IN THE SUPREME COURT OF QUEENSLAND OS No. 5 of 1999

Toowoomba District Registry

Before the Hon. Mr Justice Mackenzie

IN THE MATTER of the *Powers of Attorney Act* 1998 (as amended)

and

IN THE MATTER of applications by GRAHAM PERCIVAL ANDREW CALDWELL and BRAMLEY REGINALD McLENNAN for a declaration that a Power of Attorney executed by CLIFFORD ANDREW McCLELLAND is void for lack of capacity and for directions pursuant to the said Act

JUDGMENT - MACKENZIE J.

Judgment delivered 6 August 1999

CATCHWORDS:

PRACTICE AND PROCEDURE - Power of Attorney - whether a lack of capacity existed when the Power of Attorney was executed - I whether further medical examination is required.

s 41(1)(2) *Powers of Attorney Act* 1998

Counsel: Mr R Peterson for the applicants
Mr PB Rashleigh for the first respondent
Solicitors: Clewett Croser & Drummond for the applicants
Justin F O'Sullivan & Edgar for the first respondent
Wonderley & Hall for the second respondent
Hearing Date: 2 July 1999

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This is an application for a declaration that an enduring Power of Attorney executed by Clifford Andrew McClelland is void for lack of capacity. The applicants are nephews of Mr McClelland and until the disputed Power of Attorney was executed on 12 February 1999 had been donees of a Power of Attorney executed on 28 July 1994.

The Attorney under the disputed Power of Attorney is a neighbour Graham Leslie Edwards There is also reference in the affidavits to Mrs Binney, who has for some years had an involvement with Mr McClelland's care. It is apparent that the applicants have a negative view of her role in the development of the dispute. As is frequently the case in matters of this kind the applicants are concerned for Mr McClelland's welfare, and as it was put to me, at least seek to be satisfied that he had the capacity to execute the Power of Attorney.

The orders sought include orders that Wonderley & Hall, who had acted in relation to the execution of the Power of Attorney, produce a copy of it for inspection and produce for inspection copies of all medical reports in its possession prior to the execution of the Power of Attorney by Mr McClelland. A copy of the Power of Attorney is exhibited to the affidavit of Mr Edwards who is represented by a firm of solicitors other than Wonderley & Hall. A copy

of a certificate from Dr I.E. Keys, who examined Mr McClelland on 29 January 1999 was produced by Wonderley & Hall, after I ordered that it should be produced. Wonderley & Hall's stance was that the firm had acted for Mr McClelland in relation to the execution of the Power of Attorney, but held no instructions from him in relation to the present proceedings No argument was addressed against production of the medical certificate, and the attitude of the firm was simply to abide the order of the court in the absence of instructions to make the documents available for inspection.

Dr Keys' report was to the effect that in his opinion, Mr McClelland fully understood the meaning of a Power of Attorney and its full implications. Dr Keys says that Mr McClelland stated that he wished to change his current Power of Attorney. In the doctor's opinion he was fully capable of understanding the ramifications of that and was capable of changing it should he so desire. Mr Edwards exhibited a report from Dr N.W.S. Oliver, a specialist in internal and geriatric medicine, who examined Mr McClelland on 22½ June 1999. The effect of that opinion was that upon a mini-mental examination being performed, Mr McClelland scored 22 out of 30. The main defects were in temporal orientation and spacial dyspraxia. Dr Oliver questioned Mr McClelland about the reasons for changing his Power of Attorney and was told that his nephews were not looking after his affairs properly, and that he approved of Mr Edwards having control of his affairs. The report contains a reference to prescribed medication and expressed the view that two of the tablets may "impair his performance a little". He concluded by stating the opinion that Mr McClelland was aware of his actions and was reasonably informed for a man of 84 without a great deal of formal education. The report concludes: "My recommendation would be that he is competent to make a decision as to whom should arrange his affairs".

In February 1998, a report had been obtained from Dr Venugopalan, a specialist psychiatrist, who had seen Mr

McClelland on 24 October 1997, when he was recovering from a surgical condition. On that occasion he was disorientated in time and could not recognise the doctor although he had been to see him several times over the preceding two years He concluded that Mr McClelland was suffering from an organic mental disorder, most probably dementia. However, the doctor could not exclude the possibility that the condition was an acute confusional state related to the surgical condition which, unlike dementia, would be reversible. In his opinion, at the time of the examination there was a significant impairment of Mr McClelland's testamentary capacity. The opinion was based on the facts that he did not know the nature and extent of his property, nor when he had made a will and what its contents were, and he did not know who the natural beneficiaries were. However, he did know that his wife was in a nursing home and recognised Mrs Binney as his carer. He expressed his wish to live with Mrs Binney.

A further assessment was made of his mental condition on 17 March 1998. Mr McClelland was less confused than he was on 24 October 1997. The detail in the report indicates that the extent of his comprehension and recollection was much improved. The doctor's opinion was that Mr McClelland's mental state had improved significantly since the last examination. However, he said there was still some evidence of impairment of Mr McClelland's testamentary capacity. The doctor expressed the opinion that he was capable of managing his everyday financial affairs, and noted that there appeared to be disagreements between his carer and his family about his finances, of which Mr McClelland was aware. He said that Mr McClelland was capable of making decisions about his personal and social needs, and deciding where and with whom he wanted to live. He said that his mental state could continue to fluctuate and recommended a further review in some months time.

On 4 January 1999, he was seen by Dr Venugopalan for the purpose of completion of a functional competence report for the Intellectually Disabled Citizens Council of

Queensland. He did not carry out further testing on this occasion. The form contained a question whether the person had a diagnosis which impaired his or her cognitive ability. The answer given was "long history of recurrent depression, senile dementia since mid-1997".

With regard to his condition on 4 January 1999, it was stated that there was significant impairment in his testamentary capacity. He was able to express clearly where and with whom he wanted to live and was not depressed. In another part of the form the multiple choices ticked were that the cognitive impairment was fluctuating and progressive. The prognosis was that a slow deterioration was expected. To a question whether the cognitive impairment would interfere in any way with the person's understanding of financial affairs the doctor answered "yes", and commented that there was impaired testamentary capacity, but he could manage day to day finances for daily living. With respect to the capacity to execute an enduring Power of Attorney, he ticked the "no" box.

When concerns were raised by the applicants with Wonderley & Hall about Mr McClelland's capacity to revoke his existing Power of Attorney, and a request was made for examination by an independent geriatrician, the firm replied to the effect that the client had produced medical evidence to support the fact he fully understood the meaning and implications of a Power of Attorney, and that he could change it if he wished. The reply also referred to the fact that the solicitor handling the matter questioned Mr McClelland at length on separate days, when the instructions were given and when the document was executed, to satisfy himself of capacity.

The other piece of evidence bearing on the issue of capacity is a transcript of a conversation between the applicants and Mr McClelland in the presence of a nursing sister on 24 February 1999. It is difficult to get a true appreciation of how the conversation progressed, but on the face of the transcript Mr McClelland may have been

displaying evidence of confusion. It is not clear from the material before me whether the tape recording itself still exists and whether it is likely to confirm that observation or cast a different light on it.

That is the background against which the application must be resolved. I intimated at the hearing on 2 July 1999, that I felt unable to resolve the conflicting evidence in a way which would finally dispose of the matter on the material before me. The emphasis then shifted to whether an independent examination of Mr McClelland should be ordered.

Section 41(1) of the *Powers of Attorney Act* 1998 states that a principal may make an enduring Power of Attorney only if the principal understands the nature and affect of it. The principal matters as to which there must be an understanding are set out in s 41(2). Importantly, in the context of the present matter there is a presumption in schedule 1 s 1, that an adult has capacity for a matter.

Like any presumption it can be rebutted by satisfactory evidence. As the narrative above indicates it is not a case where there is a mere assertion of lack of capacity. There is evidence, relatively contemporaneous with the execution of the Power of Attorney, to raise the issue of capacity in a serious way. The onus lies on the applicants to prove positively that Mr McClelland did not understand the nature and affect of enduring Power of Attorney at the time it was executed. In view of the evidence positively supporting a conclusion that he had capacity, especially that of Dr Keys and the solicitor, the onerous nature of the task of the applicants should not be underestimated. In the end and having regard to the protective nature of the jurisdiction sought to be involved, it would be inappropriate where there is conflicting evidence on the issue, to prevent the applicants from having the opportunity to litigate the issue of lack of consent if so advised.

However, it must be reinforced that the onus to be discharged is substantial. The evidence of Dr Venugopalan is at least supportive of the applicants' case but has some aspects which need greater elaboration or clarification before its cogency can be determined. The cogency of the conversation between the applicants and Mr McClelland in determining the question may well be influenced by whether it exists in electronic form, or whether it now exists only as a transcript.

I am satisfied that I would have had power to order examination of Mr McClelland, on the basis of the submissions in writing requested by me on the issue at the time of the hearing. However, I have decided that it is not a case where I should make such an order at this point. At the time when the present application was commenced, it was about 4½ months since the Power of Attorney had been executed. There is evidence close in point of time as to the capacity of Mr McClelland, and also evidence to suggest that his condition may fluctuate. When the intrusiveness of the process of compulsory examination is balanced against the possible benefits of what will be an examination at least six months after relevant events, I have decided not to order that he be further examined.

If the applicants intend to proceed with the application, and the parties can agree on directions, I will initial a consent order signed by the legal representatives of the parties. Failing that, an application for directions will have to be made in the ordinary way. Subject to that, I adjourn the application to a date to be fixed. I reserve the costs of the application as between the applicants and the respondents other than Wonderley & Hall, subject to the proviso that if the application is not proceeded with beyond its present point, the applicants pay those respondents' costs of and incidental to the application to be taxed. With respect to the costs as between the applicants and Wonderley & Hall, I make no order as to costs