NZLR

IN THE HIGH COURT OF NEW ZEALAND 15/1
WELLINGTON REGISTRY

P No. 1259/92

2613

IN THE ESTATE of W DENNIS of Lower Hutt in New Zealand, Retired Post Office Clerk, Deceased

Counsel: R J Grigg in support

Judgment: 16 December 1992

JUDGMENT OF GREIG J

This is an application for grant of Letters of Administration on an intestacy. The applicant is the sister-in-law of the deceased. She makes the application in her own name for the use and benefit of the deceased's brother, her husband.

The deceased died on 1992, on a visit to London, aged . He died intestate. His wife and parents had predeceased him and he had no children. His only surviving relative is the brother. As appears from the applicant's affidavit to lead to the grant and a confirmatory affidavit by a medical practitioner the brother is afflicted with Alzheimers disease and is unable to manage his own affairs or to apply for and manage the administration of the deceased's estate. The brother lives at home with his wife, the applicant, who looks after him. She holds an enduring Power of Attorney made in accordance with Part IX of the Protection of Personal and Property Rights Act 1988. There are two such powers, one in relation to property and the other in relation to personal care and welfare. Both follow a form of the powers set out in the Third Schedule to the Act and are general in their scope. The Power of Attorney in relation to property, in the words of the form, gives the wife "general authority to act on my behalf in relation to the whole of my property". There are no further specifications of the power beyond those general words. The deed declares that the authority given by it

"shall not be revoked if I become mentally incapable". The powers are each executed on 3 February 1992, signed bearing signatures of the donor and the attorney and witnessed by Mr Grigg. Photocopies of those powers have been furnished to the Court.

The brother is not subject to any order or assessment made under either the Mental Health Act 1969 or the Mental Health (Compulsory Assessment and Treatment) Act 1992. There is no order made, whether a personal order or a property order, under the Protection of Personal and Property Rights Act 1988.

The estate is sworn not to exceed $210,000 gross value.

The application was considered by the Registrar at Wellington. He considered that, in accordance with the current practice by Registrars since the Protection of Personal and Property Rights Act came into force, the applicant should first obtain appointment as a welfare guardian or manager under the Act with specific authority to make this application. Counsel, in a memorandum to the Registrar, contended that the existence of the enduring Power of Attorney avoided the need for any other order under the Act. It was submitted, further, that that Power of Attorney and its recognition under the Act should be sufficient authority, notwithstanding any former rule or practice.

This is, in the first place, an application by an attorney of the person entitled to the grant who is resident in New Zealand. The only specific provision about grants to an attorney is contained in R 647 of the High Court Rules which is limited to grants to a person entitled who is residing out of New Zealand. That rule reflects the earlier practice applied both in New Zealand and in England. Similar provision was contained in the Probate Rules (Non-Contentious) 1862, R 32 (and see *Halsbury's Laws of England* (1st ed, vol 14, para 448)). A general Power of Attorney may be sufficient. However, where the person entitled to the grant is resident in this country the grant will not be made to his attorney for his use and benefit: *In re Norris* [1955] NZLR 7 at p 8 Barrowclough CJ; *In the Goods of Burch* [1861] 2 Sw & Tr 139, 164 ER 946. In that case the Judge, Sir C Cresswell, having reserved his decision is reported as deciding:

> " I directed a search to be made in the Registry, and am informed that no case can be found where an administration has been granted to AB for the use of CD when CD was within the jurisdiction of the Court, and able to take the grant. I have an objection to creating a new precedent, and must reject the motion. "

That was in spite of the Judge's earlier decision in 1858 *In the Goods of Roberts* 1 SW & Tr 64, 164 ER 631, in which Letters of Administration were granted to a son of the elderly next-of-kin and person solely entitled in distribution who were unwilling to take upon themselves the burden of administration.

In England the position has been different since at least 1971, under R 32 of the Non-Contentious Probate Rules 1954 as amended by the Non-Contentious Probate (Amendment) Rules 1967: see *Tristram and Coote's Probate Practice* (25th ed, p 359). The present position is provided for in R 31 of the Non-Contentious Probate Rules 1987 which makes no distinction between the residence of the person entitled to a grant. Thus the position in England has been altered whereas in New Zealand the rules have been re-enacted without any change and so without any extension of the right to an attorney beyond that of the attorney of the person entitled who is resident outside New Zealand. I am satisfied that the law as stated by Barrowclough CJ is and remains the law.

The question, then, is whether the existence of an enduring Power of Attorney made under the special statutory provisions is to be treated any differently. To decide that it is necessary to consider the position generally of the person who is entitled to the grant being under incapacity.

The former state of the law and practice is described in *Halsbury's Laws of England* (1st ed, vol 14, para 441) as follows:

> " Where the executor or, in case of intestacy, the person entitled to a grant of administration is of unsound mind, whether so found or not (Ex parte Evelyn (1833) 2 My & K 3), a grant is made to another for the use and benefit of the person of unsound mind, limited for such period as the latter may remain of unsound mind (*In the Goods of*

Milnes (1826) 3 Add 55; *In the Goods of Binckes* (1836) 1 Curt 286). "

A grant might be made to a committee or to a person appointed with general authority and, in the absence of such person, to the lunatic's husband, wife, next-of-kin or heir at law according to the circumstances (see para 442). A grant might be made to a stranger: see *In the Goods of Hastings* (1877) 4 PD 73 in which the person previously appointed a committee of the sole next-of-kin who was the only person entitled to distribution had renounced his right; see also *In the Goods of Eccles* (1889) 15 PD 1.

The position in England is now specifically dealt with under R 35 of the Non-Contentious Probate Rules 1987. A grant is made to the person authorised by the Court of Protection acting under the Mental Health Act 1959, or where there is no such person to the lawful attorney of the incapable person acting under a registered enduring Power of Attorney. The practice requires that the order of the Court should specifically include authority to apply for a grant and where that is lacking a supplemental order must be obtained. The enduring Power of Attorney provisions are made under the Enduring Powers of Attorney Act 1985 and regulations and rules made thereunder. In addition to the provision of prescription of the form the form has to be registered at the Court of Protection and, in any event, copies of the applications are filed with the Court of Protection: see generally *Tristram and Coote's Probate Practice* (27th ed, p 367 and following).

In New Zealand there is no particular rule for grant of Letters of Administration in the case of incapacity of the person entitled. The topic is dealt with in a general heading in *Dobbies Probate and Administration Practice* (4th ed, chap 30) under the general discretionary provisions of s 6 (2) of the Administration Act 1969. There seems to be no New Zealand cases dealing with incapacity of the person entitled. I have no doubt that within the very wide discretion of s 6 (2), the incapacity of the person entitled in and subject to the circumstances of the particular case may weigh in an ultimate finding of a special circumstance which will allow the Court, in the words of the section, to grant administration to such persons as it thinks expedient, though always preferably for the use and benefit of the person entitled.

The current practice is for the Registrar to require that the applicant obtained appointment as manager or welfare guardian under the

Protection of Person and Property Rights Act with specific authority to apply for the grant. The practice is referred to in *McGechan on Procedure* at para 665.04 (6). I think that in the ordinary case that is a proper practice.

Where a manager is appointed pursuant to s 31 of the Act, the Court is to determine, by reference to the powers set out in the first schedule to the Act, what rights and powers and such additional rights and powers the manager is to have, together with any restrictions there may be. The Manager would therefore have the powers that are specified and no other. The First Schedule powers do not in terms provide for applications to the Court for grants of administration. The power to institute proceedings is limited to the property of the person concerned which would not in terms include the entitlement to grant of the Letters of Administration or appointment as an executor. Thus where there is a property order in place the Registrar has to be satisfied that there is the requisite power and authority to make the grant specified in the order appointing the manager. If it is not there then further application has to be made to add that power.

Where there is no property order or manager then there is no person with authority to act. Once it appears that a person does not have appropriate competence to manage his or her affairs the Act applies, in the words of the long title, for the protection and promotion of the personal and property rights of that person. The supervisory and protective jurisdiction then applies and the person acting on behalf of the disabled person needs to be clothed with the appropriate authority in terms of the statute and by a Court order before he or she can act, or before he or she can be invested with the powers and duties of administration on behalf of the disabled person.

When it comes to an enduring Power of Attorney, as provided for in Part IX of the Act, it has no sanction of registration or other form of approval but is subject to the overriding jurisdiction of the Court, among other things to determine whether it is an enduring Power of Attorney or not, whether the donor was induced by undue influence or fraud to create the power, and with power to modify the scope of the power by inclusion or exclusion of the power or powers (s 102). There may also be a question apart from the statute as to the validity of the power. The general power over property expressed in s 97 (2) is made subject to a limitation on the attorney's power to benefit herself and others by way of gift and, in any event, to the

overriding jurisdiction of the Court (ss 102 and 107). With that background the proper course must be for the Registrar to require the establishment of proper authority by means of an appointment of manager and a property order with the requisite explicit power to apply for a grant. An enduring power under the Act will not on its own give sufficient authority to the grantee to obtain a grant of letters of administration on behalf of the grantor.

There remains the additional discretionary jurisdiction under s 6 (2) of the Administration Act. That is to be exercised in special circumstances. Special circumstances are not merely incapacity and the existence of an enduring Power of Attorney. It must be something over and above, beyond those circumstances to make it special. Then a Court or Registrar might grant the administration to the applicant in the absence of any appropriate property order or her appointment as manager. This is not a case where it appears so far that there are special circumstances.

In the result, then, the application in its present form can not be granted and is refused.

Solicitors: Grigg Le Page & Cross, LOWER HUTT, for Applicant