

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*DALLEY & DALLEY & ANOR*

[2021] FCCA 34

## Catchwords:

FAMILY LAW – Property – application for the appointment of a litigation guardian – insufficient medical evidence – application dismissed - application for the revocation of an Enduring Power of Attorney – lack of jurisdiction – concession made – application for injunctive relief restraining power of attorney dealing with property in certain circumstances – application granted.

## Legislation:

*Federal Circuit Court Rules 2001* (Cth), r.11.08

## Cases cited:

*L v Human Rights and Equal Opportunity Commission* [2006] FCAFC 114, (2006) 233 ALR 432  
*Masterman-Lister v Brutton & Co (Nos 1 & 2)* [2003] 1 WLR 1511, [2003] 3 All ER 162, 188  
*Murphy v Doman* [2003] NSWCA 249  
*Owners of Strata Plan No 23007 v Cross* (2006) 153 FCR 398, 414  
*AJI Services Pty Ltd v Manufacturers Mutual Insurance Ltd* [2005] NSWSC 709  
*Forster v Forster* (2012) 47 Fam LR 77  
*Slaveski v State of Victoria & Ors* [2009] VSC 596  
*Goddard Elliot v Fritsch* [2012] VSC 87  
*Krnjic v Bunnings Group Ltd. (No. 2)* [2018] FCCA 1609  
*Materanzi v Suskain (No. 2)* [2011] FamCA 276

Applicant:	MS DALLEY
First Respondent:	MR DALLEY
Second Respondent:	MR B DALLEY
File Number:	BRC 14170 of 2019
Judgment of:	Judge Laphorn
Hearing date:	8 July 2020
Date of Last Submission:	8 July 2020

Delivered at: Brisbane

Delivered on: 20 January 2021

## **REPRESENTATION**

Solicitors for the Applicant: Pearson & Associates Solicitors

Counsel for the First Respondent: Mr Byrne

Solicitors for the First Respondent: Conroy Stewart Spagnolo

Solicitors for the Second Respondent: Self represented

## **ORDERS**

- (1) That the Application in a Case filed 31 March 2020 be dismissed.
- (2) That, until further order, the second respondent, Mr B Dalley be restrained and an injunction issue restraining him from dealing with any and all property of the first respondent Mr Dalley save for paying for the expenses directly concerning the first respondent's welfare, treatment and care within the care facility in which the first respondent is residing from time to time.
- (3) That the application for the revocation of the second respondent's appointment as the Enduring Power of Attorney of the first respondent dated 1 February 2018 be dismissed.

**IT IS NOTED that publication of this judgment under the pseudonym *Dalley & Dalley & Anor* is approved pursuant to s.121(9)(g) of the *Family Law Act 1975 (Cth)*.**



**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT BRISBANE**

**BRC 14170 of 2019**

**MS DALLEY**

Applicant

And

**MR DALLEY**

First Respondent

And

**MR B DALLEY**

Second Respondent

**REASONS FOR JUDGMENT**

**Introduction**

1. Substantive proceedings for property division were filed by Ms Dalley on 21 November 2019. In that application she named her husband, Mr Dalley, as the first respondent and her son, Mr B Dalley, the second Respondent. Mr B Dalley has been appointed an Enduring Power of Attorney for Mr Dalley who lives in a care facility.
2. On 31 March 2020 an Application in a Case was filed seeking the appointment of the second respondent as the first respondent's litigation guardian. This application was said to be made by Mr Dalley although the application also refers to it being filed on behalf of the 'respondents'. It is trite to say that if the first respondent needs a litigation guardian he would not have been able to give instructions to make the application. I propose to proceed on the basis that the second

respondent is the applicant for the purposes of this Application in a Case.

3. In order to avoid confusion as to who is the applicant and who is the respondent I propose to refer to Ms Dalley as the wife and Mr Dalley as the husband. I will refer to Mr B Dalley by his name. In adopting this course, I mean no disrespect to any of the parties.
4. The Application in a Case is opposed by the wife. She filed a Response on 16 April 2020 seeking its dismissal but in the alternative if the court was to find that the husband did need a litigation guardian that person should be the parties' other son, Mr C. She also sought an order that the Power of Attorney granted to Mr B Dalley on 1 February 2018 be revoked or in the alternative that an injunction issue restraining him from dealing with the husband's property save for expenses directly concerning the husband's welfare, treatment and care in his care facility. Mr B Dalley gave an undertaking to the court on 8 July 2020 to the effect that until further order he would not deal with the proceeds of a bank account in Country D save for medical expenses or nursing home costs in respect of the husband.
5. This judgment relates solely to the appointment of a litigation guardian and the orders sought by the wife in her Response. The parties agreed for these issues to be determined on the papers by the provision of written submissions.
6. Mr B Dalley relied on the following documents:
  - a) Application in a Case filed 30 March 2020;
  - b) Affidavit of Mr B Dalley filed 30 March 2020; and
  - c) Affidavit of Mr B Dalley filed 29 May 2020.
7. The wife relied on:
  - a) Response to an Application in a Case filed 16 April 2020;
  - b) Initiating Application filed 21 November 2019;
  - c) Affidavit of Ms Dalley filed 21 November 2019;

- d) Affidavit of Ms Dalley filed 16 April 2020;
  - e) Affidavit of Ms Dalley filed 24 June 2020; and
  - f) Affidavit of Mr C filed 22 May 2020.
8. Mr B Dalley objected to the wife relying on her two most recent affidavits. He argued that the affidavit of Mr C did not contain relevant evidentiary material and that it contained a document that purported to be a settlement agreement brokered by him between the husband and wife in circumstances where the medical evidence suggests that the husband lacked the capacity to enter into such an agreement. I am not satisfied that the objection is made out and will allow the affidavit into evidence. I am satisfied that in order to determine the issue of the appointment of a litigation guardian it is important to have all evidence before the court. Any assessment of weight to be given to the evidence is another matter which would be determined when weighing up all other evidence including medical evidence.
9. In relation to his objection to the wife's affidavit filed 22 June it was submitted:
- a) No leave was sought or granted at the directions hearing on 25 May 2020 for the applicant wife to file a reply affidavit in the matter.
  - b) The Orders required the first respondent to file and serve an affidavit in reply by 4pm on 1 June 2020.
  - c) The affidavit is an attempt to put evidence before the Court of Ms Dalley and her son Mr C actively going behind the medical evidence by speaking and corresponding with Mr Dalley who is in lockdown in the nursing home.
10. When looking at the order made 25 May 2020 it can be seen that there is an error in the reference to the parties. The orders related to the Application in a Case filed by the respondents but were headed as if they were for the substantive proceedings in which the wife is the applicant. It does not make sense for the first respondent to file an affidavit in reply given the first respondent is the husband who is said not to have capacity. The order for the filing of an affidavit in reply

was clearly meant to be for Mr B Dalley. In any event the wife filed her affidavit and I am satisfied that her evidence is important to help determine the issue in dispute notwithstanding no orders were made for her to file a further affidavit. I will have regard to the affidavit.

## **Brief Background**

11. The husband is 68 years of age and the wife, 63. They married in 1979 and separated on 28 August 2011. They have two sons: Mr B Dalley who is 37 and Mr C who is 34. The family moved from Country D to Australia in 2002. They still have interests in property in Country D.
12. In her affidavit filed 21 November 2019 the wife gave evidence of the husband experiencing mental health issues during their relationship and having been admitted to hospital on eight occasions. She gave evidence of the husband being diagnosed with Bipolar Disorder. Mr B Dalley gave evidence that his father suffers from bipolar disorder, psychotic depression and neurological deficiencies caused by shock therapy and that he has been diagnosed with early onset dementia. The wife disputed any shock therapy was a cause of the husband's mental health issues. She also said she was unaware of any diagnosis of early onset dementia.
13. There was no independent sworn evidence as to the husband's health. Annexed to Mr B Dalley's affidavit filed 30 March 2020 was a two line report from a general practitioner, Dr E, which said that the husband suffers from bipolar disorder and mood disorder and does not have capacity to provide instructions to lawyers. Also annexed to that affidavit was an aged care assessment team report which refers to the husband having the following medical conditions: Bipolar affective disorder with psychotic features; history of psychotic depression requiring lengthy hospital admission and ECT; hypothyroidism; tremor; Parkinson's feature; reduced mobility, shuffling gait, falls. The noting of this information was not a diagnosis but a history as provided to the assessment team. The source of the information was not readily apparent.
14. The husband made the wife his enduring power of attorney in 2011. In that role, she made a claim on his income protection policy and received \$16,652.85. Her evidence was that she used this money to

pay back to her monies she had advanced to the husband to pay for general living expenses and expenses incurred by her in making the claim. Mr B Dalley said that the wife kept the money for her own personal use without any accounting to the husband. In a letter dated 11 February 2016 from a firm of solicitors, F Lawyers, purporting to act on behalf of the husband, the wife was requested to forward the sum of \$8,000 to the husband being half of the amount she received from the claim. The letter also enclosed a revocation of the power of attorney. In response to this letter the wife's then solicitors, G Lawyers, sent a letter dated 19 February 2016 alleging the husband did not have capacity to execute the revocation of the power of attorney and went on to say that it may be necessary for the husband to have a litigation guardian appointed for him. The wife explained her position in her affidavit filed 24 June 2020 by saying that at the time she was uncertain of the husband's capacity as he had previously been unable to make decisions and she was unsure whether Mr B Dalley was in fact making decisions for him. She went on to say that after this letter was sent she formed the view after having discussions with the husband that he did have capacity.

15. This is clearly a number of disputed facts in relation to the circumstances surrounding the claim on the insurance policy and the revocation of the power of attorney. These cannot be determined at this stage, given the matter proceeded on the papers.
16. Soon after the correspondence the wife instituted proceedings in Country D in relation to the division of matrimonial property and injunctive relief. On 2 December 2016 the High Court of Country D issued an injunction over the husband's bank accounts in Country D. This litigation remains ongoing.
17. In February 2018 the husband executed a power of attorney appointing Mr B Dalley as his enduring power of attorney to come into effect: 'once a medical practitioner considers that he is unable to manage his affairs (and provides a document to that effect)'.
18. Mr B Dalley gave evidence in his affidavit filed 30 March 2020 that Dr H provided a report in 2019 that his father lacked capacity to manage his affairs and that he has acted as the appointed power of attorney since that date. Mr B Dalley was not able to locate a copy of that



report and therefore it is not before the court. A letter from Dr E from the J Clinic dated 2 March 2020 was however annexed. Dr E who appears to be a general medical practitioner had this to say: *I certify that Mr Dalley suffers from Bipolar Disorder and Mood Disorder and is(sic) therefore does not have the capacity to provide instructions to lawyers in the family law matter due to his declining mental health.*

19. It was submitted on behalf of the wife that Dr E's letter is not helpful to determining the husband's capacity and that there is insufficient evidence to support a finding that the husband suffers a degree of incapacity preventing him from adequately conducting his family law proceedings or to instruct his lawyers by virtue of his medical condition. I accept that submission.
20. Later in this judgment I will address the legal approach to be taken in cases such as this, however it is disappointing to see only a two line opinion in relation to a person's health as the evidence put forth in support of a case for the appointment of a litigation guardian. Whilst it is the case that a copy of the Aged Care Assessment Team's assessment of the husband was annexed that does not assist in determining capacity. Dr E has not sworn an affidavit attesting to his qualifications nor the extent of his involvement in the care of the husband. He did not address the nature of the decline in his mental health and how that impacts his ability to adequately understand the proceedings and give instructions to his lawyers.

## **Legal Approach**

21. Division 11.2 of the *Federal Circuit Court Rules 2001* provides a mechanism by which the appointment of a litigation guardian can be made.

### ***Division 11.2—Litigation guardian***

#### ***11.08 Person who needs a litigation guardian***

- (1) *For these Rules, a person needs a litigation guardian in relation to a proceeding if the person does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding.*

***11.09 Starting, continuing, defending or inclusion in proceeding***

- (1) *A person who needs a litigation guardian may start, continue, respond to or seek to be included as a party to a proceeding only by his or her litigation guardian.*
- (2) *The litigation guardian of a party to a proceeding:*
  - (a) *must do anything required by these Rules to be done by the party; and*
  - (b) *may do anything permitted by these Rules to be done by the party.*

***11.10 Who may be a litigation guardian***

*A person may be a litigation guardian in a proceeding if he or she is an adult and has no interest in the proceeding adverse to the interest of the person needing the litigation guardian.*

***11.11 Appointment of litigation guardian***

- (1) *The Court may, at the request of a party or of its own motion, appoint or remove a litigation guardian or substitute another person as litigation guardian in a proceeding in the interests of a person who needs a litigation guardian.*
- (2) *A person becomes a litigation guardian if he or she consents to the appointment by filing an affidavit of consent in the proceeding.*
- (3) *The Court may remove a litigation guardian at the request of the litigation guardian.*

22. The Full Court of the Federal Court of Australia considered Rule 11.08(1) in the matter of *L v Human Rights and Equal Opportunity Commission*<sup>1</sup> (*L v HREOC*) where it was observed that the appointment of a litigation guardian is intended to be '*for a person who lacks the requisite capacity to conduct litigation or the capacity to give instructions to a person conducting litigation on their behalf*'. The principles to be applied in cases such as this are:

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<sup>1</sup> [2006] FCAFC 114, (2006) 233 ALR 432

- a) a litigant of full age is presumed competent to manage their affairs unless and until the contrary is proved;<sup>2</sup>
- b) the onus of proof lies on those who assert incompetence;<sup>3</sup> and
- c) medical evidence will be required 'in almost every case', unless medical evidence is unavailable because a person refuses to undergo a medical examination, or 'the lack of capacity is so clear that medical evidence is not called for'.<sup>4</sup>

23. In *Forster v Forster*<sup>5</sup> The Full Court of the Family Court of Australia held that while there may be circumstances in which an appointment may properly be made in the absence of medical evidence as to the party's capacity, that step nevertheless should be approached with extreme care.

24. In *Slaveski v State of Victoria & Ors*<sup>6</sup> Kyrrou J when considering the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) held:

*[26] There is no universal test for determining whether a person is capable of managing his or her affairs.<sup>7</sup> Lack of capacity is usually denoted by a person's inability to understand the nature of an event or transaction when it is explained.<sup>8</sup> In relation to litigation in which a person is a party, the person must be able to understand the nature of the litigation, its purpose and its possible outcomes, including the risks in costs.<sup>9</sup>*

*[27] The words 'in relation to the proceeding' in r 15.01 are important because they focus on the person's ability to bring or defend a particular proceeding rather than on whether the person is able to manage his or her affairs generally or in relation to some other transaction.<sup>10</sup> As Chadwick LJ observed in *Masterman-Lister v Brutton & Co*: 'The test is issue specific; and,*

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<sup>2</sup> *Masterman-Lister v Brutton & Co (Nos 1 & 2)* [2003] 1 WLR 1511, [2003] 3 All ER 162, 188 (*Masterman-Lister*); *Murphy v Doman* [2003] NSWCA 249 (*Murphy*).

<sup>3</sup> *Masterman-Lister; Owners of Strata Plan No 23007 v Cross* (2006) 153 FCR 398, 414 ('*Cross*').

<sup>4</sup> *Masterman-Lister; Murphy; AJI Services Pty Ltd v Manufacturers Mutual Insurance Ltd* [2005] NSWSC 709 (*AJI Services*).

<sup>5</sup> (2012) 47 Fam LR 77 per Coleman, May and Ainslie-Wallace JJ

<sup>6</sup> [2009] VSC 596; See also the approach adopted by Bell J of the Victorian Supreme Court in *Goddard Elliot v Fritsch* [2012] VSC 87

<sup>7</sup> *Murphy* (2003) 58 NSWLR 51, 58 [33].

<sup>8</sup> *Gibbons v Wright* (1954) 91 CLR 423, 437-8.

<sup>9</sup> *Dalle-Molle v Manos* (2004) 88 SASR 193, 199-200 [26] ('*Dalle-Molle*').

<sup>10</sup> *Cross* (2006) 153 FCR 398, 411 [53].

*when applied to different issues, it may yield different answers.*<sup>11</sup> Accordingly, the fact that a person has been involuntarily admitted to a psychiatric facility under mental health legislation is not conclusive proof of incapacity under r 15.01, but it may be relevant to an assessment of such incapacity.<sup>12</sup>

[28] *The question of incapacity in relation to litigation must be examined against the facts and subject matter of the particular litigation, the number and complexity of the issues involved and the identity, number and interests of the other parties, particularly opposing parties.*<sup>13</sup> A person can have the requisite capacity for one proceeding and lack it for another.

[29] *Where a person is a party to a proceeding and is legally represented, he or she will be incapable of managing his or her affairs in relation to the proceeding if he or she does not have the mental capacity to understand the nature of the acts or transactions in respect of which he or she needs to give instructions to the lawyer.*<sup>14</sup>

25. Although Kyrou J was discussing different rules to that which I am required to apply I am satisfied the general principles set out by his Honour are applicable to my consideration. Given there is a presumption that an adult person has the capacity necessary to bring or defend proceedings, I need to be satisfied, on the evidence, that the husband does not understand the nature and possible consequences of the wife's application for property adjustment orders or is not capable of 'adequately' conducting, or giving 'adequate' instructions to his lawyers. In doing so I must have regard to all of the particular facts and circumstances of the case. The test is not simply whether he has capacity to manage his affairs. As Bell J of the Victorian Supreme Court said in *Goddard Elliot v Fritsch*<sup>15</sup>(*Goddard*):

[557] .....

*..... the focus should be on the capacity of the client to understand they have a legal problem, to seek legal assistance about the problem, to give clear instructions to their lawyers and to understand and act on the advice which they are given. ....*

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<sup>11</sup> [2003] 3 All ER 162, 188 [74].

<sup>12</sup> *Cross* (2006) 153 FCR 398, 417 [75].

<sup>13</sup> *Dalle-Molle* (2004) 88 SASR 193, 199 [23].

<sup>14</sup> *Martin v Azzopardi* (1973) 20 FLR 345, 347-8.

<sup>15</sup> [2012] VSC 87

26. The rule speaks about being able to ‘adequately’ conduct the proceedings or give ‘adequate’ instructions. Something less than a perfect ability is invoked by r.11.08.<sup>16</sup> Many litigants have difficulties understanding aspects of their litigation but that does not mean they lack an adequate capacity to give instructions or, if self-represented, present their case.

### **Does the Husband need a Litigation Guardian?**

27. As the analysis of the legal approach above indicates, the court will rarely proceed to appoint a litigation guardian without medical evidence to establish the litigant lacks the requisite capacity. Although Mr B Dalley annexed a brief report from Dr E and an Aged Care Assessment Team report to his affidavit, I am not satisfied there is sufficient evidence before the court to establish that the husband does not have adequate capacity to understand the proceedings and to instruct his lawyers.
28. The two line report speaks to the ultimate determination rather than setting out the specific difficulties experienced by the husband that would enable the court to determine the extent of his capacity. It was submitted on behalf of the wife as follows:

*[56] Dr E in his one line statement that the first respondent “suffers from Bipolar Disorder and Mood Disorder and is therefore[sic] does not have the capacity to provide instructions to lawyers in the family law matter due to his declining mental health.” is deficient in a number of respects, namely:-*

*(a) The letter does not comply with the Expert Evidence guidelines*

*(b) There is no indication in his brief letter of the extent of his professional involvement, if any, with the first respondent or whether he even saw him,*

*(c) Dr E does not advise as to his professional expertise apart from being a Fellow of the Australian College of Rural and Remote Medicine and having a Bachelor of Medicine and Bachelor of Surgery.*

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<sup>16</sup> *Krnjic v Bunnings Group Ltd. (No. 2)* [2018] FCCA 1609 per Wilson J. See also *Materanzi v Suskain (No. 2)* [2011] FamCA 276

*(d) There was no diagnosis of any medical condition nor mention of the matters relevant to the test in r.11.08 of the Rules had not been addressed*

*(e) The letter does not address nor explain the rapid decline in the mental health of the first respondent in almost exactly 2 years post execution of the EPOA and in circumstances when the respondent has had bipolar for at least 10 years and has successfully medicated its control over that time.*

*(f) The doctor does not suggest that the first respondent lacked the mental capacity to understand the nature and possible consequences of the present proceedings*

*(g) He does not address whether the first respondent's bipolar impaired the first respondent's capacity to attend to information and to analyse such nor how it has affected his capacity to provide instructions;*

*(h) He does not suggest that his condition has led or could lead to problem-solving and memory problems*

*(i) Does not advise as to the extent of the decline of the first respondent's mental health*

*(j) Does not speak of the connection between the bipolar and the declining mental health nor how nor whether the concomitant effects of the bipolar has affected the first respondent's capacity to give instructions*

*(k) Does not address whether the First Respondent has the ability to understand the nature of the problem in the present case, in that his ex-wife was attempting to distribute assets attained during their matrimonial relationship*

*(l) Did not express an opinion as to whether the first respondent had the capacity to manage the implications of what was occurring in a courtroom*

*[57] This Court could not be satisfied that Dr E's "report" is in anyway helpful. It certainly doesn't comply with the Expert Evidence Guidelines.*

29. I accept those submissions. Even though the wife had raised in issue back in 2016 the husband's capacity and suggested he may need a litigation guardian I need to be satisfied at this point in time that the husband lacks the requisite capacity for these proceedings. The report

annexed to Mr B Dalley's affidavit falls far short of the evidence needed. I am not satisfied the case for the appointment of a litigation guardian has been made out and will therefore dismiss the application.

## **Other Applications**

30. In light of my findings in relation to need for a litigation guardian it is not necessary for me to consider who should be the litigation guardian. That issue would no doubt have to be addressed if a fresh application for the appointment of a litigation guardian was brought. In case such an application is made, I take this opportunity to express a preliminary view that neither Mr B Dalley nor Mr C might be suitable litigation guardians. In saying that I am not making any adverse findings against either gentleman but their conduct has been brought into question in the course of these proceedings and it might be prudent for any party raising the issue of an appointment in the future to give thought to an alternative person. I stress this expression is a preliminary view only, offered to assist the parties in future considerations in the hope of minimising costs.
31. It was conceded by the wife in her written submissions that this court does not have jurisdiction to revoke an enduring power of attorney that was executed in New South Wales since such revocation comes under the exclusive jurisdiction of the NSW Civil and Administrative Tribunal and the NSW Trustee and Guardian is a statutory party to all reviews in relation to the revocation of an Enduring Power of Attorney. The concession is appropriately made. I will dismiss that part of the Response to the Application in a Case.
32. The court does however have jurisdiction to restrain Mr B Dalley from dealing with matrimonial property given he holds the Enduring Power of Attorney for his father. The wife has alleged that both the husband and Mr B Dalley have removed funds from overseas and she is concerned about a diminution of the property pool. I did not receive submissions from Mr B Dalley in relation to this issue. I note he gave an undertaking to the court on 8 July 2020 not to deal with the proceeds of a bank account in Country D save for medical expenses or nursing home costs in respect of the husband. Whilst most of the parties' property is in Country D I am satisfied given the wife's

allegations and Mr B Dalley's silence on this issue that it would be appropriate to make the injunction sought.

33. For these reasons I will make the orders set out at the commencement of this judgment.

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**I certify that the preceding thirty-three (33) paragraphs are a true copy of the reasons for judgment of Judge Laphorn**

Associate:

Date: 20 January 2021