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IN THE FAMILY COURT
AT AUCKLAND

FAM-2015-004-001072
[2016] NZFC 9831

IN THE MATTER OF	THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988
BETWEEN	OG Applicant
AND	JK Other Party
AND	VK Person In Respect Of Whom The Application Is Made

Hearing:	7 October 2016
Appearances:	GA Ireland for the Applicant LJ Kearns for R Hucker for the Other Party S Jefferson QC for the Subject Person
Judgment:	8 December 2016 at 2.00 pm

RESERVED JUDGMENT OF JUDGE A J TWADDLE
[Jurisdiction to Revoke Enduring Power of Attorney and to Review Attorney's Decisions]

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[1] This case is about VK and an Enduring Power of Attorney ("EPA") she signed in favour of her son, JK.

Background

[2] Mrs VK signed the EPA in 2014. There is no issue that the EPA related only to Mrs VK's personal care and welfare and that it did not take effect unless Mrs VK was incapacitated.

[3] Mrs VK is 84. In October last year, while travelling in Europe in the company of Mr JK, Mrs VK contracted a listerial meningitis. She was admitted to a hospital in [location deleted] in a critical condition. She suffered numerous complications, including what has been described as a "multi-factor limited hyperactive delirium". Following treatment her condition improved. She was discharged from hospital on 16 February this year on multiple medications and with a recommendation for ongoing monitoring, medication adjustment and continuation of intensive physiotherapy.

[4] Mrs VK then entered a clinic near [location deleted] where she has undertaken therapy, including gym work and walking retraining.

[5] At the Court's direction, an Auckland specialist psycho-geriatrician, Dr Casey, travelled to [name of country deleted] and, with Mrs VK's consent, examined her on 29 and 30 March.

[6] In her report dated 5 April, Dr Casey concluded that during the protracted acute phase of her illness, when Mrs VK suffered from the prolonged and multi-factional delirium, her mental and cognitive state would have been affected, and her capacity to make decisions about matters affecting her health would have been compromised. But by 29-30 March there was, in Dr Casey's opinion, no evidence of a delirium, and during the timeframe of the assessment Mrs VK demonstrated the capacity to decide with respect to health matters and, crucially, with respect to the place where she would undertake rehabilitation. Dr Casey said:

> Mrs VK, on the dates of 29 and 30 March, 2016, knew she was in the REHA Clinic in [name of country deleted]. She was of the firm view that this clinic was providing the best possible rehabilitation available to her at this time. She expressed a consistent determination to be able to walk again for her return to New Zealand. She could understand that there is an ongoing risk of infection in hospital settings. She also could understand that there was a possibility that her situation could change and that the rate of improvement could slow. She expressed the choice that she wished to persevere and that she would consider the options if and when that scenario should arise.
>
> I have been informed by two independent medical professionals that Mrs VK is stubborn, optimistic and efficient, and may formulate her own views on treatments and options in relation to health matters. It was also evident in this assessment that Mrs VK is resilient and realistic. Mrs VK knew that on her return to New Zealand, rehabilitation would be ongoing and that she would require additional formal supports in her ongoing recovery.
>
> Thus, in my opinion, during the timeframe of the assessment, Mrs VK demonstrated the capacity to decide with respect to these health matters.

The proceedings

[7] By an amended application filed on 6 April, Mrs VK's daughter OG applied for:

(a) An interim order appointing her, or any other suitable person approved by the Court, to be welfare guardian of Mrs VK;

(b) Alternatively, for personal orders pursuant to s 10 of the Act, requiring Mrs VK to return to New Zealand on such conditions as the Court should approve for her rehabilitation in New Zealand;

(c) An order revoking the EPA as to welfare granted by Mrs VK to Mr JK (s 105 of the Act);

(d) Orders reviewing decisions made by Mr JK while Mrs VK was ill in [location deleted] and for any order the Court thinks fit (s 103 of the Act);

(e) Such further or other orders or directions as the Court thinks fit.

[8] Ms OG no longer wants to pursue her application for an interim order appointing a welfare guardian or for personal orders requiring Mrs VK to return to New Zealand for rehabilitation.

[9] The grounds for the application for orders under ss 105 and 103 of the Act are:

(a) JK had acted unreasonably in exercising his powers pursuant to the EPA and would continue to do so if given the opportunity;

(b) JK had exercised undue influence over Mrs VK and would continue to do so;

(c) JK's interests conflicted with the interests of Mrs VK.

Context

[10] Ms OG's affidavit evidence was:

(a) She and two other family members went to the hospital immediately they were notified Mrs VK had been hospitalised. They stayed in [location deleted] for six days;

(b) Mr JK had convinced the hospital authorities that he had sole power to make decisions over who could and could not see Mrs VK. While they were able to see Mrs VK, the time they could spend with her was very limited and Mr JK had denied them contact on every possible occasion;

(c) Mr JK did not adopt a consultative approach about Mrs VK's medical condition or about decisions relating to her care; on the contrary he was obstructive and bullying;

(d) The family left [location deleted] due to the continual obstruction by Mr JK in terms of them receiving information from the medical personnel and also because of his controlling behaviour with respect to them visiting Mrs VK;

(e) Mr JK appeared to have become fixated with the idea of Mrs VK remaining in [location deleted] for her rehabilitation and had not looked at the option of her returning to New Zealand by air ambulance as recommended by the insurers and medical staff at the hospital;

(f) Mrs VK had expressed a wish to her that she wanted to return to New Zealand to be close to her home and family;

(g) After she left [location deleted] she was not able to speak personally to Mrs VK. She believed that Mr JK was behind Mrs VK not accepting her calls;

(h) She accepted that Mrs VK was very well treated by the hospital staff at the [location deleted] Hospital.

[11] RG, a grandson of Mrs VK, visited her in [location deleted] hospital. His affidavit evidence was:

(a) Mr JK seemed to be in total control of the situation and made decisions without consulting Ms OG or him;

(b) Mr JK kept them from receiving relevant medical information about Mrs VK;

(c) He and other members of the family became concerned about Mrs VK's safety and that they might never see her again in New Zealand, and he recorded some of the conversations which took place (some with all of the family present; some when only Mr JK and Mrs VK were present);

(d) Mr JK appeared to make completely disparaging remarks about his family to Mrs VK and to be deliberately misleading her about several matters, including the nature of the proceedings brought by Ms OG and who would pay for the costs of Mrs VK's rehabilitation in [name of country deleted].

[12] Mr JK's affidavit evidence in response was:

(a) He had welcomed the family visiting [location deleted] and Mrs VK;

(b) His advice about the hospital policy was that only two people could be present with Mrs VK while she was in intensive care;

(c) He denied misusing the power of attorney; he had always wanted the best medical care available for Mrs VK;

(d) He did not ban any family member from seeing Mrs VK; the medical team required him to be present with Mrs VK whenever possible to assist in her treatment and rehabilitation, and he tried to facilitate visits by family members;

(e) He did not prevent medical updates being made available to Ms OG.

[13] An affidavit by Mrs VK was filed. The affidavit was filed before Mr Jefferson QC received instructions. The affidavit appears to have been signed on 17 June this year. There is no evidence that an oath was taken, or that the person who witnessed Mrs VK's signature was entitled to do so. Nevertheless in terms of s 12A of the Family Courts Act, I consider the document may assist the Court to determine the proceeding, and receive it as evidence. In the document Mrs VK said:

(a) She opposed the application filed by her daughter to cancel the arrangements she put in place for her wellbeing;

(b) She was comfortable with the arrangements she had made and that JK held responsibility for her wellbeing in the event she was unable to make decisions herself;

(c) She was aware she had been very unwell (near death) but had pulled through and was recovering well;

(d) She was aware of various rehabilitation clinic options;

(e) Her rehabilitation was going very well and she wanted to stay in [name of country deleted] to continue her rehabilitation. She did not want to return to New Zealand at that stage but might wish to revisit this decision in the forthcoming summer months;

(f) She was concerned about a proposal by Ms OG that she returned to New Zealand to a public hospital for assessment; she had been assessed on several occasions in [name of country deleted] and wanted to focus on her recovery and rehabilitation;

(g) She wanted to have decisions over her welfare left with JK; he had been with her throughout her hospitalisation and residence at the clinic; he had an understanding of her needs and had been in communication with her doctors and medical team in [name of country deleted];

(h) She had no confidence in Ms OG managing her personal affairs or the affairs relating to her wellbeing.

The issues

[14] Mr JK and Mrs VK contend that the Court has no jurisdiction to make the orders which are sought. Ms OG does not agree.

[15] The issues for determination are:

(a) Whether the Court has power under s 105 of the Act to revoke an appointment of an attorney under an Enduring Power of Attorney while the donor of the EPA has capacity;

(b) If not, whether the Court nevertheless has the power to revoke the appointment under s 103(4) as an adjunct to a review of the attorney's decisions;

(c) Whether the application to review Mr JK's decisions while Mrs VK was ill in [location deleted] lacks any reasonable basis and should be struck out under Rule 193 of the Family Courts Rules.

Submissions

[16] Mr Jefferson QC submitted:

(a) The starting point is that Mrs VK is now completely competent;

(b) Section 105 of the Act creates jurisdiction to revoke the appointment of an attorney in any proceeding commenced under ss 101, 102A or 103 if the Court is satisfied that:

(i) The attorney is not acting, or proposes not to act, in the best interests of the donor (s 105(1)(a)); or

(ii) The attorney is failing, or has failed, to comply with any of the attorney's obligations under ss 99A or 99B or proposes not to comply (s 105(1)(b));

(c) Section 105(1)(a) clearly implies that the EPA must be active if it is to be revoked. If Mrs VK has capacity, the EPA is not activated. In such circumstances the Court does not have jurisdiction to revoke the EPA;

(d) There is a clear temporal link in s 105(1)(a) between the actions or proposed actions of a person and the existence of an EPA. A person

cannot be said to be acting (or proposing to act) contrary to the best interests of a "donor" if that person is not acting under the authority of an EPA;

(e) Section 105(1)(b) concerns a failure to comply with ss 99A and 99B which are not applicable if the EPA is not activated;

(f) Section 105(1A) of the Act is irrelevant because no proceedings have been brought under s 101 and there is no dispute as to the validity of the EPA, nor as to the current capacity of Mrs VK (s 102);

(g) Section 105(2) implicitly applies only when the donor is incapable; if the donor was capable, there would be no need for an application under s 105(2) as the donor would be able to revoke the power or alternatively, expressly confirm it;

(h) Taking into account s 5 of the Acts Interpretation Act, an interpretation of s 105(2) which suggests that for the Court to exercise its powers under 105, the donor of the power must lack capacity, is consistent with the purpose of the legislation, namely to protect the personal and property rights of people who cannot competently manage their affairs;

(i) Section 103 of the Act provides jurisdiction for certain persons (including a relation of the donor) to apply to the Court to review an attorney's decision while the EPA is in force, or after it is revoked by the death of the donor or otherwise;

(j) Section 103(4) provides that the Court may, if it thinks it reasonable to do so in all the circumstances, review the decision/s of the attorney and make any order it thinks fit;

(k) A plain reading of s 103(4) ostensibly gives the Court the broadest discretion to make orders following a review of an attorney's

decisions, which could conceivably include revocation of an EPA, but s 103(4) must be read subject to the specific provisions of s 105, and a reading of s 103(4) that would give the power to the Court to revoke a EPA on the basis of that subsection alone would render s 105 redundant as it relates to applications under s 103;

(l) With respect to a review of the decisions made by Mr JK under the EPA, s 103(4) cannot apply because the evidence does not identify with particularity the decisions complained of, and the jurisdictional foundation for a review is not established.

[17] Ms Kearns submitted:

(a) For the reasons submitted by Mr Jefferson QC, the Court does not have jurisdiction to revoke the EPA under s 105(1);

(b) Despite notice having been given to Ms OG on 20 June to identify the specific decisions sought to be reviewed under s 103 and the relief sought, Ms OG has not identified any aspect of Mr JK's conduct during the six month period of Mrs VK's incapacity which should be reviewed by the Court;

(c) Mr JK arranged for Mrs VK to receive treatment of the highest quality and she made a remarkable recovery;

(d) There is no reasonable basis for the application to review Mr JK's decisions, and the application should be struck out under Rule 193 of the Family Courts Rules.

[18] Mr Ireland submitted:

(a) The proceedings should be allowed to go to a full hearing;

(b) Ms OG and her family continue to have grave concerns about Mrs VK's welfare; they believe she remains very much under the

influence of Mr JK and that it suits him to have her live in circumstances in which she is isolated from the rest of the family;

(c) Some caution is required with respect to Mrs VK's current capacity; while it was accepted that Mrs VK had capacity at the date she was interviewed by Dr Casey, no comprehensive examination of her as suggested by Dr Casey "if there were specific legal matters on which decisions were required in the future" had been carried out. Nevertheless he did not contend that Mrs VK is currently mentally incapable;

(d) An overly technical approach is not to be adopted when it comes to jurisdiction;

(e) The possible sources of jurisdiction to make the orders sought are ss 102, 103 and 105 of the Act;

(f) It was accepted s 102(2) does not apply as that only applies when a donor has become mentally incapable;

(g) Section 103(1) gives the Court jurisdiction to review any decision made by an attorney acting under an EPA while the donor is or was mentally incapable. Section 103(3) provides that the application for a review may be made while the EPA is in force or after it is revoked by the death of the donor or otherwise, and s 103(4) provides that the Court may, if it thinks it reasonable to do so in all the circumstances, review the decision and make any order it thinks fit;

(h) The power under s 103(4) to make "any order it thinks fit" includes the power to revoke an EPA;

(i) During the time Mrs VK was incapable, Mr JK made various decisions (including disputes he had with hospital authorities and his efforts to restrict family access to Mrs VK) which Ms OG considered

to be totally unreasonable, and these actions or decisions mean that the EPA should be revoked under ss 103(4) or 105;

(j) Section 105(1)(a) relevantly provides that the Court may in any proceedings under ss 101, 102A or 103 revoke the appointment of an attorney under an EPA if it is satisfied that the attorney is not acting, or proposes not to act, in the best interests of the donor;

(k) The Act was amended in 2007. Before the amendment, s 105(1)(a) provided that where a Court was satisfied that an attorney under an EPA "has not acted, is not acting or proposes not to act in the best interests of the donor of that power", the Court may revoke the appointment of the attorney. The section was amended to refer to proceedings under ss 101, 102A and 103, and by the deletion of the words "has not acted";

(l) The omission of the words, "has not acted" from the section was likely to have been an accidental drafting slip because:

(i) The clause by clause analysis in the explanatory note to the Bill when it was introduced stated:

> Subsection (1) of section 105 enables the Court to revoke an attorney's appointment if it is satisfied the attorney has not acted, is not acting, or proposes not to act in the attorney's best interests;

(ii) It would be illogical to interpret s 105(1)(a) as having "a temporal aspect"; the reality is that the Court can only review what has already happened and the section should be interpreted as if the words, "has not acted" remain in the section.

Statutory provisions

[19] The provisions of the Act dealing with enduring powers of attorney are set out in Part 9.

[20] The purpose of Part 9 is set out in s 93A and includes to enable a person to grant to another person an EPA to act in relation to the donor's personal care and welfare if the donor becomes mentally incapable. Part 9 sets out the requirements for creating an enduring power of attorney, defines when a person is mentally incapable for the purposes of Part 9, states the duties of an attorney, sets out the Court's jurisdiction in respect of an EPA, provides for the review by the Court of any decisions of an attorney and establishes the circumstances in which an EPA may be suspended or revoked.

[21] Section 93B(1)(b) provides that every person is presumed, until the contrary is shown, to have the capacity:

> (a) to understand the nature of decisions about matters relating to his or her personal care and welfare; and
>
> (b) to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; and
>
> (c) to communicate decisions about those matters.

[22] Section 98A applies to an attorney acting under an EPA in relation to the donor's personal care and welfare and provides:

> [2] The paramount consideration of the attorney is the promotion and protection of the welfare and best interests of the donor, while seeking at all times to encourage the donor to develop and exercise his capacity to –
>
> (a) Understand the nature and foresee the consequences of decisions relating to his or her personal care and welfare; and
>
> (b) Communicate such decisions;

[3] Without limiting the generality of subsection [2], the attorney must:

(a) Encourage the donor to act on his or her behalf to the greatest extent possible; and

(b) Seek to facilitate the integration of the donor into the community to the greatest extent possible;

[4] When deciding any matter relating to the donor's personal care and welfare, the attorney must give due consideration to the financial implications of that decision in respect of the donor's property.

[23] When acting under a EPA, an attorney has a duty to consult as far as is possible with the donor and, in relation to any particular matter, any person specified in the EPA to be consulted: s 99A(1).

[24] An attorney must promptly comply with any request for information relating to the exercise of the attorney's powers under the EPA if:

(a) The person requesting the information is specified in the EPA as a person to be provided with such information and the information requested is the kind of information specified in the EPA to be provided to that person;

(b) The person requesting the information is a barrister or solicitor appointed under s 65 and the information requested is the kind of information specified in the EPA.

[25] Section 102 of the Act gives the Court jurisdiction to do any or all of various defined things in respect of an EPA, where the donor has become mentally incapable. The section does not specifically give the Court power to revoke an EPOA.

[26] Section 103 of the Act provides that any of a defined group of people (including a relative of the donor) may at any time apply to the Court to review any decision made by an attorney acting under an enduring power of attorney while the donor is or was mentally incapable.

[27] Further, the section provides:

[3] For the avoidance of doubt, an application for review may be made while the enduring power of attorney is in force or after it is revoked by the death of the donor or otherwise.

[4] The Court may, if it thinks it reasonable to do so in all the circumstances, review the decision and make any order it thinks fit.

[28] Section 105 of the Act relevantly provides:

[1] The Court may, in any proceeding commenced under ss 101, 102A or 103, revoke the appointment of an attorney under the enduring power of attorney if it is satisfied that the attorney:

(a) Is not acting, or proposes not to act, in the best interests of the donor; or

(b) Is failing, or has failed, to comply with any of the attorney's obligations under s 99A or 99B or proposes not to comply with any of those obligations.

Family Court Rules

[29] Rule 193 of the Family Courts Rules provides:

193 Striking out pleading

(1) The Court may order that all or part of an application or defence or other pleading be struck out if the pleading or part of it—

(a) discloses no reasonable basis for the application or defence or other pleading; or

(b) is likely to cause prejudice, embarrassment, or delay in the proceedings; or

(c) is otherwise an abuse of the Court's process.

(2) An order under subclause (1) may be made by the Court—

(a) on its own initiative or on an interlocutory application for the purpose:

(b) at any stage of the proceedings:

(c) on any terms it thinks fit.

Discussion

[30] I find that Mrs VK lacked capacity for a period of about six months between October 2015 and the end of March this year and the EPA was in effect during this

period. Since the end of March this year, she has had full capacity to make decisions about her personal care and welfare.

[31] Section 102 of the Act applies only when a donor has become mentally incapable and, I infer from the wording of ss (2), remains mentally incapable. The section does not give the Court the jurisdiction to revoke an EPA.

[32] Section 103 of the Act gives the Court jurisdiction to review a decision or decisions of an attorney and make any order it thinks fit. To review a decision implies that the decision was made in the past. This would enable the Court to consider decisions made by Mr JK during the six months Mrs VK was incapacitated and, on the face of the section, the discretion given by s 103(4) is sufficiently broad to enable the Court to revoke an appointment.

[33] But the path to revocation must still go through the gate provided by s 105; the section specifically applies to a proceeding commenced under s 103, and s 105 would be redundant if the Court could revoke an EPA on the basis of s 103(4) alone.

[34] With respect to s 105(1)(a), there is some force in Mr Ireland's submission that the omission of the words, "has not acted" may have been the result of a drafting slip at the time the Act was amended in 2007. This conclusion is supported by the explanatory note to the Bill, and because the Court in considering whether to revoke an appointment, would in most cases be considering what has happened in the past. Further, 105(1)(b) enables the Court to look to the past when considering whether an attorney "has failed" to comply with the attorney's obligations under ss 99A or 99B and it is difficult to see why the same should not apply when the Court is dealing with the attorney's obligation to act in the best interests of a donor.

[35] But I do not consider that I can read s 105(1)(b) as if the words, "has not acted" remain in the section. It is not for the Court to read into a section words which significantly change the section's effect; the Court's task is to apply the clear words of the section. If there was a drafting slip, that would be for Parliament to remedy rather than the Court.

[36] I accept Mr Jefferson QC's argument that there is a temporal aspect to the interpretation of s 105(1)(a); all the Court can do is look at the present situation and make a predictive assessment as to the future. Mrs VK now has full capacity; she could revoke the EPA herself should she wish to do so, or alternatively, expressly confirm it. For the Court to revoke the EPA while Mrs VK has capacity would be inconsistent with the scheme of the Act and the presumption of competence. I conclude that the Court does not have jurisdiction to revoke the EPA because the Court cannot intervene where a donor has capacity.

[37] Although in view of this conclusion it is not strictly necessary for me to do so, I turn to consider the evidential basis for the application to review Mr JK's decisions.

[38] It is noteworthy that the application to revoke the EPA and review Mr JK's decisions was not made on the grounds in s 105(1)(b), namely that he "is failing, or has failed, to comply with any of the obligations under s 99A or 99B, or proposes not to comply with any of those obligations".

[39] In essence, the evidence of Ms OG and RG was that when they visited Mrs VK in [location deleted], Mr JK had assumed full power to make decisions without consulting either of them, he prevented them from seeing Mrs VK, he obstructed them from receiving information about Mrs VK's medical condition and he appeared to be misleading her about various matters, including the nature of the proceedings brought by Ms OG and who would pay for the costs of her rehabilitation in [name of country deleted].

[40] But the EPA gave to Mr JK authority to act in relation to Mrs VK's personal care and welfare and he was entitled in terms of the EPA to assume "full power" to act in respect of her medical treatment and personal care. The EPA did not specify any person to be consulted or to receive information and Mr JK was therefore under no legal obligation to consult with Ms OG and Mr RG; nor was he under any legal obligation to give them any information about Mrs VK's medical condition or treatment. Mr JK's paramount consideration was to promote and protect Mrs VK's welfare and best interests. Ms OG accepted that Mrs VK was very well treated by

the medical staff at the [location deleted] Hospital and there was no complaint about arrangements Mr JK made for Mrs VK's admission to hospital and the treatment she received in the hospital.

[41] What is left are allegations that Mr JK appeared to be misleading Mrs VK about various matters and in some way exercised undue influence on her. Assuming that these allegations are well founded, Mrs VK has now fully recovered her capacity, and it is very difficult to see what relief a Court could provide short of revoking the EPA, which the Court lacks jurisdiction to do. It is likely these allegations would be more appropriately dealt with under s 102(1)(i) (under that provision the Court can 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) but as Mrs VK is not mentally incapable, this section has no application.

[42] I have considered whether there is a likelihood of further evidence being provided which would raise other matters of more significance but there was no response to the notice given to Ms OG in June to identify specific decisions sought to be reviewed and the relief sought. I therefore infer that no further evidence will be forthcoming.

[43] For these reasons, I find there is no reasonable basis for the application to review Mr JK's decisions under the EPA.

Orders

[44] I make the following orders:

(a) The application for an interim order appointing a welfare guardian of Mrs VK or, in the alternative, for a personal order directing the return of Mrs VK to New Zealand for her rehabilitation in New Zealand, is withdrawn by leave;

(b) The application for an order reviewing the decisions made by Mr JK under the EPA and for any other order under s 103 of the Act, and for an order revoking the EPA is dismissed;

(c) Counsel are to file memoranda as to costs, contemporaneously, within 28 days.

A J Twaddle
Family Court Judge