EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 80 OF THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT PORIRUA

FAM-2015-091-000358
[2016] NZFC 3117

IN THE MATTER OF	THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988
BETWEEN	RW Applicant
AND	TW BW Respondent
AND	CW Subject Person

Hearing:	15April and 6 May 2016
Appearances:	P Strachan for applicant A Gray for respondents R Cochrane for subject person
Judgment:	9 May 2016

JUDGMENT OF JUDGE P R GRACE

Background

[1] The applicant and the subject person ("CW") have been in a relationship for 30 years, having been married for approximately 26 of those years. The applicant is 75 years of age and CW is now 77. CW resides in a retirement home and the applicant continues to reside in the former family home.

[2] This is CW's second marriage. He had five children, now all adults, from his first marriage. The respondent is a child from that earlier relationship. In this proceeding, the respondent is supported by his four adult siblings.

[3] The applicant and CW had executed powers of attorney in favour of each other, as to welfare and property. Those powers of attorney were only to come into effect if either of the parties was found to have reached the point in their life where they lacked capacity. Those powers of attorney were never activated.

[4] In addition, CW has a Will which he executed on 3 October 2012.

[5] On or about 12 June 2015 CW executed new enduring power of attorneys in favour of the respondent and his brother TW. One power of attorney appointed both of them as his property managers and the other power of attorney appointed TW as his welfare guardian. Those powers of attorney were recorded as having immediate effect. Those powers of attorney were executed without any input or knowledge on the part of the applicant.

Issues

[6] The issues in this case are:

(a) Are the enduring powers of attorney made on 12 June 2015 valid or were the documents completed at a time when CW lacked the capacity to grant those powers of attorney (s 102).

(b) Where should CW continue to live? Should he remain at the [name of residence 1 deleted] or move to the [name of residence 2 deleted]?

Should the Court make an order pursuant to s 10 specifying CW's living arrangements? To what extent should any such a personal order address specific aspects of CW's care?

(c) If the powers of attorney executed on 12 June 2015 were not validly granted, should the Court now appoint

(i) A property manager;

(ii) A welfare guardian

for CW?

(d) If the powers of attorney were validly granted, should the Court now exercise its discretion and appoint:

(i) A property manager;

(ii) A welfare guardian

for CW, noting that should the terms of such an order conflict with the powers and duties of an enduring power of attorney, the order shall prevail (s 110)?

(e) If orders are made appointing property managers and / or a welfare guardian, who should be appointed?

(f) What powers or restrictions should be granted or imposed upon any person appointed welfare guardians or property manager.

[7] The main focus of this hearing must be directed at the time CW executed the powers of attorney on 12 June 2015, and determine whether or not he had capacity at that point in time.

Applicant's position

[8] The applicant has filed applications for:

(a) An order setting aside the enduring powers of attorney on the basis that CW lacked capacity as at 12 June 2015;

(b) She has applied herself to be appointed as both property manager and welfare guardian.

Respondent's position

[9] The respondents' position is that CW did not lack capacity on 12 June 2015, and consequently the enduring powers of attorney are valid.

[10] If the Court came to the conclusion that CW did lack capacity, then the respondents' argue that TW should still be appointed as the welfare guardian for CW. They do not accept that the applicant should be appointed as property manager, but rather the Public Trust should now be appointed to that position.

[11] At the start of the second day of this fixture Mr Cochrane set out his suggestions as to how it may have been possible to resolve the dispute in this matter. While there appeared to be some consensus about his proposals there were difficulties about conditions that each side wished to attach to and orders. In those circumstances, and having regard to complete lack of trust that now prevails between the parties, I proceeded with the fixture.

[12] Both parties appear to accept that there should be a personal order made confirming CW's living environment.

The evidence

[13] The evidence is that the applicant, and the respondent and his four siblings, got on reasonably well as a family until sometime in 2014. The siblings would visit CW and the applicant. TW was a frequent visitor. BW would visit between two or three times per year, despite the fact he lived only 10 minutes away. Their sister

visited at about the same frequency. Two siblings lived overseas. There does not appear to have been any state of tension between the siblings and the applicant until early 2014.

[14] In or about August 2013, CW had a mild stroke while sitting at the dining table. He began to babble for a few seconds, and then he appeared to be "alright". Later on that day one of the neighbours came over and the neighbour and CW went off to bowls. Neither CW nor the applicant considered it necessary for CW to see a doctor. The applicant appears to have thought that because CW seemed to recover quickly, that he was alright. She did not mention this incident to the respondent or any of the siblings.

[15] Prior to that date however, CW's health had been showing signs of deterioration. That was evidenced by statements from the applicant saying that CW had started to show signs of forgetfulness and an inability to string words together. The applicant acknowledges that she did not draw this to anyone's attention because she did not want to face up to the possibility that CW's health was deteriorating. However approximately three months after the mild stroke, CW was examined by two doctors and a report was prepared on 11 November 2013. This was almost 18 months before CW signed the powers of attorney on 12 June 2015. The report referred to the incident at the kitchen table. The report went on to state:

> On examination today CW looks well. He has less of a fluent aphasia with word finding difficulty in conversation. I performed the Montreal Cognitive Assessment today and he scored 7/30 which would indicate a significant cognitive impairment, however his language difficulty did impact his ability to complete this test. He is not able to name to simple animals or to find the words to tell me the date or whereabouts he is and was not able to complete a sentence after me. He also had evidence of memory impairment being unable to recall five words and also visuospatial deficits including being unable to draw a cube and to place the hands on a clock drawing.

[16] The report went on under the heading "Assessment" to state:

> The cognitive impairment appears to predate the onset of the stroke and may represent vascular dementia.

[17] Neither the content of this report, nor the fact of its existence was known to the respondents, or any of the siblings, at the time the new powers of attorney were executed in June 2015.

[18] It appears common ground that the applicant did not tell the siblings about her concerns surrounding CW's health, or about any medical information she had regarding that. The siblings are critical of the applicant for what they consider her failure to keep them informed about their father's health. It would be fair to say that it was not until all affidavits were filed in these proceedings that all parties and siblings became fully informed of the extent of CW's problems. It was only when proceedings issued that the applicant saw the report the respondents had obtained on CW.

[19] What has caused tension is the fact that the siblings, particularly TW and BW, are enquiring people. This is evidenced by the fact they make enquiries about the effects of medication and will look at alternative options in an effort to determine what is best for CW. They will speak their mind. The applicant is not so forthright and is more inclined to accept and follow the advice/recommendations of the medical staff. The applicant appears to be overborne by the siblings.

[20] According to the applicant the relationship between her and the children generally went downhill when the applicant says TW was visiting the house and inquired as to how much money CW had. The applicant told him it was none of his business. Communication between the parties then seems to have become fractious. The children formed a view from what they gleaned from comments purportedly made by the applicant to TW, that she, the applicant, wanted to change CW's Will. There was some suggestion that they believed the applicant was wanting to sell the house and move with CW to live in [location deleted]. The applicant has denied that that was her intention to sell the house and move to [location deleted], although she did point out that she and CW had visited [location deleted] and that they liked the climate and location. She says that she had no intention and never has had an intention to alter CW's Will.

[21] TW says the relationship went downhill after a meeting between himself, the applicant and CW, in June 2015 when he says the applicant stated she wanted to sell the house and move CW and herself to [location deleted] and to change CW's Will.

[22] Whatever the cause it is clear that from that point on there was a breakdown in communication between the parties. From that point on the siblings' evidence is that they started to take steps to carry out what they believed were their father's wishes. TW accepts he did not inform the applicant about what the siblings were doing. He says the siblings proceeded on the basis they were doing what their father wanted them to do.

[23] TW is the spokesperson for the family. TW has then embarked on a course of action which had the agreement of the other siblings.

[24] Both TW and BW gave evidence that up to that point they had both thought CW's health had deteriorated to the point where he has lost competence. TW then appears to have had discussions/communications with the lawyer who had up to that point in time, been acting for both CW and the applicant.

[25] In the interim the applicant had instructed a new lawyer to act for her.

[26] As a consequence of consulting the new lawyer the applicant discovered that the family home was registered in CW's sole name. Her new lawyer proceeded to place a notice under the Property (Relationships) Act over the title.

[27] The new lawyer then acting for the applicant sent the applicant an authority for CW to sign in order to have CW's papers transferred over to that new lawyer. That authority does not appear to have been signed.

[28] In the meantime the lawyer who had previously acted for CW and the applicant was in communication with the siblings. In the course of his correspondence he raised the question as to whether or not CW had capacity.

[29] It was agreed between the children that they would arrange for CW to be seen by CW's doctor to determine whether or not he had capacity.

[30] A medical appointment was made but on the day in question, the doctor, who had been CW's doctor for some time and whom CW had dealt with, was away ill. TW then arranged for CW to see a doctor who was a friend of TW's That doctor correctly said he could not examine CW' because of the possible conflict and referred CW to yet another doctor within his practise That doctor, who has not filed any report, referred CW for an assessment by a psychiatrist. What instructions were issued to the psychiatrist is not in evidence.

[31] The assessment undertaken by the psychiatrist was the subject of a report dated 6 June 2015, which records that most of the information was provided by one of the children. The psychiatrist had apparently met with CW and as a consequence of that meeting he had determined that in his view, that CW did not wish to change his Will, and the psychiatrist recorded that in his report. The report clearly noted that, because of CW's speech difficulties, the psychiatrist was not able to carry out a cognitive test of CW.

[32] Because the report refers specifically to the opinion that CW did not want to change his Will I infer that the main purpose for the assessment was to determine that point. I say that because the emphasis up to that point in time was around CW's Will.

[33] A copy of the report was sent to Mr Brace, the lawyer who had acted for CW to that point. In an email to TW dated 11 June Mr Brace referred to the statement in the medical report that CW had sufficient ability to indicate that he did not want to change his Will and then said "I therefore assume that he has mental competence".

[34] TW's evidence is that up to that point he had thought CW lacked capacity and had thought the medical examination would come to that conclusion. He was surprised to hear that his father "had capacity".

[35] As a consequence it was decided action needed to be taken to protect CW. Mr Brace said he could not act as he had acted for both the applicant and CW in the past. He referred TW to a new solicitor.

[36] The respondent had made an appointment for CW to meet with this lawyer. That lawyer was a Ms Mills and was someone with whom CW had had no prior contact. CW was taken by two of his sons, BW and TW, to Ms Mills on 12 June. TW had previously been in touch with Ms Mills, by phone, making a general inquiry about matters.

[37] Ms Mills gave evidence that she met CW on his own for about 30 minutes. She had the medical report from the psychiatrist. She says that CW was able to tell her the names of his children, and from her discussion she formed the view that CW had capacity. On that basis she instructed her staff member to prepare enduring powers of attorney while CW and his two sons went out to lunch. CW and the two sons subsequently returned and the enduring powers of attorney were signed. Ms Mills says that she went through the documents with CW, on his own, and explained everything that was in the two documents which CW signed.

[38] Once the enduring powers of attorney had been executed, TW contacted the bank which held CW's money, in his sole name, and arranged to transfer the funds of approximately $500,000 into an account under the control of the property manager. The rest home was also advised of the fact that enduring powers of attorney as to welfare had been put in place.

[39] Unsurprisingly the applicant was very upset when she found that this had occurred without her knowledge or without any consultation with her, and she now feels that she can no longer trust the siblings.

The law

[40] Section 102 of the Protection of Personal and Property Rights Act 1988 provides:

> **102 Court's jurisdiction in respect of an enduring power of attorney**
>
> (1) A court shall have jurisdiction to determine—
>
> (a) whether or not any instrument is an enduring power of attorney; or
>
> (b) whether or not the donor of an enduring power of attorney is mentally incapable.

(2) A court shall have jurisdiction to do all or any of the following things in respect of an enduring power of attorney where the donor has become mentally incapable:

(a) determine any question as to the meaning or effect of the instrument by which the power is given:

(b) determine whether or not any such instrument has ceased to have effect:

(c) give directions with respect to—

(i) the management or disposal by the attorney of the property and affairs of the donor; or

(ii) the rendering of accounts by the attorney and the production of the records kept by the attorney for the purpose; or

(iii) the remuneration or expenses of the attorney, whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive, or the payment of additional, remuneration; or

(iv) any matter relating to the personal care and welfare of the donor:

(v) any other matter on which the directions of the court are sought under section 101:

(d) modify the scope of the enduring power of attorney by including or excluding—

(i) part of the donor's affairs in relation to his or her property, or any powers relating to any such affairs; or

(ii) any specific matters in relation to the donor's personal care and welfare, or any powers relating to any such matters, not being a matter referred to in section 98(4):

(e) require the attorney to furnish information or produce documents or things in his or her possession as attorney:

(f) give any consent or authorisation to act that the attorney would have to obtain from the donor if the donor were mentally capable:

(g) authorise the attorney to act, otherwise than in accordance with section 107, to the benefit of the attorney or persons other than the donor, but subject to any conditions or restrictions contained in the instrument:

(ga) authorise the attorney to make any loan or advance of the donor's property subject to—

(i) any conditions that the court considers appropriate; and

(ii) any conditions or restrictions contained in the instrument:

(h) determine whether the donor of the power was induced by undue influence or fraud to create the power:

(i) determine whether, having regard to all the circumstances and, in particular, the attorney's relationship with the donor, the attorney is suitable to be the donor's attorney:

(j) authorise an attorney acting under an enduring power of attorney in relation to a donor's property to execute a will for and on behalf of the donor if the court is satisfied that—

(i) the donor lacks testamentary capacity; and

(ii) there is no express provision to the contrary in the enduring power of attorney.

(2A) For the purposes of any application for the exercise of the court's jurisdiction under subsection (2)(j), section 55 applies as if every reference to a manager were a reference to the attorney, and every reference to a person subject to a property order were a reference to the donor.

(3) Nothing in the foregoing provisions of this section shall limit or affect the jurisdiction of any other court.

[41] Section 100 of the Protection of Personal and Property Rights Act 1988 provides:

> **100 Enduring powers of attorney subject to personal order and property order**
>
> Where an enduring power of attorney is given by a person who is or who subsequently becomes subject to a personal order or a property order, the order shall be binding on the attorney; and, in the event of any conflict arising between the powers and duties of the attorney and the terms of the order, the order shall prevail.

[42] In *Waldron v Public Trust* (High Court, Auckland, CIV-2009-404-00485) Potter J put beyond any doubt that the Family Court has jurisdiction to determine whether a donor has a mental capacity to execute an enduring power of attorney:

> [46] Section 102(1)(a) confers on the Family Court jurisdiction to determine whether or not any instrument is an enduring power of attorney. I conclude that this includes jurisdiction to determine whether an enduring power of attorney has come into effect, including whether the donor had mental capacity at the time the enduring power of attorney was entered into and executed.
>
> [47] I consider this interpretation is supported by:
>
> a) The structure of s 102(1);

i) Under s 102(1)(a) the Family Court has jurisdiction to determine whether there *is* any instrument which is a valid enduring power of attorney;

ii) Under s 102(1)(b) the Family Court has jurisdiction to determine when the enduring power of attorney comes into effect, that is when the donor is mentally incapable;

iii) Under s 101(2) the Family Court is empowered to give directions and make determinations on all kinds of issues arising in relation to the enduring power of attorney including the suitability of the appointment and whether the instrument has ceased to have effect;

b) The interpretation is consistent with the expressed intent of the Act to vest jurisdiction in the Family Court, except in relation to Part 9A.

c) It would be anomalous if s 102(1) were interpreted to give the Family Court power to determine mental capacity at any time after the execution of an enduring power of attorney under s 102(1)(b) but not to determine mental capacity at the time the instrument was executed.

d) Given that the Family Court has jurisdiction under s 102(2)(b) to determine whether or not any enduring power of attorney has ceased to have effect, it is logical and consistent that the provisions of s 102 should be interpreted to include jurisdiction to determine whether an enduring power of attorney has come into effect.

Mental capacity or competence

[43] In *Re Tony* (1998) 5 NZFLR 609, 614 the Court stated that:

> It did not matter greatly whether the disability was described in terms of capacity or competence, the essential issue being the person's power to function being impaired in particular respects.
>
> That must necessarily be a matter of degree, to be assessed and determined in each particular instance … the capacity required at the time of giving an enduring power of attorney is the capacity to appreciate the consequences of doing so rather than the capacity to manage the very affairs that are being placed in the charge of the attorney … he was not managing his property affairs; he was delegating their management.

[44] Judge Inglis QC referred to an English case *Re K (Enduring Powers of Attorney)* [1998] 2 WLR 781:

> The validity of that act depends on whether she understood its nature and effect and not on whether she would hypothetically been able to perform all the acts which it authorised.

> I do not think that *Re K* can be distinguished on any ground that is relevant in terms of the New Zealand Act and I respectfully follow it holding that all that was required of "Tony" when he executed his enduring power of attorney whilst capacity to understand the broad essentials of an enduring power of attorney, including the understanding that he was placing his property in safe hands.

[45] The mental capacity or competence is to be assessed in relation to specific functions and is determined by a person's understanding and ability to deal with particular decisions. Mental capacity or competence is relative and is to be considered against the risks and benefits of the decision to be made. It is important to consider the circumstances and the nature of the decision to be made.

[46] In *M J Tavendale and E B L Hilson v P A Hargreaves* [2003] NZHC 2374 (11 September 2013) D Gendall J made it clear that there was a difference between dementia and mental capacity. In that case it was the capacity to alter a will.

Validity of enduring power of attorney dated 12 June 2015

[47] Until June 2015 CW had been represented by Mr R Brace. Mr R Brace had in fact acted for both CW and the applicant for many years. There is no evidence before the Court from Mr Brace, but there are various emails exhibited to affidavits which have been exchanged between Mr Brace and TW. What is clear from that correspondence is that Mr Brace had raised the issue of CW's capacity. Whether that was due to his personal knowledge of CW, or whether it was a precautionary concern due to CW's age, is unclear. What is clear is that the issue was fairly and squarely being raised for consideration.

[48] In the correspondence, it is also clear that the medical report that had been obtained by the family (dated 5 June 2015) was sent to Mr Brace, because he refers to it in one of his emails. He refers to it on the basis that the letter from the doctor made it clear that CW did not wish to change his Will.

[49] This report from the doctor stating that CW did not wish to change his Will has been taken by the children as an indication that CW had capacity to execute the enduring powers of attorney, thus placing his affairs and the control of his affairs in the hand of some other party.

[50] The concern I have regarding this:

(a) It is clear from the medical report of 11 November 2013, which is some 18 months prior to the date upon which the disputed enduring powers of attorney were executed, that CW had been diagnosed with cognitive impairment which may well have been consistent with dementia.

(b) The applicant herself had noticed that CW was having difficulty communicating and expressing himself and stringing words together. Part of this may well have been associated with the stroke that he had in or around August 2013. However, the medical report tends to suggest that the potential dementia predated the stroke.

(c) The medical report obtained on 5 June 2015 makes it clear that because of CW's speech and communication difficulties, the doctor was not able to carry out a cognitive assessment. Two further issues arise with that:

(i) It appears that the doctor who carried out the assessment in June was not aware of the assessment done in November 2013 which suggested that CW was suffering from dementia;

(ii) The doctor made it clear that he was unable to conduct a cognitive assessment on that particular occasion in June 2015. All he was saying was that this man did not wish to change his will and that he, the doctor, was satisfied that that was a genuine intention on the part of CW. He was not saying that CW therefore had "capacity". The Doctor however record "no clear evidence of dementia" but as I have not heard any evidence from the doctor (or indeed any doctor) I interpret that form of response as raising a question over the issue of dementia and therefore capacity. Such an answer is suggestive

that there may have been some evidence of dementia, or that dementia could not be excluded.

(d) I also note that when the medical report of 5 June 2015 was received a copy was sent to the lawyer who had previously acted for CW. In an email dated 11 June that lawyer referred to the statement that CW had sufficient ability to indicate that he did not want to change his Will and then said "I therefore assume that he has mental competence". This was an assumption only. The balance of the email infers there is a need for caution in following that assumption without further medical evidence.

(e) The evidence of both TW and BW was to the effect that the family was concerned about whether CW had capacity. Indeed TW stated that he was hopeful that the medical examination on 5 June would come to the view that the finding would be that CW did not have capacity. Clearly the family was concerned that CW's health was showing signs of deterioration.

(f) CW's medical records placed into evidence record that on 28 May 2015 "cognitive function appears to have declined further". CW was referred to Kenepuru for a geriatric assessment (which is the assessment referred to below).

(g) As a consequence of what occurred, CW was assessed on 6 July 2015 by a Consultant Geriatrician in order to determine capacity. The Geriatrician completed a report which stated "*CW is known to our service. He was first seen in November 2013 having presented with dysphasia. His CT scan showed evidence of left parietal occipital infarct. His wife at the time told us that he had some cognitive impairment prior to the onset of the dysphasia and the diagnosis of vascular dementia was also made although cognitive function was difficult to assess because of language impairment. --- Even in 2013 when we first met CW, I would have assessed him as not having*

capacity given his severe dysphasia so I would seriously doubt that he had capacity a few weeks ago to consent to have medical records released or indeed appoint a EPOA"

(h) The report went on to state "*I can confirm after today's assessment that CW does not have the capacity to make decisions with regard to his health or property, he has no capacity to appoint an Enduring Power of Attorney".*

[51] The concern in this case is that CW was seen on 12 June by a solicitor well experienced with elder law, and as a consequence of the half hour that she spent with CW, and as a consequence of reading the medical report dated 5 June 2017, and as a consequence of her discussions with the two sons, she had formed the view that CW had capacity. It is clear from her evidence that much of CW's communication with her was by body language and gestures, but she says he was able to tell her the names of his children.

[52] With respect to that lawyer, the fact that he could tell the names of his children does not in itself lead to capacity.

[53] The capacity that we are talking about is the comprehensive understanding that CW was signing a document that:

(a) Had the effect of revoking the earlier enduring powers of attorney in favour of his wife of 26 years;

(b) Appointing new powers of attorney both as to property and as to welfare and that the persons holding the power of attorney stood in the shoes of CW and that they were able to make decisions that bound CW, namely control all his finances potentially to the exclusion of his wife. There would also need to be capacity to understand and comprehend the impact and net effect of all the conditions which attach to an enduring power of attorney. Ms Mills indicated in her evidence that she formed the view that CW had that capacity.

[54] The onus of establishing that CW did not have capacity rests on the applicant. The standard of proof is on the balance of probabilities. What the Court is now asked to do is go back in time and make decision on the basis of all the evidence. Unfortunately all the evidence was not made known to the relevant people at the time.

[55] As TW said 'this is a continuum, where do you draw the line?" The line is from the assessment in November and the 6 July 2015.

[56] In the face of the medical evidence from November 2013 which was evidence that Ms Mills was not aware of, and in the face of concern raised by the lawyer who had previously acted for CW, Mr Brace, raising the issue of capacity, and the concerns raised by the applicant as to her knowledge of CW's inability to be able to communicate, and in the face of the evidence from TW and BW who both believed CW did not have capacity before 12 June 2015, and noting the medical records that say CW's health had deteriorated around May 2015 requiring an undated assessment, and coupled with the fact that by 6 July, some three weeks after the EPOAs were signed, CW was assessed as not having capacity, I have to the conclusion that the relatively high threshold that the applicant must establish in order to satisfy me on the balance of probabilities that CW did not have capacity at the time he signed the enduring powers of attorney on 12 June 2015 has been met and discharged.

[57] In those circumstances, I have come to the finding that the enduring powers of attorney issued on 12 June are not valid.

[58] The next question is who should be appointed as his attorney. There would need to be two attorneys, one as to welfare and one being a property manager.

Welfare guardian

[59] As to the welfare guardian, a number of issues have been raised in the evidence over that:

(a) Is the applicant able to discharge the duties required of her if she were to be appointed as CW's welfare guardian;

(b) Should there be any restrictions or conditions attaching to that appointment; or

(c) Should one of the children of CW be appointed to act as a welfare guarding.

[60] The issues which have been raised are these:

(a) The concern by the children that if the applicant is appointed as CW's welfare guardian, she would prevent the children from visiting CW in his rest home. The applicant has made it quite clear that that has never been her intention and she has stated that on oath and has also stated that she would never stop any member of the family visiting CW.

(b) The other issue is the concern raised by the family that the applicant will stop them taking CW away from the home on outings. Again, the applicant has stated on oath that that has never been her intention and she would not do that provided however that CW is returned to the home at a reasonable time. She considers a return to the home at about 4.00pm in the afternoon is appropriate, whereas she says CW has been returned on occasions at 7.00pm or 7.30pm and he is disorientated at that stage.

[61] The applicant visits CW most days of the week. She cooks food for other people within the rest home and staff members and she has been doing this now for some time. She knows the staff at the rest home. She is guided by advice and suggestions given to her by the staff at the rest home. The applicant is CW's partner of 30 years. She is herself 75 years of age, but does appear to be alert and articulate, and does not appear to be suffering from any incapacity.

[62] The siblings raise a concern that the applicant may cease to visit CW once the orders are made and therefore do not consider that she should be appointed as welfare guardian.

[63] They also consider that she has not kept them informed about CW's health and that in their opinion they worry that she will not keep them informed about CW in the future.

[64] The siblings also want to be involved in all meetings with the medical staff at the home and to have input into the discussions around CW's medication. The applicant wants to attend those meetings on her own, because of the lack of trust she feels about how this matter has gone to this point. She is prepared for the siblings getting this information, and attending their own meetings with the medical staff, but she wants to be the decision maker. It appears she feels she cannot work with the siblings.

[65] In my view there would need to be cogent grounds why a subject person's partner should not be appointed as the welfare guardian for the subject person. This is especially so where that person has sworn that she is not opposed to the family visiting and taking CW out on trips/visits. In the circumstances of this case, I can see no such reason as to why the applicant cannot be appointed as welfare guardian for her partner. There will be an order accordingly.

[66] The next question is should there be any restrictions placed upon the welfare guardianship order. I accept that the applicant will not restrict the family in their access to CW or their ability to take him out, but there has been a breakdown in the inter-family relationship and the parties will need to rely on the good will and intentions expressed by the applicant. Where the family relationships have frayed as they have here I consider that it is proper to specifically record what the parameters of the order are so the parties avoid the potential for future conflict. The order should therefore be tagged with conditions that the applicant will not restrict the family having reasonable contact with CW in [name of residence 1 deleted], and will not unreasonably restrict the family taking CW out for outings during hours appropriate for CW's age and state of health. The length and frequency are to be

determined in consultation between the applicant and the medical doctor responsible for CW's care within the home, and that decision is to be conveyed by the home manager to the siblings. The siblings are to adhere to the terms fixed.

[67] The next issue is whether TW can attend meetings between the doctors. and the welfare guardian. In view of the hostility there is a risk that such meeting are unlikely to be successful. However I do have a concern as to how the information about CW's health will be conveyed to the family if they do not have a representative present at these meetings. It is not a responsibility that should be placed on the home to convene several meetings.

[68] Therefore those meetings are to be attended only by the welfare guardian and TW,. The welfare guardian is to act in accordance with any agreement reached at such meeting or if no agreement is reached than the welfare guardian is to act on the advice given to her by the doctors. This does not stop the siblings setting up their own meetings with the doctors and/or staff, and does not stop them from talking to the welfare guardian if they wish to raise issues about the [name of residence 1 deleted] treatment of CW, but the ultimate decision is the welfare guardian to determine.

Personal Order

[69] Another issue raised in this case is whether or not the Court should make a personal order that CW remain at the [name of residence 1 deleted] home. This is due to the fact that the children want to transfer CW to a home known as [name of residence 2 deleted]. The applicant is opposed to this because that home is some considerable distance north of where CW currently is, and the applicant feels that if CW is to live in that home, he will be further away from her, thus making it more difficult for her to see him and travel to that home. He would be nearer to two of his children. One of his children lives just down the road from [name of residence 1 deleted].

[70] In an effort to resolve that, I invited Mr Cochrane to commission a short report from Dr Duncan who is a respected geriatrician to advise which of the two

homes may be able to provide the better care for CW. Dr Duncan's report is to the effect that both homes are equally capable of providing the standard of care that CW requires at this point in time.

[71] In those circumstances there will be a personal order that CW is to remain living at [name of residence 1 deleted].

[72] The next issue is should there be and any conditions. It seems the siblings want some mechanism to enable a review of the personal order in the event the applicant ceases to visit CW.

[73] A personal order can be reviewed every 3 years, but anyone can apply to review at any time if there is a change in circumstances. I do not consider it is appropriate to place any conditions on this order.

Property manager

[74] The final issue is whether or not there should be an order appointing a property manager and if so who that should be. There is clear conflict here between CW's children on the one hand and the applicant on the other. That conflict is exacerbated because this is CW's second relationship and the children come from the first relationship. There are no children of the second relationship and the applicant has no children.

[75] The reality is that the assets which CW and the applicant have accumulated over those 30 years of their relationship are theirs. However there is always potential for conflict and a property manager must always act in the best interests and welfare of the person whom they represent. So there are potential conflicts of interests between the interests of CW on the one hand and the interests of the applicant on the other.

[76] Likewise if any of the children were to be appointed as property manager, there is clearly a conflict of interest between what they see as the best interests and welfare of CW and the best interests and welfare of the applicant.

[77] Mr Cochrane has made inquiry of the Public Trust and the Public Trust has indicated that it would be prepared to act as property manager in this case. Both parties indicated they were prepared to accept the appointment of the Public Trust. Whilst I acknowledge that there are fees involved, nevertheless, in my view in order to ensure a degree of neutrality and to avoid the potential conflict, the Public Trust should be appointed as the property manager. There will be that order accordingly.

[78] The Public Trust will have all the powers in terms of the First Schedule

[79] The question of further orders attaching to the property order has been raised, more particularly by the applicant. This is due to the fact that the funds in the bank are in CW's sole name. The house is registered in his sole name but has a charge over it under the Property (Relationships) Act. The house and the bank funds are all relationship property. The house and the funds constitute the asset pool from which the property manager will be making payment for rest home fees.

[80] The Public Trust is a professional agency well versed in the administration of property matters such as this and I do not consider it incumbent on the Court to impose conditions on it. If however the Public Trust wish to have further conditions imposed they have leave to file a memorandum setting out their request within 21 days of today's date.

[81] The personal orders and the orders as to welfare and property are to be reviewed in three years from today.

[82] There will be an order pursuant to s 85(1) of the Act that these orders remain in full force and effect in the event of any appeal.

[83] The costs of Mr Cochrane as lawyer for CW are to be met from the assets of CW and refunded to the Court in due course.

[84] The issue of the costs of the proceedings are reserved.

Judge P R Grace
Family Court Judge