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

IN THE FAMILY COURT
AT AUCKLAND

FAM 2016-004-000737
[2017] NZFC 1000

IN THE MATTER OF	THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988
BETWEEN	RICHARD CHARLES WORRALL Applicant
AND	PH Person in respect of whom the Application is made

Hearing:	14 December 2016
Appearances:	A Finnie and B Mills for the Applicant J Collinge for the Family R Thomson for the Subject Person
Judgment:	6 March 2017

RESERVED JUDGMENT OF JUDGE A M MANUEL

Introduction

[1] This is an application for interim and final orders under ss 10 and 14 under Part 1 of the Protection of Personal and Property Rights Act 1988 (the PPPRA).

[2] It was made in August 2016 by Richard Worrall, a medical specialist employed by the local District Health Board (DHB). It concerns PH, a 77 year old woman who suffers from dementia. If made, the orders sought would result in Mrs PH:

(a) Residing at [Hospital name deleted] (or any other facility nominated by the DHB);

(b) Receiving medical care and attention as nominated by her medical practitioner; and

(c) The Public Trust giving all assistance necessary to give better effect to the orders.

[3] The application is opposed by Mrs PH's family; her husband GH and her adult daughter TH.

[4] The dispute is over a jurisdictional issue. For a Court to make the orders sought the requirements of s 6 of the PPPRA must be met. Section 6 relevantly provides that:

> **6 Jurisdiction of court under this Part**
>
> (1) Subject to subsection (2), a court shall have jurisdiction under this Part in respect of any person who is ordinarily resident in New Zealand and who—
>
> (a) lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; or
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> (b) has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters.
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> (2) Subject to section 12(3), no court has jurisdiction under this Part in respect of a person who has not attained the age of 18 years and who—
>
> (a) is not, and never has been, married or in a civil union; or
>
> (b) is 16 years old or older and is not living, and never has lived, with another person as a de facto partner.
>
> …

[5] It is agreed that two of the three s 6 PPPRA requirements are met (age under s 6(2) and incapacity under 6(1)(a)). The issue is whether Mrs PH is a person who is

"ordinarily resident in New Zealand". The family maintain that Mrs PH, who arrived in New Zealand from the Cook Islands on 3 May 2016 and has remained here since, is not ordinarily resident in New Zealand and consequently the application should be dismissed.

Background

[6] Mrs PH was born in the Cook Islands on [date deleted] 1940. By virtue of the Cook Islands Constitution Act 1964, Mrs PH is a New Zealand citizen. The Cook Islands is part of the Realm of New Zealand and Cook Islanders are New Zealand citizens accordingly. Mrs PH holds a New Zealand passport. As a young woman she spent some years in New Zealand attending high school and subsequently training [qualification details deleted] but most of her life has been spent in the Cook Islands.

[7] In 1962 she married Mr GH. The couple had two daughters, [details deleted]. Despite separating many years ago they remained married legally and continued to live in close proximity; Mrs PH in a home [details deleted] and Mr GH with their daughter TH in a home about 500 metres away.

[8] With the onset of Alzheimers, Mrs PH's health began to gradually decline. For some years she continued to drive, albeit erratically, and carry out [job details deleted]. Her [details deleted] role was halted about three years ago after the demands on her abilities became too great. By early 2016 the family was struggling to cope with her care, even with a local daycare facility providing carer respite three days a week.

[9] In April 2016 the family arranged for Mrs PH to travel to Brisbane, Australia, to spend time with [details deleted] family in the hope that a change of environment amongst close friends would help to settle her. TH accompanied her mother to Brisbane then returned to Rarotonga. Within a short time it became apparent that [details deleted] family could not manage Mrs PH's care. Her behaviour became "impossible, rude and sometimes threatening". She wandered off and the police had to be called on two occasions.

[10] As a result of the increasing difficulties with managing Mrs PH's care, the family discussed the relevant Cook Islands legislation with Mrs PH's doctor, Dr Fariu. It was explained to them that although the legislation[1] provided a framework for inpatient treatment, there were currently no such facilities available. Persons who needed to be detained, such as Mrs PH, were committed to the local prison. This prospect was "appalling" and "quite unacceptable" to the family.

[11] In late April 2016 the family arranged to meet with the Cook Islands Minister of Health and, with his assistance, arrangements were made between the relevant authorities in the Cook Islands and New Zealand for Mrs PH to be referred to New Zealand for assessment and treatment under the Cook Islands Patient Referral Policy of August 2010. Under the policy document there was provision for Mrs PH to be repatriated to the Cook Islands once a discharge summary or medical clearance was provided.[2]

[12] On 3 May 2016 Mrs PH arrived in Auckland, New Zealand, from Brisbane accompanied by TH. By that time Mrs PH wholly lacked capacity.

[13] Initially Mrs PH and her daughter stayed at a motel in Auckland. When she was seen by medical practitioners she was promptly admitted to the Fraser McDonald Unit at Auckland City Hospital. She was diagnosed as having a mental disorder and made the subject of a compulsory inpatient treatment order under the Mental Health (Compulsory Assessment and Treatment Act) 1992 (MHA) on 2 June 2016. She underwent pharmaceutical and other treatment which changed from time to time under the assessment of the medical practitioners responsible. Meanwhile TH returned to Rarotonga on 11 May 2016.

[14] Over time the DHB reached a clinical decision that Mrs PH required care, rather than assessment and treatment.

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1 The Cook Islands Act 1915 (Part XXI) and the Ministry of Health (Mental Health) Regulations 2013.

2 Policy document p 11 Activation of Repatriation 1.i.

[15] Prior to this application being made Mrs PH was placed on leave under s 31 MHA and was accepted at [Hospital name deleted] Hospital, where she is currently residing, on that basis.

[16] The DHB took the view that the MHA was neither designed nor intended to provide a legal framework for the care of dementia patients such as Mrs PH in residential care in the community. If she were to remain under the MHA it would be under the umbrella of a s 29 MHA order, but the terms of such orders are limited in that Mrs PH could not be directed to reside in care, leaving her and her caregivers without any legal framework to underpin her placement at [Hospital name deleted] Hospital or any other facility.

[17] On 1 December 2016, when the compulsory treatment order expired, the DHB elected not to seek an extension of the order. There is no current legal framework in place for Mrs PH at [Hospital name deleted] Hospital under any legislation.

[18] When the DHB requested the family make the present application they declined to do so. The concern was that if orders were made Mrs PH would lose rights and entitlements in the Cook Islands such as her Cook Islands pension. The family wished to have a suitable facility established in the Cook Islands and for Mrs PH to be repatriated and cared for there. They had been agitating towards this end, apparently with some success.

[19] But at the date of hearing Mrs PH's health prevented her from returning to her home and former manner of living. There was no secure care facility available in the Cook Islands and the family was unable to provide secure care for Mrs PH themselves.

[20] I was invited by counsel for the family to enter into a discourse and make findings about:

(a) the decision of the DHB not to apply to extend the compulsory treatment order; and

(b) the current lack of treatment facilities available in the Cook Islands.

[21] These are matters which are beyond the issue for determination and I decline to do so.

The law as to jurisdiction

[22] The expression "ordinarily resident" has been considered at various times, in various jurisdictions and various statutory contexts.

[23] In *R v Barnet LBC v Ex p Shah*[3] the UK House of Lords considered whether four foreign students qualified for an education grant on the basis that they had been "ordinarily resident" in the United Kingdom throughout the three years preceding the first year of their course. The statutory authorities argued that their ordinary residence, in the sense of their "real home", was elsewhere. The House of Lords disagreed. Lord Scarman, in the leading speech, made the following statement about the "natural and ordinary meaning" of the term:[4]

> Unless, therefore, it can be shown that the statutory framework or the [legal] context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.
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> …
>
> And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

[24] Where there is no voluntary adoption of residence (as in the case of Mrs PH, who lacks capacity) it is customary to apply the tests in *R v Waltham Forest LBC v*

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3 [1983] 2 AC 309.
4 Page 343G-H.

Ex parte Vale[5]. There were two tests but the first can be disregarded as not applicable in the present case. The second is as follows:

> In cases where the first test is not appropriate, for example when the parents were dead, a person's ordinary residence should be determined as if they had capacity, looking at the person's physical presence in an area and the purpose of that presence, in line with the *Shah* test, but without the person having to have adopted their residence voluntarily.

[25] *Vale* concerned a woman mentally incapable of forming a settled intention of where to live. She had been living in residential care in Ireland for many years where her parents had been living. When her parents returned to England it was decided she would return to live near them. She stayed with them at their new home at Waltham Forest for a few weeks before a suitable residential home was found. Then she was placed in a home in Buckinghamshire. A shortfall in costs for her care was sought from Waltham Forest on the grounds that she was "ordinarily resident" there.

[26] Subsequently, in the case of *R (on the application of Cornwall Council) v Secretary of State for Health*[6] Lord Carnwath on behalf of the UK Supreme Court concluded that the *Vale* tests should not be treated as separate legal tests:

> Rather they were complementary, common-sense approaches to the application of the *Shah* test to a person unable to make decisions for herself; that is, to the single question whether her period of actual residence with her parents was sufficiently "settled" to amount to ordinary residence.

[27] In *Chief Executive of the Ministry of Social Development v Greenfield*[7] the New Zealand Court of Appeal determined the meaning of the words "ordinarily resident in New Zealand" as they appeared in s 8(a) of the New Zealand Superannuation and Retirement Act 2001 (NZSRA).

[28] Mrs Greenfield was a New Zealand missionary who had lived in Singapore since 1993. Her application for New Zealand superannuation in 2012 upon turning 65 was declined on the grounds that in terms of s 8(a) NZSRA she was not "ordinarily resident" in New Zealand at the date of her application.

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5 Unreported, 11 February 1985.
6 [2015] UKSC 48 at [47].
7 [2014] NZCA 611.

[29] Mrs Greenfield had not lived in New Zealand since 1993 apart from returning to the country for temporary visits. She had family in New Zealand and continued to own a residential property which she used when she made her visits. She gave evidence that she intended to retire in New Zealand but there was no clear return date.

[30] In its judgment, the Court of Appeal applied the relevant principles of statutory interpretation, having regard to both the immediate and general legislative context. In the absence of any statutory definition in the NZSRA, the starting point was the meaning of the expression ascertained from dictionary definitions:

> [26] The New Zealand Oxford Dictionary gives the following relevant definitions:
>
> "ordinarily" – normally; customarily, usually
>
> "resident" – a permanent inhabitant,
>
> [27] When the two definitions are read together, the expression refers simply to the place where a person usually lives. The concept of permanence is reinforced by the definition of "reside" which includes "to dwell permanently".
>
> [28] Questions whether absences, temporary, lengthy or indefinite, and whether intentions, subjectively or objectively ascertained, are relevant and, if so, to what extent, are not answered by the text of the expression. They need to be considered therefore in the light of the purpose of the provision.
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> [29] The purpose of the requirement that an applicant for New Zealand superannuation be "ordinarily resident in New Zealand" on the date of their application is to provide a degree of connection between the applicant and New Zealand. Parliament has decided that only applicants with the requisite degree of connection should be entitled to apply for New Zealand superannuation.

[31] Adopting a practical approach, the Court of Appeal held that the expression "ordinarily resident" was to be interpreted to cover the following further elements:

> [32] …
>
> (a) Physical presence here other than casually or as a traveller;
> (b) Voluntary presence;
> (c) Some intention to remain in the country for a settled purpose;
> (d) Continuing residence despite any temporary absences; and
> (e) Residence in New Zealand rather than anywhere else. …

> [33] We also consider that "ordinarily" means something more than "residence", indicating the place where a person regularly or customarily lives, as distinct from temporary residence in a place for holiday or business purposes.

[32] Finally, the Court held at [34]that the expression "ordinarily resident"

> … will be a question of fact in each case. In other words, an objective determination will be required based on an assessment of all the relevant factors in the particular case.

[33] In *KBC v JEC*[8] the New Zealand Family Court considered the issue of ordinary residence under the PPPRA in respect of an Australian woman.

[34] The Family Court noted that:

> [44] Parliament could have included a definition of "ordinarily resident in New Zealand" in the *Protection of Personal and Property Rights Act 1988,* as it did in s 218 of the Child Support Act 1991, but it did not. It is the Court's duty, therefore, under s 5 of the *Interpretation Act 1999* to ascertain the meaning of this expression from the text of the Act and in light of the provision's purpose.
>
> [45] The purpose of the Act is stated in its short title as being "to provide for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs." The purpose of the provisions I am required to interpret is to define the class of persons entitled to those protections.
>
> [46] On the one hand, it is similar to those provisions which circumscribe those to whom our taxation and welfare laws apply and those over whom the Government has obligations under the Hague Convention. It is different from those provisions, on the other hand, in that it is not concerned with the rights or obligations of New Zealand citizens or those within its borders but is an example of the state's paternalism towards those unable to make informed decisions for themselves.

[35] Having reviewed the UK cases of *Thompson v Ministry of National Revenue*[9] and the aforementioned *Shah*, the Family Court concluded that:

> [65] … in determining whether J is "ordinarily resident in New Zealand" I am primarily concerned with immediately past events and the usual order of her life including where she has lived in recent times. Although I am required to determine whether her residence in New Zealand is voluntary or for a settled purpose, the inquiry is more objective than subjective. Accordingly, I am to be more concerned with what she did than why she might have done it. Nor am I to be

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8 (2005) NZFLR 989.
9 (1948) SCR 209.

> particularly concerned about her intention or expectation for the future because the focus is upon her actions viewed objectively. The fact that some of those actions may have been taken without a full appreciation of the surrounding circumstances at a time when she may have been incapable of making informed decisions of that type, is immaterial.

[36] The Family Court granted the application and held at [66] that:

> … the very persons requiring protection under the Act are likely, in the months or years preceding the application, to have taken decisions without having the capacity to appreciate their significance. Were a millionaire from Australia suffering from such a disability to be found sleeping on the steps of Christchurch Cathedral, it is hard to believe that Parliament would have contemplated that the State's protection under the Act would only be available if it could be established that this millionaire had the intellectual capacity to both make an informed decision to come to this country and to have a settled purpose for being here.

[37] In *KBC v JEC*, J had left Australia in mid-October 2004 and was found to be ordinarily resident in New Zealand by January 2005, less than three months later. There are two differences of note between that case and the present one. One, that the capacity of J was seemingly much less impaired than that of Mrs PH. While Mrs PH is wholly incapable, J at least had significant partial capacity. The other, that while Mrs PH is a New Zealand citizen, J was not.

Submissions for the family

[38] Counsel for the family argued that Mrs PH had lived 69 of her 77 years in the Cook Islands. Her car and home were there. So too were her roots, her family, her pets and her household effects – everything in fact apart from a few personal possessions which had been taken with her to the hospital. She had a Cook Islands pension (not a New Zealand one) and her employment and tax records were held there.

[39] It was argued that involuntary referral and compulsory detention for treatment for the seven months to the date of hearing was not a basis for being "ordinarily resident" and was insufficient to override Mrs PH's permanent association with the Cook Islands. The duration of her stay was not determinative; it was the purpose of the stay as part of the regular order of life which was central and

relevant to the *Shah* test. The nature and purpose of her residence was to receive treatment for a mental disorder and care associated with that, which was not a settled purpose but a transient one. It was clear from the medical reports that she believed she was still in the Cook Islands [details deleted] continuing the regular and usual order of her life.

[40] Counsel for the family submitted the *KBC v JEC* case, which was relied upon by the DHB in support of the application, was distinguishable. In that case, the subject person had left Australia voluntarily and knew that when she left Australia she was unlikely to ever live there again but would be beginning a new life in New Zealand with family and friends. In this case, the referral was via Mrs PH's caregivers and decision makers and she has no immediate family or friends in New Zealand.

[41] Consistent with the approach in *Greenfield*, whether a person is ordinarily resident in New Zealand depended on matters such as intention to reside or remain (there was none), the presence of assets, income earned or taxes paid (there were none), or commitment and involvement (there was none). In short, there was no close and clear connection between Mrs PH and New Zealand; her purpose from the outset was regarded as temporary and her return to the Cook Islands contemplated.

[42] While the DHB emphasised the purpose of the PPPRA for those who could not manage their affairs, the submissions advanced by counsel for the DHB overlooked the fact that the state's protection was subject to the "ordinarily resident" qualification and that the reasons for declining to extend the paternalism too far were fiscal and administrative. The intention of Parliament as to the ambit of the PPPRA could not be ignored.

Response to submissions for the family

[43] I express my gratitude to counsel for the family for the care and thoroughness of his submissions and research. Nevertheless, I am not persuaded to concur with him for the following reasons:

The purpose of the residence

(a) While the family may prefer to characterise the purpose of Mrs PH's residence in New Zealand as transient rather than settled, the purpose is not transient. It is to address her dementia which is a long term, ongoing concern. When Mrs PH was transferred to New Zealand it was because the existing arrangements for her care were unsatisfactory, there were no suitable facilities available for her care in the Cook Islands and her family could not provide the secure care which she needed. The position remains unchanged. It follows that the purpose for Mrs PH's residence in New Zealand is neither temporary nor transient. It is a settled purpose.

"Involuntary" decision

(b) The decision to reside in New Zealand is described by the family as involuntary. However while the decision was involuntary on Mrs PH's part, it was a deliberate decision on the part of her caregivers and decision makers. There was agreement between the family and the Cook Island and New Zealand authorities that she should reside in New Zealand for a particular purpose. Moreover, the *Cornell Council* case is authority for the proposition that where the subject person is incapable of making decisions for herself, the question of ordinary residence should be decided on an objective rather than subjective basis.

Intentions: subjective and objective

(c) The intention of the family (that Mrs PH should be repatriated to the Cook Islands at some time in the future) is inappropriately elevated in the submissions made on their behalf. On an objective analysis, Mrs PH is resident in New Zealand because she was transferred here by agreement for assessment, treatment and care. She remains here for that purpose. As stated, there is no prospect of her returning to her

former manner of living because her health would not permit it. There are no appropriate facilities for her secure care in the Cook Islands. Her family, quite understandably, cannot provide secure care for her. The reality is that Mrs PH is in long term hospital care at [Hospital name deleted]. Her former usual residence in the Cook Islands has been lost as a result of decisions made on her behalf and by dint of circumstance.

Ordinary residence and domicile

(d) The submissions for the family tend to conflate "domicile" with "ordinarily resident", but the two concepts are distinct.

Analysis

[44] In the absence of any definition of "ordinarily resident" in the PPPRA, the meaning of the expression must be ascertained under s 5 of the Interpretation Act 1999 - from the text and in the light of the purpose of the PPPRA.

[45] The starting point is the meaning given in the dictionary definition. The New Zealand Oxford Dictionary gives the definition referred to in *Greenfield*:

"ordinarily" – normally; customarily, usually

"resident" – a permanent inhabitant.

[46] As stated in *Greenfield* the Court of Appeal held that when these two definitions were read together the expression refers "simply to the place where a person usually lives".

[47] The purpose of the expression "ordinarily resident" in the PPPRA is to provide a degree of connection between the applicant and New Zealand. Applicants who are "ordinarily resident" in New Zealand have the requisite degree of connection for orders under Part 1 of the PPPRA to be made. Other applicants do not. The expression was included in the legislation to put a fiscal and administrative barrier in place. While the purpose of the legislation may be paternalistic, the

paternalism is subject to restraints. Those who are made subject to orders under Part 1 of the PPPRA are required to have a close and clear connection to New Zealand.

[48] There are two factual matters which are particularly relevant to establishing Mrs PH's close and clear connection with New Zealand. The first is the factor of her New Zealand citizenship. The second is the basis on which she came to New Zealand. When reaching agreement that Mrs PH reside in New Zealand for care, I infer that the relevant authorities must have contemplated that some financial and administrative responsibility would or might flow from that decision.

[49] Applying the "practical approach" enunciated in *Greenfield*, I find that Mrs PH's presence is "other than casually or as a traveller", is a "continuing residence", and is "residence in New Zealand rather than anywhere else". The elements of "voluntary presence" and "intention to remain in the country for a settled purpose" are not apposite because of Mrs PH's total incapacity.

[50] In terms of the *Vale* tests, as modified in *Cornwall Council*, Mrs PH's physical presence in New Zealand (for a period of seven months in hospital care) and the purpose of her presence (for the assessment, treatment and care of dementia) are sufficiently settled to amount to ordinary residence.

[51] In summary, Mrs PH is resident in New Zealand for a settled purpose and as part of the regular order of her life for the time being. There is a sufficient degree of continuity to be properly determined as settled.

Decision

[52] Mrs PH is ordinarily resident in New Zealand and jurisdiction in terms of s 6 of the PPPRA is established.

[53] Final orders in terms of paragraphs 1 and 2 of the applicant's application of 3 August 2016 are granted for a period of three years from the date of this judgment.

[54] No submissions were made in respect of the interim order sought at paragraph 3 (appointment of the Public Trust to give better effect to the above

orders). It is unclear whether the applicant intends to pursue this. If so, a memorandum is to be filed within seven days and any response is to be filed seven days thereafter.

[55] Should costs be sought, a memorandum is to be filed within 14 days and any reply is to be filed 14 days thereafter.

[56] In the case of an appeal, the orders at [53] above are not to be suspended in part or in whole pending determination of the appeal.

A M Manuel
Family Court Judge