

‘Disgraceful and dishonourable’¹

Powers of attorney and elder abuse

WITH CHRISTINE SMITH



Staunchly, I defend Queensland solicitors, and proudly I celebrate the good we achieve in our community. Sadly, this article is not about one of those occasions.

In the past few years, our profession has done much to support our community as it suffers the insidious increase of elder abuse. Our community looks to us, the legal profession, to support and protect our vulnerable from such abuse. Equally as important, newer practitioners look to more experienced practitioners for guidance and support in this complex legal framework. What then, when it is one of our own, a lawyer 75 years of age with 53 years of legal experience, who engages in elder abuse?

In the matter of *Legal Services Commissioner v Poole* [2019] QCAT 381 the tribunal found Ivan Poole, a practising solicitor since 1966,² guilty of four charges brought under the Legal Profession Act 2007 arising from his conduct involving the making of wills, powers of attorney and property transactions. The sustained charges were:

Charge 1 – Dishonest and disreputable conduct in breach of rule 5 of the Australian Solicitors Conduct Rules 2012 (ASCR)

Charge 2 – Duties concerning current clients in breach of rule 11 of the ASCR³

Charge 3 – Communication with another solicitor’s client in breach of rule 33 of the ASCR⁴

Charge 4 – Unfounded allegations in breach of rule 32 of the ASCR.⁵

In finding Mr Poole guilty of each charge, QCAT ordered that Mr Poole be publicly reprimanded, suspended his practising certificate, prohibited him from applying for a practising certificate for five years, and ordered him to pay costs.⁶

So, what did Mr Poole do?

ABC⁷ was an 87-year-old⁸ man with significant property interests, whose estate was estimated to be in the region of \$50 million. In 2007, ABC appointed his longstanding solicitor, Sean McMahon, as his personal and financial power of attorney.⁹ Later, and at the relevant time, a property deal was in train involving MDG who were seeking to be appointed managers of a property involved

in the deal. Simultaneously, the relationship between ABC and Mr McMahon was under strain. Mr Ivan Poole represented MDG.

In 2013, ABC suffered a heart attack, was admitted to hospital by his attorney, Mr McMahon, at which time ABC was diagnosed as having also suffered a stroke and diagnosed with dementia.¹⁰

Despite Mr McMahon writing to Mr Poole on 16 April 2013 advising him of ABC’s medical condition including capacity issues¹¹ and advising that ABC was his client and directing him to cease dealing with ABC directly¹¹ on 17 April 2013 Mr Poole and MDG removed ABC from the hospital without the knowledge or permission of the hospital staff and his attorney, Mr McMahon.¹²

That same day, Mr Poole had ABC sign a costs agreement in favour of Mr Poole. Mr Poole then shepherded ABC into the offices of “Mr Field of Aylward Game Lawyers seeking to revoke the Power of Attorney”.¹³ Mr Poole was unsuccessful in that attempt. However, the next day Mr Poole “arranged for ABC to attend at the offices of Mr Hughes of Small Meyer Hughes where ABC revoked the Power of Attorney and made certain changes to his will including appointing Mr Poole as an executor”.¹⁴

Want to focus on your area of law?

Shine Lawyers are now purchasing personal injury files.

We have a team of dedicated personal injury experts in Queensland who can get these cases moving, allowing your firm to concentrate on your core areas of law.

We are prepared to purchase your files in the areas of:

Personal Injury

Medical Negligence

Motor Vehicle Accidents

WorkCover Claims

CONTACT



Simon Morrison
Managing Director

• smorrison@shine.com.au
• 1800 842 046



SHINE LAWYERS

Mr McMahon filed an application and obtained orders that the revocation of attorney was invalid and that ABC lacked capacity.¹⁵ Immediately thereafter, the Legal Services Commission (LSC) corresponded on at least two occasions with Mr Poole confirming the court's order as to ABC's lack of capacity.¹⁶

In the meantime, Mr Poole became aware that ABC's will did not leave him a bequest. Undeterred by the court's finding as to lack of capacity, the correspondence from the LSC and correspondence from Mr McMahon, Mr Poole arranged for another solicitor, this time one known to him, to consult with ABC over the phone while ABC was in hospital.

Mr Poole, did not disclose any of the history of the matter to the solicitor, and directed the solicitor not to ask ABC any questions. A will was ultimately made in which Mr Poole, MDG and a certain doctor were to each receive a 16% share of the \$50 million dollar estate – about \$24 million.¹⁷ During this time, Mr Poole wrote to ABC and made certain allegations against Mr McMahon.

In paragraphs 64 to 84 the tribunal discusses the law and its application to the agreed facts. Justice Daubney properly found "these were serious incidents of misconduct. The public interest and the interests of the profession require that it be clearly understood that practitioners who engage in disgraceful and dishonourable conduct, as occurred here, will be subject to serious sanctions."⁸

In his 2014 paper, 'Current Issues In Probate Law Administration: Life, Death, Form, Function And History', Justice Geoff Lindsay forecast that "culturally, death has become more of a process, and less of an event, than it once was."¹⁹ He observed that, while the "expression 'elder law' genuflects in the direction necessary,"²⁰ there is a greater "need to redefine the whole subject area",²¹ and that "as a process, with different dimensions for 'person' and 'property', death requires different but interrelated approaches to management before and after the event of 'physical death'."²²

"The legal process of passing property from one generation (or, more broadly, from one person) to the next may commence during a period of incapacity before the arrival of physical death."²³ "Within the limits of the protective jurisdiction, the interests of an incapable person's family might be taken into account in the deployment of an enduring power of attorney or during the course of protected estate management,²⁴ fundamentally changing the character of probate litigation."²⁵

Practitioners in the field of succession law may increasingly find themselves thrust unwittingly into the process of the abuse, or indeed aid in the abuse. Poole's decision amplifies the importance of proper enquiry and fulsome understanding of our responsibilities.

On 30 March this year, the amendments to the *Powers of Attorney Act* will commence, and with that there will be new capacity guidelines made under the *Guardianship and Administration Act 2000*. Once published, practitioners will be well served in making them a familiar and staple resource.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, QLS Senior Counsellor and Consultant at Robbins Watson Solicitors. She is an executive committee member of the Law Council Australia – Legal Practice Section, Court Appointed Estate Account Assessor, and member of the QLS Specialist Accreditation Board, Proctor Editorial Committee, QLS Succession Law Committee and STEP.

Notes

- ¹ Legal Services Commissioner v Poole [2019]QCAT 381 per Daubney J at [90]
- ² At [8]
- ³ At [11]
- ⁴ At [50]
- ⁵ At [57]
- ⁶ At [94]
- ⁷ "The narrative has, however, been anonymised to prevent identification of certain affected parties, there having previously been a non-publication order made in this proceeding and a further non-publication order made in the course of the present hearing." Per Daubney J at [8]
- ⁸ At [28]
- ⁹ At [1]
- ¹⁰ At [6]
- ¹¹ At [50]
- ¹² At [63] [8]
- ¹³ At [80]
- ¹⁴ At [9]
- ¹⁵ At [93] [22]
- ¹⁶ At [33] [34]
- ¹⁷ At [53] [40]
- ¹⁸ At [90]
- ¹⁹ At [9]
- ²⁰ At [5]
- ²¹ At [6]
- ²² At [50]
- ²³ At [51]
- ²⁴ Ibid.
- ²⁵ At [53]

LexiMed
Medicolegal Specialists

experienced expert medicolegal consultants

comprehensive objective reports

committed to making a difference

tel 07 3831 5681 | email contact@leximed.com.au | web www.leximed.com.au