

PRESENTATION FOR PUBLIC FORUM ON DEMENTIA



21 September 2010

Recap on last year...

Types of Power of Attorney

- General Power of Attorney
- Enduring Power of Attorney
 - Financial Matters
 - Personal Matters
- Advance Health Directives
- Statutory Power of Attorney

Other forms of acting on behalf of person without capacity

- Guardian
- Administrator
- Adult Guardian
- Public Trustee

Case Study

- Dorothy (80 years old)
 - Lived in her own house for 30 years
 - Recently moved to nursing home
 - Good days and bad days
 - Four children (one passed away 2 years ago)
 - Enduring power of attorney – appointing deceased child
 - Will leaves her house to 2 of the children, another house to another child (deceased) and cash of \$20,000.00 equally between the children
 - Need to sell one of the houses to pay the nursing home costs

Case Study continued...

■ Issues

1. Capacity.
2. Property/financial decisions (e.g. selling home).
3. Health decisions.
4. Effect of the will.
5. Which house?
6. Effect on pension entitlements.

1. Capacity

- Banks v Goodfellow (testamentary capacity)
 - A testator must:
 - Understand the nature of the act and its effects
 - Be aware of the extent of the property of which he or she is disposing
 - Appreciate the claims to which he or she ought to give effect
- Guardianship and Administration Act
 - An adult has impaired capacity if they are incapable of:
 - Understanding the nature and effect of the decision
 - Freely and voluntarily making a decision
 - Communicating the decision in some way

2. Property/Financial Decisions

- Need to sell property
- Enduring power of attorney is revoked upon the death of the attorney (s58 Powers of Attorney Act)
- Otherwise a court (or QCAT) could make an order removing the attorney and replacing the removed attorney (s115)
- Appointment of an administrator under the Guardianship and Administration Act

■ Section 12 – Appointment, Guardianship and Administration Act 2000

- (1) The tribunal may, by order, appoint a guardian for a personal matter, or an administrator for a financial matter, for an adult if the tribunal is satisfied--
 - (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 adult guardian or an interested person.
- (4) This section does not apply for the appointment of a guardian for a restrictive practice matter under chapter 5B.

Note-- Section 80ZD provides for the appointment of guardians for restrictive practice matters.

■ Section 15 – Appropriateness considerations, Guardianship and Administration Act 2000

- (1) In deciding whether a person is appropriate for appointment as a guardian or administrator for an adult, the tribunal must consider the following matters (appropriateness considerations)--
 - (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.
- (2) The fact a person is a relation of the adult does not, of itself, mean the adult's and person's interests are likely to conflict.
- (3) Also, the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean the adult's and person's interests are likely to Conflict.

- (4) In considering the person's appropriateness and competence, the tribunal must have regard to the following--
- (a) the nature and circumstances of any criminal history, whether in Queensland or elsewhere, of the person including the likelihood the commission of any offence in the criminal history may adversely affect the adult;
 - (b) the nature and circumstances of any refusal of, or removal from, appointment, whether in Queensland or elsewhere, as a guardian, administrator, attorney or other person making a decision for someone else;
 - (c) if the proposed appointment is of an administrator and the person is an individual--
 - (i) the nature and circumstances of the person having been a bankrupt or taking advantage of the laws of bankruptcy as a debtor under the Bankruptcy Act 1966 (Cwlth) or a similar law of a foreign jurisdiction; and
 - (ii) the nature and circumstances of a proposed, current or previous arrangement with the person's creditors under the Bankruptcy Act 1966 (Cwlth), part 10 or a similar law of a foreign jurisdiction; and
 - (iii) the nature and circumstances of a proposed, current or previous external administration of a corporation, partnership or other entity of which the person is or was a director, secretary or partner or in whose management, direction or control the person is or was involved.

(5) In this section--

attorney means--

- (a) an attorney under a power of attorney; or
- (b) an attorney under an advance health directive or similar document under the law of another jurisdiction.

power of attorney means--

- (a) a general power of attorney made under the Powers of Attorney Act 1998; or
- (b) an enduring power of attorney; or
- (c) a power of attorney made otherwise than under the Powers of Attorney Act 1998, whether before or after its commencement; or
- (d) a similar document under the law of another jurisdiction.

- In *IT* [2010] QCAT 258, the appointment of two family members as administrators was revoked as they had removed the adult from one nursing home and put in another where they thought the care was better. They did this without the approval of the Adult Guardian. This was clearly beyond the administrators' powers.

3. Health Decisions

- No advance health directive
- No current enduring power of attorney

■ Statutory Health Attorney

- A statutory health attorney is a person authorised to do particular things for a principal in relation to health care.
- A statutory health attorney is the first in order of the following people who is readily available and culturally appropriate to exercise power for the matter:
 1. Spouse of the adult if relationship is close and continuing;
 2. A person, who is at least 18, who has care the of the adult but is not paid;
 3. A person who is at least 18 years and is a close friend or relation of the adult and is not a paid carer.

- A Statutory Health Attorney may make any decision about the health matter that the adult could lawfully have made if they had capacity for the matter.
- A statutory health attorney's power for a health matter is only exercisable during periods where the adult has impaired capacity for the matter.

- Appointment of Guardian under the Guardianship and Administration Act
 - In *DN* [2010] QCAT 398, the Adult Guardian was appointed as the family members did not understand or accept the diagnosis of the adult and the high level of care required. The family members took a view contrary to the medical evidence presented.

4. Effect on Will

- Possibility of challenge (here assume none)
- If house is sold 2 of the children may miss out
- What happens to second house?
- Possibilities:
 1. S33 Succession Act 1981 – power of court to rectify a will if the will does not give effect to the testator's instructions.

Note: application must be made within 6 months from the date of death.

- **Section 21 – Court may authorise a will to be made, altered or revoked for a person without testamentary capacity, Succession Act 1981**

- (1) The court may, on application, make an order authorising--
 - (a) a will to be made or altered, in the terms stated by the court, on behalf of a person without testamentary capacity; or
 - (b) a will or part of a will to be revoked on behalf of a person without testamentary capacity.
- (2) The court may make the order only if--
 - (a) the person in relation to whom the order is sought lacks testamentary capacity; and
 - (b) the person is alive when the order is made; and
 - (c) the court has approved the proposed will, alteration or revocation.
- (3) For the order, the court may make or give any necessary related orders or directions.
- (4) The court may make the order on the conditions the court considers appropriate.
- (5) The court may order that costs in relation to either or both of the following be paid out of the person's assets--
 - (a) an application for an order under this section;
 - (b) an application for leave under section 22.

- (6) To remove any doubt, it is declared that an order under this section does not make, alter or revoke a will or dispose of any property.
- (7) In this section--
person without testamentary capacity includes a minor.

■ **Degois v Korp (Victoria)**

- Husband allegedly conspired with lover to kill wife
- Wife discovered unconscious in car boot
- Daughter applied to court to make a new will in favour of her two children (mother on life support)
- Previous will in favour of husband (committed suicide after committed for trial)

5. Which House

- Main residence exemption
- Available even though no longer lives there
- Is it appropriate to sell it?

6. Pension Entitlements

- Look at both Dorothy and the children
- Sometimes better to leave assets direct to the next generation
- Former home is exempted from pension assets test for 2 years for people entering residential care (longer if person's partner remains living there)
- If home rented out to pay the bond by periodic payments the former home and rental income is exempt from pension assets and income tests for as long as Dorothy is liable to pay a periodic payment
- Message: make careful decisions surrounding these issues

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THANK YOU