

## Dementia Forum – Legal Update

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### INTRODUCTION

This article contains information presented at the 2011 Dementia Forum by Sean Kelly, Director of Kelly Legal. It contains an overview of the Queensland system, some comments on legal capacity and an overview of recent cases.

### THE SYSTEM

The system we are talking about is the system for managing your legal affairs including decision making for personal/health matters and financial/property matters.

Your place in the system depends on whether or not you have capacity.

If you have capacity you can make a Will and an Enduring Power of Attorney. You can also make an Advance Health Directive. You can enter into contracts and give directions. In short, you can formulate your own estate plan.

While this paper is not intended to be a paper on estate planning as such, some relevant estate planning considerations are:

- involvement of trusts
- are any companies involved
- superannuation
- CGT/income tax issues
- insurance
- pension entitlements
- whether the Will should contain Testamentary Trusts
- family law considerations (marriage/divorce/binding financial agreements)

A carefully made and up to date estate plan means that you should be okay if something goes wrong (for example, if you lose capacity). However, even then things can change or go wrong.

Different considerations apply if you lose legal capacity and do not have a carefully prepared and up to date estate plan.

Some of the relevant components of the system (which we have discussed in previous years) include:

- the Statutory Health Attorney provisions
- appointment of a Guardian (for personal matters)
- appointment of an Administrator (for financial matters)
- the existence of the Adult Guardian
- the existence of the Public Trustee
- the statutory Will making (or amending or revoking) power

- in some cases the *Mental Health Act* (involuntary treatment orders)
- Court Rules can also be relevant in certain cases

## CAPACITY

Testamentary capacity was considered in the classic case of *Banks v Goodfellow*<sup>i</sup>. To have 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

In terms of the *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

Finally, under the *Powers of Attorney Act*, capacity, for a personal matter means the person is capable of:

- understanding the nature and effect of decisions about the matter
- freely and voluntarily making decisions about the matter
- communicating the decisions in some way

## RECENT CASES

### QCAT Case: 5 May 2011 – BWE<sup>ii</sup>

- Daughter applied for Adult Guardian and Public Trustee to be appointed as decision makers for BWE
- BWE had ordered daughter off property
- BWE appointed grandson under enduring power of attorney
- BWE had changed Will in favour of grandson
- Daughter sought additional orders removing grandson as attorney and reinstating previous version of BWE's Will
- Daughter and her two siblings beneficiaries under previous will

#### **Report of Dr C**

- Medical conditions included diabetes, osteoarthritis, impaired hearing and vertebrobasilar ischaemia
- Did not know if BWE had ability to understand and act on information relevant for decision making
- BWE could not handle any form of financial affair
- BWE could not make decisions freely and voluntarily and was easily influenced
- BWE could not make complex decisions or even simple financial decisions due to dementia and could not understand the factors involved in an enduring power of attorney
- \*Note: BWE denied these allegations and produced his own evidence refuting them

#### **BWE Medical Evidence**

Included:

- Dr A
  - no medical conditions other than slightly elevated blood sugar levels

- BWE completely independent, looks after himself, pays his own bills, does his own shopping, BWE can made decisions freely and voluntarily
- Dr M
  - Mini Mental State Examination in March 2011 BWE scored 20 out of 30
  - indicative of mild to moderate cognitive impairment
  - expressed the opinion that BWE could make decisions freely and voluntarily and that he was not being influenced by any person

### ***Tribunal Decision***

- The definition of 'capacity' is not dependent on a medical diagnosis but looks to the functional process involved in decision making
- The evidence was contradictory and BWE strongly opposed any appointment
- The Tribunal noted that the appointment of an Administrator would have no impact on his Will the validity of which was ultimately a matter for the Courts
- The applications were dismissed

 view case at: <http://www.austlii.edu.au/au/cases/qld/QCAT/2011/216.html>

### **PM Program 19 September 2011<sup>iii</sup>**

\*Note: on the PM Program (ABC Radio) 19 September 2011 it was reported that one of the "biggest applicants" to the Protective Tribunal (Victoria) was aged care facilities that were seeking the appointment of an independent administrator because their aged care fees had not been paid.

 read or listen to the full story at: <http://www.abc.net.au/pm/content/2011/s3321128.htm>

### **QCAT Case: 20 May 2011 – Case WJ<sup>iv</sup>**

- Application by director of an aged care facility for the appointment of an administrator
- Reason: Residential Care Agreement needs to be signed and it was believed that the attorney for WJ could be taking advantage of her
- Medical report supported WJ's appointment of the attorney
- WJ was aware that she would struggle managing her own finances and therefore she had handed this responsibility to her attorney
- Tribunal decided – no satisfactory evidence that the appointment of an administrator was needed – application dismissed

 view case at: <http://www.austlii.edu.au/au/cases/qld/QCAT/2011/238.html>

### **Supreme Court Case: March 2011 – Mace v Malone<sup>v</sup>**

- Application for Statutory Will
- Sister (Josephine) applied for an order authorising a Will to be made on behalf of her brother Patrick
- Patrick lacked testamentary capacity, was 91 years old, physically and mentally impaired and was cared for in a nursing home
- Patrick had an existing Will dated 19 September 2000
- 2000 Will:
  - \$2000.00 to Josephine
  - \$2000.00 to Joan
  - balance of estate to Mary then her children if she is predeceased
- Mary died of cancer in October 2007

- Josephine's proposed Will:
  - all of Patrick's estate would go to Josephine and Joan
  - none of Patrick's estate would pass directly or indirectly to any of Mary's children
- Question for the Court – is it satisfied that the proposed Will “is or may be a Will” that Patrick would make if he were to have testamentary capacity and that it is or may be appropriate for an order to be made under section 21
- Fundamental submission by Josephine – the conduct of Mary in misusing her power of attorney to divest Patrick of interests in properties and failing to account to him for the proceeds of one sale would have caused Patrick to completely change his Will
- Court looked at the extensive personal and financial history by which Patrick's estate and Mary's estate had become connected over the years and was not satisfied that the Will proposed by Josephine fulfilled the criteria
- The application was dismissed

👉 view case at: <http://www.austlii.edu.au/au/cases/qld/QSC/2011/49.html>

## SUGGESTIONS

- Always have a carefully prepared up to date estate plan
- You can have an estate plan for incapacitated persons as well
- Carefully consider each estate planning issue
- Look at all possibilities under the existing system

## CONCLUSION

This paper has been prepared to highlight some of the matters discussed at the Dementia Forum held on 21 September 2011. It is not exhaustive and it is not intended as legal advice.

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## REFERENCES

<sup>i</sup> *Banks v Goodfellow* (1870) LR 5 QB 549

<sup>ii</sup> BWE [2011] QCAT 216 (5 May 2011)

<sup>iii</sup> Rachel Carbonell, *Financial abuse of elderly people is a growing problem* (19 September 2011) ABC News <<http://www.abc.net.au/pm/content/2011/s3321128.htm>>

<sup>iv</sup> WJ [2011] QCAT 238 (20 May 2011)

<sup>v</sup> *Mace v Malone* [2011] QSC 49 (25 March 2011)