

# SUPREME COURT OF QUEENSLAND

CITATION: *Watkins v Christian* [2008] QSC 345

PARTIES: **EVELYN MAUD WATKINS by her litigation guardian  
PETER LAMBERT**  
(plaintiff/respondent)  
v  
**DEBORAH JOY CHRISTIAN**  
(defendant/applicant)

FILE NO: 7821/08

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 22 December 2008

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 27 November 2008

JUDGE: Wilson J

ORDERS: **1. That the application be dismissed;  
2. That the Applicant pay the Respondent's costs of and incidental to the application on the standard basis;  
3. That the Registrar provide a copy of the reasons for judgment to the Adult Guardian.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PARTIES - Where the plaintiff is an elderly woman of weakened mental capacity residing in aged care facility – where plaintiff had executed an enduring power of attorney in favour of the defendant – where plaintiff alleges the defendant induced her to write cheques in favour of defendant – where plaintiff commenced proceedings to recover sums of money from defendant – where plaintiff revoked power of attorney in favour of defendant and executed new power of attorney in favour of nephew – where nephew her litigation guardian – where defendant applies to have plaintiff's nephew removed as litigation guardian - whether plaintiff's nephew is ineligible to be her litigation guardian – whether it would be in plaintiff's interests for her nephew to be removed as her litigation guardian

LEGAL PRACTITIONERS – SOLICITORS – RIGHT OF AUDIENCE – JURISDICTION TO RESTRAIN FROM ACTING – TEST TO BE APPLIED – RELEVANT CONSIDERATIONS – Where the plaintiff is an elderly woman of weakened mental capacity – where law firm has

drafted new will and new power of attorney in favour of plaintiff's litigation guardian – whether fair-minded, reasonably informed member of public would conclude that proper administration of justice requires law firm to be prevented from acting

*Guardianship and Administration Act 2000* (Qld), s 174, s 180

*Powers of Attorney Act 1998* (Qld)

*Supreme Court of Queensland Act 1991* Schedule 2

*Uniform Civil Procedure Rules 1999* (Qld), Schedule 4

*EPAS Limited v James* [2007] QSC 38, cited

*Geelong School Supplies Pty Ltd v Dean* [2006] FCA 1404, cited

*Grimwade v Meagher* [1995] 1 VR 446, cited

*Kallinicos v Hunt* (2005) 64 NSWLR 561, cited

*Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501, cited

COUNSEL: JD Johnson (solicitor) for the defendant/applicant  
FG Forde for the plaintiff/respondent

SOLICITORS: Johnsons for the defendant/applicant  
Quinn & Scattini for the plaintiff/respondent

- [1] **Wilson J:** This is an application by the defendant for the removal of Peter Lambert as the plaintiff's litigation guardian and to restrain any partner or employee of Quinn & Scattini from acting for the plaintiff in the proceeding.
- [2] The plaintiff is a 92 year old widow now resident in an aged care facility. She commenced this proceeding on 14 August 2008 against Deborah Joy Christian, her then neighbour, claiming rescission of certain transactions, restitution in the sum of \$314,960.00 and alternative relief. Subsequently, Mr Lambert (her nephew) consented to be her litigation guardian. On 29 October 2008 Daubney J allowed her to amend the claim and statement of claim to record that she now brings the proceeding by Mr Lambert as her litigation guardian.
- [3] The plaintiff alleges –
- “3. The Plaintiff is and was at all material times, as the Defendant well knew:
- (a) Elderly and unable to care properly for herself;
- (b) Habitually required assistance with tasks, including:
- (i) Heating her meals;
- (ii) Grocery and other shopping;

- (iii) Paying her bills; and
- (iv) Washing her hair.
- (c) Of weakened mental capacity due to old age.
- (d) Had no family members living in her locality;
- (e) Reliant upon the Defendant for guidance and advice on financial affairs; and
- (f) In such a condition of mind as to accede readily to a request and to be easily persuaded into a course of action or agreement".<sup>1</sup>

[4] The plaintiff further alleges –

- (a) that between about 17 June 2006 and about 13 February 2007 the defendant induced her to execute cheques in the defendant's favour totalling \$154,960.00, and that such sums were paid to the defendant;<sup>2</sup>
- (b) that on or about 14 February 2007 she executed an enduring power of attorney in favour of the defendant;<sup>3</sup>
- (c) that on 14 February 2007 and 10 June 2007 the defendant induced her to execute further cheques in the defendant's favour totalling \$160,000.00, and that such sums were paid to the defendant;<sup>4</sup>

[5] The plaintiff contends –

- (a) that the defendant's conduct in inducing her to execute the cheques was in breach of fiduciary duties which the defendant owed her;<sup>5</sup>
- (b) that in so far as the defendant induced her to execute cheques after she had executed the power of attorney, the defendant's conduct was in breach of a statutory duty under the *Powers of Attorney Act 1998* (Qld);<sup>6</sup>
- (c) that the transactions were made without consideration moving from the plaintiff to the defendant [sic];<sup>7</sup>

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<sup>1</sup> Amended Statement of Claim filed 3 November 2008, para 3.

<sup>2</sup> Ibid, para 5.

<sup>3</sup> Ibid, para 7.

<sup>4</sup> Ibid, para 9.

<sup>5</sup> Ibid, paras 5, 8.

<sup>6</sup> Ibid, para 8.

<sup>7</sup> Ibid, para 11.

(d) that the plaintiff was induced to execute the cheques by the defendant's undue influence and/or unconscionable conduct.<sup>8</sup>

- [6] The defendant has not filed a notice of intention to defend and defence. She was represented before Daubney J, but apparently no submissions were made on her behalf.<sup>9</sup> At any rate, the Court order sheet records simply "OAPD" (order as per draft). On the hearing of the present application, counsel for the respondent plaintiff submitted that the defendant needed leave to bring the application pursuant to *Uniform Civil Procedure Rules 1999 (UCPR)* r 135. The defendant's solicitor made an oral application for leave. I grant the defendant leave.
- [7] By *UCPR* r 93(1), a person "under a legal incapacity" may start or defend a proceeding only by a litigation guardian. Relevantly, a person "under a legal incapacity" is one incapable of making the decisions required of a litigant for conducting proceedings.<sup>10</sup> The defendant concedes that the plaintiff is a person "under a legal incapacity",<sup>11</sup> but contends that Mr Lambert ought to be removed and someone else substituted.
- [8] Mr Lambert's eligibility to be the plaintiff's litigation guardian depends on his not being under a legal incapacity and his having no interest in the proceeding adverse to the plaintiff's interest in it: *UCPR* r 94(1). The Court may remove him as litigation guardian if the interests of the plaintiff require it: *UCPR* r 95(2).
- [9] According to the defendant, she has known the plaintiff since September 2002, and she provided the plaintiff care, comfort and support over the ensuing years. In early February 2007 the plaintiff executed a power of attorney, prepared by a solicitor, in her favour. So far as the defendant is aware, the plaintiff was not visited by Mr Lambert or any other relative from the time she came to know her until Mr Lambert came to stay with her for a couple of weeks in about late February 2007. In about April 2007 he came to stay with the plaintiff full-time. The defendant spoke with Mr Lambert about the plaintiff's poor health and suggested that she had enough funds to pay for a full-time carer. Mr Lambert responded that that would be a waste of money. He told the defendant that he had no money and nowhere to live, and that he would either live with the plaintiff or in his car in Victoria. He asked to see the plaintiff's will. The defendant subsequently spoke with the plaintiff who provided her with a copy of the will, which she passed on to Mr Lambert. Under the will, which had been executed 10 years previously, the plaintiff made several small bequests, including \$3,000.00 to Mr Lambert, and left the bulk of her estate to charities. Mr Lambert became aggressive and angry about the contents of the will, and said words to the effect that he would have the plaintiff change it.
- [10] According to the defendant, Mr Lambert told her on 30 May 2007 that he had arranged for the plaintiff to change her will and that Quinn & Scattini had prepared

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<sup>8</sup> Ibid, para 12.

<sup>9</sup> Transcript of proceedings on 27 November 2008, pp 1.4 – 1.5.

<sup>10</sup> *Uniform Civil Procedure Rules 1999 (Qld)*, Schedule 4 Dictionary; *Supreme Court of Queensland Act 1991*, Schedule 2.

<sup>11</sup> Transcript of proceedings on 27 November 2008, p 1.6.

a new will by which the plaintiff left her estate to him. There is evidence that those solicitors attended on the plaintiff, obtained instructions for a new will and prepared one. However, there is no evidence whether it was executed, and no copy of it is in evidence. The defendant has deposed further that in July 2007 Mr Lambert told her that the plaintiff had revoked the power of attorney in her favour and executed another in his favour.

- [11] The defendant's solicitor, Mr Johnson, submitted that Mr Lambert's interest in maintaining the validity of the plaintiff's new will and the power of attorney in his favour conflict with advancing the plaintiff's claim based on "weakened mental capacity" and undue influence. Mr Forde of counsel for the plaintiff submitted that Mr Lambert does not have any interest in the proceeding adverse to the plaintiff's interest in it: that he holds a power of attorney and that he may be the beneficiary under the new will could at most mean that he has an interest in recovering the moneys paid to the defendant and so maximising the estate - an interest parallel to, rather than in conflict with, that of the plaintiff.
- [12] On the evidence before the Court, I am unpersuaded that Mr Lambert is ineligible to be the plaintiff's litigation guardian. Nor am I able to conclude that it would be in the plaintiff's interests for him to be removed as her litigation guardian. A new will in the terms asserted by the defendant and/or a new power of attorney in his favour would not give rise to a conflicting interest in this litigation. There may be a possibility of conflict in the sense that his personal interest in maximising the estate and so pressing ahead with the litigation may be at odds with his obligation to the plaintiff to assess her prospects and decide whether to proceed, compromise or discontinue the litigation - but that is purely speculative.
- [13] The defendant seeks an order restraining any partner or employee of Quinn & Scattini from acting for the plaintiff in the proceeding. This application is founded on the inherent jurisdiction of the Court to control its own officers so as to ensure the due administration of justice and the integrity of the judicial process.<sup>12</sup> The test is –
- “whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice”.<sup>13</sup>
- [14] The nub of the defendant's concern is that Quinn & Scattini took instructions from the plaintiff for the new will and new power of attorney in May and July 2007, and that –

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<sup>12</sup> *EPAS Limited v James* [2007] QSC 38; *Geelong School Supplies Pty Ltd v Dean* [2006] FCA 1404; *Grimwade v Meagher* [1995] 1 VR 446; *Kallinicos v Hunt* (2005) 64 NSWLR 561; *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501.

<sup>13</sup> *Kallinicos v Hunt* (2005) 64 NSWLR 56, 582.

“22. They will be called upon to give evidence as to 'capacity' at that time (subsequent to allegations of 'weakened mental capacity' and 'undue influence' in Statement of Claim)”.<sup>14</sup>

Her solicitor has submitted that early intervention by way of restraint would avoid potential cost and inconvenience.<sup>15</sup> This assumes those documents were executed, and assumes that there will be proceedings in which their validity is in question. At present, this is pure speculation. At any rate, it overlooks the fact that the tests of mental capacity to execute a will and to execute a power of attorney are different from the issues of "weakened mental capacity" and undue influence alleged in the statement of claim - although there may be some overlap. Further, as counsel for the plaintiff submitted, where there is some question mark over a client's capacity to execute a document, the solicitor is obliged to make appropriate inquiries as to that capacity and to be in a position to give evidence should the question of capacity arise; but it is not for him or her to determine that the client lacks capacity and to prevent the client executing the document, because ultimately the question of capacity is to be determined by the Court adjudicating on the validity of the document, and the solicitors' assessment may be wrong.<sup>16</sup>

[15] On the evidence before the Court the application to remove Mr Lambert as the plaintiff's litigation guardian and to restrain Quinn & Scattini from acting as her solicitors in the proceeding should be dismissed.

[16] I am nevertheless concerned by the allegations made by the plaintiff against the defendant and those made by the defendant against Mr Lambert. I will hear the parties' legal representatives on why, in the interests of the plaintiff, a copy of these reasons for judgment ought not be provided to the Adult Guardian who has relevant investigative powers.<sup>17</sup>

[17] The orders of the Court are:

1. That the application be dismissed;
2. That the Applicant pay the Respondent's costs of and incidental to the application on the standard basis; and
3. That the Registrar provide a copy of the reasons for judgment to the Adult Guardian.

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<sup>14</sup> Defendant's Outline of Argument filed by leave on 27 November 2008, para 22.

<sup>15</sup> Ibid, para 24.

<sup>16</sup> Transcript of proceedings on 27 November 2008, pp 1.22 – 1.23.

<sup>17</sup> See *Guardianship and Administration Act 2000* (Qld), ss 174 and 180.