondence has issued from RAG to PG, but prior to these applications being initiated, disregard for the significance of PG's role in his mother's life was apparent in RAG's decision-making.
- [50] The Tribunal has concerns about this. Given consistent evidence of deterioration in HDG's health, RAG's disregard for Dr I's advice, and the conflict between the siblings, the Tribunal finds a need for decision to be made around health matters only.
- [51] The Tribunal finds that RAG as Enduring Guardian had not taken into account the advice of health care professionals in exercising decisions under the appointment. The Tribunal is not satisfied that RAG would apply the General and Health Care Principles in making decisions under the personal powers pertaining to health matters, and finds that without the appointment of a guardian HDG's needs and interests would not be protected.
- [52] PG proposes himself and PPG as Guardian/s. The Tribunal has heard from HDG that she had concerns about PPG making decisions on her behalf. She linked these concerns with PG's previous stroke, and indicated she did not want him managing her affairs. There is also strong conflict and animosity between the siblings and the Public Guardian's submissions note continuing difficulties in communication between them. The Tribunal notes that PG lives in Sydney and PPG in Hong Kong, giving rise to concerns pursuant to s 15(1) of the Guardianship and Administration Act about their availability and accessibility as guardian for health decisions where immediate contact may be necessary. In the circumstances, the Tribunal finds pursuant to s 14(2) of the Guardianship and Administration Act that there is no-one more appropriate to be appointed as guardian given this high level of conflict between the branches of the family. The Public Guardian, in these circumstances is more appropriate for appointment than the proposed appointees.

Financial decision-making

- [53] The applicant raised concerns that RAG is not an appropriate substitute decision-maker because he had transferred \$450,000 from HDG's CUA account to his own account on 11 September 2017.
- [54] The Tribunal must consider whether it fell within an express authorisation in the instrument and whether the attorney complied with the obligations upon him. Whether the presumption of undue influence is rebutted must be considered and whether HDG had the capacity to enter into this transaction.
- [55] The applicant submitted that HDG had been diagnosed with dementia in 2016 and was unlikely to have had the capacity to enter this transaction being likely to have been heavily influenced in her decision-making around this by RAG. He relied on the reports of treating general practitioner Dr I of 11 February 2019, noted earlier. He argued that that because of this decision, RAG was not appropriate to manage HDG's finances. The applicant raised concerns that RAG's variable explanations of the nature of the transaction impact on his credibility and make him a 'poor candidate' for substitute decision-maker, 'placing his own needs and interests' before those of HDG's.
- [56] The applicant gave evidence that in June to October 2018 HDG expressed concern to PG that her money had gone missing. In November 2018 PG stated that he attended the bank with HDG and they made inquiries in November 2018, and that HDG had been 'shocked to learn' of the transfer of funds in the stated amount. He states in his submissions to the Tribunal that she was angry that RAG had taken funds without her consent. His application stated that HDG was asked if she had gifted it to RAG but she could not recall at the time whether she had given it to RAG and was unclear of arrangements around the transaction. PG stated that when he contacted RAG he advised him that he had invested the funds on HDG's behalf.
- [57] RAG denies any dishonest dealings around the receipt of \$450,000 from his mother. He contends it was a loan/ gift with which she offered having full understanding when she was fully capable. He relied upon Geriatrician Dr SB's correspondence of 19 September 2019 and 1 October 2019 which provided his third-party opinion of Geriatrician Dr H's 2017 correspondence about HDG's capacity in 2007.
- [58] RAG has given inconsistent explanations of the nature of this transaction variously described as a loan and as a gift. He explained that the full amount of these funds remains in his mortgage offset account.
- [59] RAG gave evidence to the Tribunal at the hearing on 17 June 2019 that he never acted under the Enduring Power of Attorney for financial matters, but had assisted his mother to organise direct debits around her regular expenses, and never acted on any bank account. He said HDG was making all her financial decisions, and now was capable of 99% of decisions.
- [60] He said he just assisted her with 'fiddly tasks' and that at 11 September 2017, she was fully capable of making her own decisions (although diagnosed with dementia earlier), showing only mild symptoms of cognitive impairment. Further he stated in his email to the Tribunal of 29 August 2019, that HDG's solicitor, JD had held the only copy of the Enduring Powers until 29 July 19, and that he could not therefore have been acting under the appointment and had not provided it to any banks.

- [61] The Tribunal notes that the enduring document of 29 October 2009 appointed him jointly and severally with WAG, HDG's now-deceased husband, to act upon acceptance of the appointment, which occurred when HDG executed that document, and thus he was bound by obligations held by an attorney from that date. The express terms of that document allowed the conferral of benefits to the attorney for the prescribed purposes of provided by s 12(2) *Powers of Attorney Act 2003* (NSW) for the attorneys reasonable living and medical expense.
- [62] Schedule 3(2) of the *Powers of Attorney Act 2003* (NSW) limit benefits for housing to being 'not more than is reasonable having regard to all the circumstances, and in particular the principal's financial circumstances and the size of the principals' estate'.
- [63] RAG gave evidence at the hearing of 17 June 2019 that this mother had handed him a cheque for \$450,000 for him to purchase a house. His evidence to the Tribunal was that there was a pre-existing agreement with HDG's husband, RAG's father, before his death that this loan would be extended, but that as a result of delays, these loan documents were not drawn up until after his father's death, and in 2017, he said HDG wanted to proceed with this loan. He said he did not have a copy of the documents and was not able to provide the Tribunal an indication of the terms of the loan when asked.
- [64] In written submissions of 29 August 2019, he stated that he believed that HDG had 'made the decision with a clear head and clear conscience to transfer that payment to me to help me with my home mortgage as she had helped [PG] many times previously.'
- [65] He went on to state that there had many previous occasions when HDG had helped PG, including when proceeds from a buyback of a lease in the family business went into PG's superannuation account, their father bequeathing all shares in the jewellery business to PG that passed up to him upon his death, and lump sum payments over the years in sums of \$235,000 altogether, implying that HDG therefore had a pattern of helping family members.
- [66] Ms Miller, acting on behalf of HDG, informed the Tribunal that she had spoken with HDG's solicitor, JD in Sydney, who had told her that the transaction was a loan agreed and negotiated before HDG's husband had passed away, and advanced some time later. The Tribunal sought terms around this loan agreement and neither RAG nor Ms Miller were able to give these details to the Tribunal at the hearing on 17 June 2019. She informed the Tribunal that this loan agreement could be sourced. The hearing was adjourned and directions made for Ms Miller to file the loan document she had referred to in the Tribunal before 1 July 2019. These directions were not complied with and Ms Miller informed the Tribunal in correspondence dated 26 June 2019 that this loan agreement did not exist, and did not attend the adjourned proceeding.
- [67] RAG filed correspondence from FCO accountants dated 4 April 2019. In this letter, JF, FCO Accountants' Gold Coast-based accountant for HDG since 2017, advised that he had discussions with HDG and RAG on 12 February 2018. He described the transaction as a gift, and expressed the view that HDG understood her financial position and did not appear confused or acting under duress. He noted discussions were held around tax and CGT implications. He indicated that 'if he were to receive the gift', RAG would apply the amount to his home mortgage and he would pay all

HDG's future health costs. This statement suggests that HDG was led to believe that the transaction had not already occurred as discussions relate to a future decision for which JF was providing advice to HDG. It is significant to note that this meeting with HDG to discuss ramifications of a 'gift' on 12 February 2018 occurred several months after the transaction had been made on 11 September 2017. This casts some concerns as to whether HDG was aware of the transaction when it occurred.

- [68] Further, at the hearing on 17 June 2019, RAG advised the Tribunal that HDG had written him a cheque for \$450,000 and given it to him. CUA Bank statements filed under the order of 17 June 2019 however indicate that this transaction was effected by internet transfer.
- [69] RAG has been inconsistent in his explanation of this transaction to the Tribunal. What was described at hearing as a loan subject to a discussion with his father prior to his death, purportedly documented in a loan agreement, was ultimately found to have not existed. Despite this, clear statements were made about the nature of the transaction as founded in a formal loan agreement, yet neither RAG or Ms Miller were able to give details of the terms of this.
- [70] To date, the applicant's strong submission that this transaction was a loan was accepted over the suggestion from third parties that this was a gift. In light of the statements made by Ms Miller and RAG, despite HDG's evidence, the Tribunal accepts that this is a loan, although apparently, a loan without any parameters around its repayment. The Tribunal is particularly concerned that the evidence suggests HDG was aware of this several months after the transaction occurred. This raises very significant concerns about the transparency of this transaction to HDG herself. The relevant date for determining whether she had capacity is less relevant here as the transaction appeared to occur without HDG's knowledge, and her authorisation appears to have been sought at a later date. That RAG has been inconsistent with the factual events that have occurred in his explanation to the Tribunal is of concern to the Tribunal.
- [71] The Tribunal does not consider that the transaction which occurred in New South Wales fell within the express authorisation for the conferral of benefits within the enduring document. While, pursuant to Schedule 3 of the *Powers of Attorney Act* 2003 (NSW), housing is an authorised benefit, \$450,000 is not likely to be reasonable. While HDG at the point of the loan being extended had sizeable means including rental income from two units and a commercial property, her liquid assets were substantially reduced by virtue of the transaction. HDG's CUA account record submitted in compliance with the orders of 17 June 2019 demonstrated depletion of her Credit Union Australia account from \$566,629.95 to \$116,629 by virtue of this transfer. Notably the record also showed other lump sum transactions in favour of PG. RAG's evidence is that this balance is now almost nil following ongoing payments for her accommodation in New South Wales while having relocated to Queensland.
- [72] This is not a reasonable personal expense, and in light of the lack of parameters around repayment of this loan and evidence that HDG's liquid funds have now diminished to almost nil, and the genuine insecurity around private and commercial rental income in light of the economic recession caused by COVID-19, the transaction cannot be considered to be reasonable expenses expressly authorised in the instrument of 29 October 2009.

- [73] Under the s 87 of the *Powers of Attorney Act 1998 (Qld)*, the presumption of undue influence arises where an attorney and a principal engage in a transaction. RAG led evidence from Dr SB arguing that despite the 2016 diagnosis of Alzheimer's, HDG's cognitive impairment was likely to be mild, indicative in her MMSE and MOCA scores.
- [74] RAG denied the evidence of Dr I in her report of 11 February 2019 that HDG was easily manipulated in financial matters. Dr I stated that HDG was diagnosed with dementia in 2014 (Alzheimer's and Cerebrovascular), and it was progressing slowly, although it could worsen quickly. Dr I in her 2019 report stated that HDG had no understanding of financial matters because of her poor memory. An earlier letter from Dr I, dated 14 December 2018, noted that she had been HDG's General Practitioner for three years, and that HDG could forget to eat meals laid out for her, and at December 2018 she considered her memory was rapidly deteriorating.
- [75] RAG relied upon the evidence of Dr EH, treating Geriatrician, and the interpretations of Dr SB of these reports.
- [76] Dr H's report of 18 March 2017 notes that she considered the referral was in relation to HDG's cognition. In 2016 she had diagnosed HDG with a mixed Alzheimer's dementia, at that time her MOCA had been 20/30 and MMSE 28/30, and she prescribed no treatment at that time due to a complicating medical condition. The report notes that HDG had been concerned about her memory as a 'significant issue'.
- [77] RAG's submissions of 29 August 2019 draw the Tribunal's attention to the 2018 MOCA score, noting its relevance for people with a normal MMSE is for memory complaints. Sourcing the developers of the Montreal Cognitive Assessment, he referenced her score of 20 on 17 July 2018 as reflective of 'mild but noticeable decline in cognition, mild forgetfulness, mild disorientation, mild impairment in problem solving, and generally independent in most activities.' He stated 'presumably she would be better 12 months earlier.'
- [78] The review of Geriatrician Dr H on 5 November 2017, two months after the \$450,000 transaction, notes that HDG had been physically well with no urinary infections and her cognition was at 'the similar level.' Her MOCA score was 21/30:

This is similar to six months ago. Previously we have discussed the role of any cholinesterase inhibitor medication such as Aricept. Currently HDG has a wonderful quality of life. She is active, independent and enjoying herself. They are very keen not to rock the coast. Unfortunately, Aricept can cause urinary frequency and her bladder is much improved since her surgery... It has added immensely to her quality of life...

The Tribunal interprets this as Dr H having considered memory-assisting medication for the dementia but understanding it may pose risks to the stability of her urinary condition, which is linked with periods of delirium. It would be inaccurate to suggest that medication for her memory was not necessary, in circumstances where it has been discussed as a possibility prior to this and the option rejected due to contraindications.

- [79] Dr H's letter to Dr I of 17 July 2018 noted concerns around very poor short-term memory and compliance with medication requiring greater supervision around medication management, but her physical health was again the focus of her review.

[80] Dr SB, HDG's current Geriatrician, in a letter to current GP Dr M dated 19 September 19, considered Dr H's reviews noted in the preceding paragraphs. He stated that the MOCA of 20/30 in 2017 did not necessarily indicate that she did not have capacity in 2017.

[81] In a further letter dated 1 October 2019 to RAG, Dr SB again considered Dr H's review in 2017, specifically in relation to whether she was *capable of appointing a power of attorney*. Dr SB noted that from his reading of Dr H's review, it did not look like a capacity assessment had been carried out; it was documented that she was cognitively and physically stable, functioning well, and:

Dr H did not consider the need for memory enhancing medication at that time. I would therefore assume that she was capable of executing a power of attorney... The notes clearly suggest a significant deterioration later on in this clinical history than 2017. I note that cholinesterase inhibitor was initiated in 2018.

[82] The Tribunal notes that Dr SB's above correspondence assumes Dr H did not contemplate prescribing this medication until 2018, when in fact, she clearly turned her mind to the need in November 2017 and evidently prior, and rejected this option due to the impact it would have on her urinary problems, which as can be seen also in Dr I's records, confound her delirium and worsen her dementia.

[83] The Tribunal considers the evidence indicates that a significant deterioration in her cognition is evidenced in 2018. However, there is substantial evidence of significant memory issues throughout 2017 and prior to this, with medication being rejected for contraindications rather than not being needed.

[84] The Tribunal does not accept that the absence of medication in these circumstances suggests that she was likely to have capacity to gift or loan \$450,000 around that time in the context of an active lifestyle. This opinion does not contemplate the significance of her documented memory impairment affecting her ability to make decisions freely and voluntarily. The Tribunal also notes that the capacity Dr SB provided his view about is her capacity to execute an Enduring Power of Attorney, rather than her capacity to enter the transaction relating to the transfer of \$450,000. Therefore, the Tribunal places less weight on Dr SB's opinion given that he was not directly involved and was not provided with clear parameters to provide his opinion.

HDG's evidence at hearing

[85] On 17 June 2019, an adult evidence order was made. The applicant strongly submitted that the adult was influenced by RAG. The applicant objected to her representation by Ms Miller who, they argued was instructed by RAG, rather than HDG. Ms Miller strongly denied that she had taken any instructions from RAG and had seen HDG in private interviews on all occasions. The Tribunal considered the appropriate course of action was to make a limitation order and to speak with HDG without any parties in the room, and to report the discussion to the parties on their return to the hearing. HDG was advised of the process and agreeable to participating.

[86] HDG stated that she believed that her son PG wanted her to live in Sydney so he could look after her money. She expressed a very strong view that she did not want him to look after her money. She said that she recalled gifting \$400,000 to RAG in 2017. She said she wanted him to have it so he could buy a house. She said she had

previously gifted PG large amounts also and she wanted them to have this money. She said she knew he would never pay it back, and she wanted to see him have it in her lifetime.

- [87] Asked about her financial position she said she had 'no clue'. She was not able to advise me how much money she had in the bank. She said that RAG looked after her financial matters since her husband's death, since her husband had managed all these matters through his lifetime. She said RAG had taken over these matters, and she used a credit card to manage her purchases. She was not able to state what the balance or limit was on that credit card. Her evidence clearly indicates that she has not ever managed her bank accounts and does not undertake internet transactions such as the specific transfer of funds on 11 September 2017.
- [88] The evidence of PG states HDG demonstrated confusion around the amount of money in her bank account toward the end of 2017. This is consistent with Dr H's reviews which note significant memory issues at that time.
- [89] It is open to the Tribunal to make a finding that, if HDG was aware of the transaction at 11 September 2007 (and it is not at all clear on the evidence that she was aware of the transaction at that date), her documented memory impairments at the time affected her ability to freely and voluntarily enter this transaction. Her understanding of the amount transferred was \$50,000 less than the actual amount transferred, and she did not have any knowledge of her financial position where, on her evidence, she had never been directly involved in managing her funds.
- [90] The Tribunal finds that HDG was diagnosed with dementia in 2016 and was consulting with a Geriatrician around her cognitive issues, particularly her memory. Medical evidence indicates that through 2017 while the cognitive impairment was mild, and she was living an active life, she had 'significant' and ongoing problems in relation to her memory for which treatment was considered, but held back due to complications such medication may have upon her physical health, in particular urinary issues which can cause increased confusion. The evidence indicated that she received financial advice about the transaction several months after it occurred. Her communications with PG around the change in her bank balance around that time demonstrates confusion around her finances and suggests that if she had authorised the transaction prior to February 2018 she had no recollection of that.
- [91] HDG's evidence given at hearing indicates that she wanted RAG to have these funds to purchase a house as she had previously gifted her other son funds when he needed them. Her oral evidence reflects a total reliance upon RAG for decisions and a lack of awareness of her financial position. Her solicitor has acted on her instructions and provided the Tribunal with inaccurate details of her financial position. Although RAG denies acting as her attorney, he was still bound by his obligations under the appointment. Together these considerations suggest both that HDG did not appreciate the impact any gift may have on her financial position, and it is open to the Tribunal to conclude that she was not able to make decisions freely and voluntarily. In these circumstances, there is insufficient evidence to rebut the presumption of undue influence, in circumstances where she lacked capacity to understand the consequences of the decision, or act free of RAG's influence.
- [92] The Tribunal finds that RAG was not authorised to transfer \$450,000 for the purchase of a house by the instrument which allows for 'reasonable expenses'. The transaction is a conflict of his duty as Attorney to his mother and his personal

interests. Further, the transaction gives rise to the presumption of undue influence and this has not been displaced by the evidence before the Tribunal. Accordingly, the attorney has not acted in accordance with his statutory obligations to his principal, HDG.

- [93] Further, in the late submission of the applicant, filed 23 March 2020, the applicants asked the Tribunal to consider their allegation that RAG had received a transfer of HDG Class B share-holding in Halard Pty Ltd. The Public Trustee's briefing statement indicates that HDG is director of this company and advice is being sought from their complex structures unit around these issues. RAG has not disclosed this transaction to the Tribunal, and evidence was not previously led on this at any oral hearings. Since the parties have not been provided with procedural fairness on this matter to put forward their cases on this, the Tribunal makes no finding in relation to this matter. It will be a matter for consideration by any appointed administrator.

Directions for repayment

- [94] The withdrawal of \$450,000 has substantially depleted HDG's savings and while HDG has other income-producing assets, her liquid funds have been exhausted due largely to the failure to make decisions around the termination of the New South Wales living arrangements. RAG has taken the benefit of having those funds in a mortgage offset account upon his personal mortgage. This is a conflict of interest and duty which substantially disadvantages HDG in her current financial position. HDG's financial circumstances have fundamentally altered since this transaction in 2017, and her reliance on rental income may be threatened in the current economic climate of a global pandemic. It is appropriate that the loan is immediately repaid in these circumstances. The Tribunal makes orders accordingly.
- [95] RAG asserts that he is appropriate to continue to manage HDG's financial interests. His financial management plan of 12 August 2019 states that he has managed the family property interests for 30 years and has broad commercial education and experience.
- [96] Given the findings above, the Tribunal considers the Attorney is no longer appropriate as a substitute decision-maker for financial matters. There are multiple decisions which need to be made in relation to HDG's financial matters.

Administration application

- [97] The Tribunal is asked to consider the appointment of an administrator. The Tribunal must be satisfied that the presumption of capacity is rebutted for the matter and the requirements of s 12 of the Guardianship and Administration Act are met (outlined previously), before it appoints an administrator.
- [98] The evidence previously outlined indicates a dementia diagnosis since 2016, with periods of delirium and a progressive memory loss. HDG's Geriatrician indicates she no longer has the capacity for complex financial matters. She had complete lack of awareness of her financial position. She has been unable to make financial decisions freely and voluntarily while she lacked that appreciation of her finances. The Tribunal finds that the presumption of capacity is rebutted for financial matters.
- [99] The financial management plan dated submitted by RAG indicates that there are commercial and residential properties to be managed, with outgoings in rates, water and body corporate fees. HDG's interest in the NSW accommodation needs to be

finalised so that costs do not continue to be incurred, involving a resale to lend lease of her interest. The refundable accommodation deposit needs to be returned to her, invested and managed. She has two residential properties which are her source of income and oversight around management of these is necessary. She is a shareholder of Halard Pty Ltd which holds an industrial property and this commercial lease and income needs to be managed. Her income is presently significantly under threat in the current economic crisis, and decisions will need to be made. The Tribunal finds that there is a need for financial decisions to be made and without the appointment of an administrator HDG's interests will not be adequately protected.

- [100] PG proposes himself as an appropriate administrator, together with his son PPG who lives in Hong Kong. Section 15(1) Guardianship and Administration Act requires the General Principles of the Act to be applied in determining who is appropriate for appointment. General Principle 7 requires the adult's views and wishes to be taken into account to the greatest extent possible.
- [101] The Tribunal notes HDG's strong objection to PG undertaking this role, emphatically voiced at the hearing. While the Tribunal considers PG and PPG would be likely to apply the General Principles in their decision making, HDG's strongly expressed wishes would suggest PG incompatible and not appropriate for appointment for this reason. The Tribunal also has concerns about availability and accessibility of PPG who lives in Hong Kong. Further, given that the complexities around shareholding transfers are matters which require further investigation, the Tribunal finds the appointment of the Public Trustee more appropriate than the applicants' proposed appointees.
- [102] The Enduring Power of Attorney will be overtaken by the administration appointment of the PTQ.