

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT WELLINGTON**

**FAM-2017-085-000192
[2017] NZFC 6782**

IN THE MATTER OF	The Protection of Personal and Property Rights Act 1988
BETWEEN	[LP] [BM] Applicants
AND	[DM] Person in Respect of Whom Application is Made

Hearing: On the Papers

Appearances: G F Kelly and K H Lawrence for Applicants
C J Dellabarca - Counsel for the Subject Person

Judgment: 28 August 2017

JUDGMENT OF JUDGE A P WALSH

Introduction

[1] The applicants, [LP] and [BM], are the parents of the subject person, [DM] ([DM]). They have made the following applications:

- (a) The appointment of [BM] as Welfare Guardian of [DM]
- (b) The appointment of [LP] as Property Manager for [DM].
- (c) An application to settle property on a Trust pursuant to s 62 of the Protection of Personal and Property Rights Act 1988.

[2] For reasons which follow, no issues arise about the appointment of a Welfare Guardian and Property Manager for [DM]. The issue to be determined is whether it is in the welfare and best interests of [DM] to settle property owned by him, comprising funds on deposit with the Bank, on the trust.

Background

[3] [DM] suffers from severe autism and epilepsy; he is described as being severely intellectually disabled. In his report 17 July 2017, Mr Dellabarca submitted there was jurisdiction having regard to these factors:

- (a) A report 2 February 2017 from [DM's] general practitioner confirmed [DM] suffered from severe autism and epilepsy and was severely intellectually disabled. There was no realistic prospect of [DM] recovering from this disability.
- (b) [DM] is now aged 24 years.
- (c) [DM] wholly lacks the capacity to understand the nature and to see the consequences of decisions in respect of matters relating to his personal

care and welfare. There is jurisdiction under s 6 of the Act to consider the application.

- (d) [DM] wholly lacks the competence to manage his own affairs in relation to property. There is jurisdiction to consider the application under s 25 of the Act.

[4] [DM's] siblings, [names deleted], had filed statements of consent in relation to the applications for appointment of Welfare Guardian and Property Manager.

[5] Mr Dellabarca supported the applications for appointment of [BM] as Welfare Guardian and [LP] as Property Manager. Given [DM's] intellectual disability, Mr Dellabarca advised it was not appropriate for him to be served with the applications and his presence should be excused at any Court hearing.

The Proposed Settlement to the Trust

[6] The applicants considered [DM's] assets, which comprise approximately \$60,000 on bank deposit, would not otherwise warrant the administration and expense involved in having a Property Manager. He receives a disability benefit from Work and Income of approximately \$262.64 per week. He had two bank accounts which were used for his day-to-day expenses. His term deposit was not being used at present and was accumulating interest. They proposed the term deposit be settled on a trust with further accumulated funds held in [DM's] name to be transferred to the trust from time-to-time.

[7] The applicants wish to protect [DM's] assets so that when the time came where they were no longer able to care for him, the assets would be protected and able to be administered by later trustees. On [DM's] death the majority of his assets then remaining would be administered according to the trust fund.

[8] A Deed of Trust 12 May 2017 had already been executed and a copy of the Trust Deed was produced. I note the following features of the Trust Deed –

- The applicants in their capacities as Settlers of the Trust had paid the sum of \$10 upon creation of the Trust, which was to be known as the “[DM] Family Trust”.
- [DM’s] parents are the Trustees.
- [DM] is the primary beneficiary.
- [DM] siblings, nieces, nephews and parents are discretionary beneficiaries.
- The final beneficiaries, who take the trust fund on the date of distribution (in 80 years) are [DM’s] siblings. Their children will take in their stead if they are not alive at that date. It is not anticipated [DM] will ever have children, but it is noted the Trust Deed allows for the addition of discretionary beneficiaries within a limited class and [DM’s] children, if any, would fall within this class.
- Clause 6.4 provides (in summary), no sole trustee who is also a beneficiary may exercise certain powers in favour of themselves or any relative, other than the primary beneficiary ([DM]).
- Clause 8.8 expressly prohibits any self-benefit by a sole trustee.
- Clause 8.14 provides that discretionary beneficiaries can be added from within a limited class (those for whom the settlers have a natural love and affection) and provides that discretionary beneficiaries can be removed. However, as [DM] is the primary beneficiary he cannot be removed as a beneficiary.

[9] Mr Dellabarca was unclear as to how the settling of [DM’s] property on a trust is consistent with the principles in the Act. He understood from discussions with counsel for the applicants, one of the principal reasons for the establishment of a trust, is to avoid if possible the need to reapply for orders in respect of management of [DM’s] funds when the current orders expire in three or five years time. While

understanding the concerns of the applicants about repeated applications, Mr Dellabarca noted their position was no different from any other applicants who brought applications under the Act.

[10] Having regard to [DM's] welfare and best interests, Mr Dellabarca raised the issue as to whether the establishment of a trust simply created a further layer of removal of control of [DM's] property from him. He acknowledged [DM] was unlikely to be able to manage his affairs at any point in the future, but he was unclear as to why [LP], as Property Manager, would be unable to manage his property as a Property Manager rather than having assets transferred to the trust.

[11] Mr Dellabarca also raised the issue of what was to happen if either, or both the applicants in their capacities as trustees, were to become unable to carry out their role or passed away. If the Court was to contemplate an order to settle property on the trust as sought by the applicants, he recommended in the event of either of the trustees being unable to carry out their role, that an independent professional trustee, for example the Public Trust or the Perpetual Trustees, be appointed to act in that capacity and that no person who had a beneficial interest pursuant to the terms of the trust be appointed as trustee.

[12] Mr Dellabarca emphasised he was not suggesting the beneficiaries would not carry out the role which is envisaged in the trustee capacity, but he raised the issue of potential conflict.

[13] If any property was to be settled on the trust, he sought a stipulation on [DM's] behalf, that the trustees clearly recorded [DM] was to be the sole beneficiary during his lifetime.

[14] Addressing the concerns of the applicants about the requirement to file annual reports in respect of property management, Mr Dellabarca noted the statutory requirement was designed to ensure [DM's] assets were protected and properly managed. He anticipated the trust would also have similar reporting obligations. In that sense there was no saving of expense likely to be achieved and if trust accounts

were to be annually reviewed, it was possible expense would be greater than the report provided in relation to property management alone.

[15] If the application to settle property on the trust was not granted, Mr Dellbarca submitted consideration be given to completion of a will for [DM].

[16] Counsel for the applicants noted [DM's] siblings had no interest in the bank account, the subject of the order and had given their consents to the proposed settlement on the trust.

[17] The order to settle property on the trust was sought primarily to facilitate management of the relatively minimal property of [DM]. Preparing and filing applications to have orders renewed by the Court and updated as necessary every three years in relation to a fund presently worth only \$60,000 may be:

- (a) Administratively onerous given [DM's] age and expected lifespan; he is currently in good physical health; and
- (b) Excessive, considering the expense involved relative to the size of the fund.

[18] A one-off application to settle [DM's] property in a trust would streamline the management of this property over the course of his years. It would also simplify the distribution of his assets on his death and obviate the need for a will to be drafted.

[19] Time and expense would be saved when [DM's] parents can no longer act as trustees and were replaced. They could be replaced by a Deed rather than by further applications being made to the Court by prospective new Property Managers.

[20] Counsel were unaware of any particular reporting obligations in relating to settlements made pursuant to s 62 of the Act, but trustees of any trust are subject to the inherent jurisdiction of the High Court and the provisions of the Trustee Act 1956 and are accountable to beneficiaries at all times.

[21] It was accepted the trustees would need to keep accounts, but the cost of doing so would be reasonably minimal for some years, particularly as long as the major trust asset was the bank account. It was anticipated there would be a cost in time saving in [DM's] limited property being administered by family member trustees rather than a Property Manager.

[22] It was not suggested [DM's] family were to be treated differently to families who chose to apply for orders appointing a Property Manager. The Court did have power to authorise a settlement under s 62 and in the circumstances of this case it was considered this would be beneficial for [DM].

[23] The applicants were concerned to plan for the future and simplify the management of [DM's] property for his benefit in a cost effective manner. They wanted to minimise the administrative burden on the other children when, or if they were required to take over the management of [DM's] affairs.

[24] In addressing the concerns raised by Mr Dellabarca, the applicants noted these factors:

- (a) There was concern family members appointed as trustees might act improperly and contrary to the clear intent of the trust deed. This was a concern whenever any person was in a fiduciary obligation with respect to the property of another. Such concern arose when a family member is appointed as a Property Manager.
- (b) The applicants disagreed with the recommendation that if they could no longer act, no family member should be allowed to be a trustee. They believed [DM's] siblings would act in his best interest. They considered it important one or both of them act as trustees if, or when the applicants wished to retire as trustees.
- (c) The provisions of the Trust Deed made it clear the trust was for [DM's] benefit as Primary Beneficiary.-

- (i) No sole trustee, who is also a discretionary beneficiary, could benefit personally; and
- (ii) No sole trustee could exercise certain provisions which would have the effect of benefitting the sole trustee or any relative unless that relative is [DM].

[25] The applicants did not support a non-beneficiary trustee or advisory trustee to be engaged in decisions made for the benefit of any person other than [DM] having regard to these factors:

- (a) Costs of non-beneficiary trustees, particularly the Public Trust, could be prohibitive when assets are minimal, as in this case.
- (b) The trustees who will not require compensation are likely to be [DM's] immediate family members who are also discretionary beneficiaries.
- (c) Any risk of trustee misconduct is mitigated by the provisions requiring at least two trustees to partake in any decision that would benefit a trustee who is also a discretionary beneficiary.

[26] Counsel submitted the risk of two trustees, for example [DM's] siblings, conspiring or colluding to benefit themselves is negligible. It was further submitted it was unnecessary and inappropriate to have the trustees specify [DM] as being the only beneficiary during his lifetime. The Trust Deed made it clear the trust was for [DM's] benefit, both in the opening recital by naming him as a primary beneficiary and protecting that status throughout the Trust Deed.

[27] Counsel for the applicants noted Property Managers, by virtue of clause 1(b)(i) of the Schedule to the Act have wide powers to use a subject person's money:

For or towards the maintenance, education, advancement, or benefit of the person, or of his or her spouse, civil union partner, child, grandchild, or other relative, or of any person wholly or partially dependent on the person.

They were concerned the limitation proposed by Mr Dellabarca would be more restrictive than the limitations placed on Property Managers.

[28] Counsel suggested it was easy to conceive of situations where it would be helpful to benefit a family member and provided two examples –

- A family member such as one of [DM's] siblings gives up work to care for [DM] on a fulltime or near fulltime basis. It may be entirely appropriate for the trustees to provide financial assistance to that caregiver.
- The trustees may wish to purchase a property for [DM] to live in and they wished to allow another family member and discretionary beneficiary to live there and care for him. That beneficiary may be required to pay rent to the trustees if [DM] was the sole beneficiary during his lifetime.

In both the above examples the Property Manager would have the power to benefit those family members.

[29] On 17 August, Mr Dellabarca and counsel for the applicants filed a memorandum referring to the memorandum which had been filed in reply by counsel for the applicants on 17 August 2017. A further affidavit from the applicants was also filed setting out their reasons why they wished to settle property on the trust. Mr Dellabarca intended taking a neutral stance in respect of matters; he and counsel for the applicants requested the matter be dealt with on the papers and for a teleconference to be convened to progress matters which could not be resolved on the papers.

Analysis and Findings

[30] Counsel for the applicants referred to *Re SK* (Family Court Auckland, FAM-2001-004-002982, 9 October 2006, Burns FCJ). In this case His Honour Judge Burns addressed the power under s 62 of the Act which provides for a specific power for the Court to settle beneficial interests of the person subject to a property order.

[31] Section 62 provides:

62 Court may settle the beneficial interests of person subject to property order

(1) A court may direct a settlement to be made of all or any of the property of a person subject to a property order on such trusts and subject to such powers and provisions as the court may think fit; and, in particular, the court may give such directions—

(a) where the property has been acquired under a settlement or will, or on intestacy, or represents property so acquired; or

(b) where,—

(i) by reason of any change in the law or of any change in circumstances since the execution by the person of a testamentary disposition; or

(ii) by reason of any absence of information at the time of that execution; or

(iii) on account of the former management of the property or the expenditure of money in improving or maintaining it; or

(iv) for any other special reason,—

the court is satisfied that the devolution or distribution of the property of the person, either under any testamentary disposition or on intestacy, would be such as might cause injustice or hardship to any person.

(2) A court may direct the transfer by way of gift of any of the property of a person subject to a property order for the maintenance and benefit of members of the person's family or for the provision of other persons or purposes for whom or which the person might be expected to provide if he or she were able to manage his or her own affairs in relation to his or her property.

(3) A court may direct the manager, to execute any transfer or other instrument, and to do any other act or thing, that may be required for giving effect to the transfer or settlement, in the name and on behalf of the person, and for that purpose may make a vesting order or appoint a person to convey; and any settlement or transfer approved by the court shall be as effectual and binding on all persons interested as if it had been made by the person while of full competence.

(4) This section applies whether or not the person has executed a testamentary disposition and notwithstanding that it is not known whether the person has executed such a disposition or not, but does not apply when the person is a minor who is not married or in a civil union.

- (5) An application to a court for an order under this section may be made by any of the following persons:
- (a) any person who has or would have had any interest in the property of the person subject to a property order or any expectation of succession to any such property, whether that interest or expectation arises or could have arisen under a testamentary disposition that is known to exist or in the event of the intestacy of the person:
 - (b) the manager:
 - (c) any other person who adduces proof of circumstances that, in the opinion of the court, make it proper that that person should make the application.
- (6) Subject to making due provision for the maintenance of the person subject to a property order in accordance with his or her means and way of life, whether out of the capital or income of the property settled or other property or partly in one way and partly in another, and to providing, by means of a power of appointment or revocation, or otherwise, for the possibility of the person recovering full competence to manage his or her own affairs in relation to his or her property, the court may, in making any order under this section, have regard to all or any of the following matters:
- (a) the manner in which the property has been settled or dealt with on former occasions:
 - (b) in the case of any land or business, the welfare of the persons employed in connection with the land or business, and the expediency of settling other assets to devolve with the land or business:
 - (c) the provisions of any testamentary disposition of the person subject to a property order:
 - (d) the expediency of providing for—
 - (i) payments or annuities for the wife, husband, civil union partner, de facto partner, or children of the person subject to a property order or for other persons dependent on that person, and for other annual or capital charges and the power to create them:
 - (ii) the continuation or provision of any superannuation or pension, and the application of any part of the income for charitable purposes:
 - (iii) discretionary trusts, trusts for effecting or maintaining policies of insurance, powers of appointment, sinking funds for making good any losses (instead of or in addition to insurance), or any other purposes:

- (iv) the extension of any statutory powers of investment, management, or otherwise:
 - (v) the manner in which any costs are to be raised and paid, whether out of the settled property or otherwise:
 - (vi) any other matter or thing that the court may consider material, having regard to the nature of the settlement, development, and enjoyment, and to the persons who are to take, either successively or otherwise.
- (7) At any time before the death of a person in respect of whom it has made an order under this section, and whether or not he or she is still subject to a property order, the court may, in respect of any property remaining subject to the trusts of a settlement made under this section, on being satisfied that any material fact was not disclosed to the court when the settlement was made, or on account of any substantial change in circumstances, by order vary the settlement in such manner as it thinks fit, and give any consequential directions.
- (8) Without limiting the provisions of section 111, rules of court may be made for all or any of the following purposes:
- (a) giving effect to the provisions of this section:
 - (b) compelling information to be furnished respecting, and production of, testamentary dispositions, and their lodgement in court:
 - (c) making representation orders.

[32] In *Re SK*, Judge Burns was satisfied that the transfer of property to a family trust, provided the objectives were to meet the best interests and welfare of the subject person, did in fact meet that objective. He noted the trustees had a continuing obligation under the Trustee Act 1956 and under the common law to ensure the objectives of the trust were scrupulously adhered to and the funds prudently invested. He had no reason to believe that would not occur in the future and saw no need for orders under the Act to continue. Having regard to the objectives of the Act, he considered the transfer of property to the trust presented less cost to the subject person's estate than the continual need for renewal of orders. In those circumstances it met the minimum interventionist principles.

[33] Having regard to the terms of the trust for [DM] and the safeguards which have been highlighted by counsel for the applicants, I am satisfied under s 62 it will be in [DM's] welfare and best interests to enable the settlement of his current term deposit

on the trust which has been established for his long term benefit, welfare and best interests.

[34] I well understand the issues raised by Mr Dellabarca. I am satisfied, however, there are ample statutory safeguards as submitted by counsel for the applicants. It is apparent the applicants have given careful consideration to the long term needs of [DM] and [his siblings] support the proposal.

[35] Viewed longitudinally, the operation of the trust will negate the need for constant reviews under the Act and costs associated with each review. I am further satisfied the proposed settlement on the trust meets the primary objective under s 8(a) which refers to making the least restrictive intervention possible in the life of [DM], having regard to the degree of his incapacity.

Orders and Directions

[36] I am satisfied jurisdiction is established. No further service directions are required. Service on [DM] is dispensed with and his presence is excused. No further report is required.

[37] I make the following orders and directions:

1. An order is made appointing [BM] as Welfare Guardian of [DM].
2. An order is made appointing [LP] as Property Manager for [DM].
3. The Property Manager is to have the following powers from the Schedule of the Act 1(a)(v), 1(b)(i), 1(b)(iii), 1(b)(iv), 1(b)(v), 1(b)(vi), 1(b)(vii), 1(b)(viii), 1(b)(ix), 1(c), 1(d), 1(l), 1(n), 1(x), 1(y) and 2.
4. Pursuant to s 62 of the Act, I make an order settling all funds held in the [bank account – number deleted] in the name of [DM], onto the “[DM] Family Trust”.

5. The Welfare Guardian order and Property Manager order are to be reviewed no later than 25 August 2020.

[38] In the event of any appeal, the orders are to continue operating pending the outcome of that appeal.

[39] Mr Dellabarca's costs and disbursements are to be paid out of the consolidated fund.

A P Walsh
Family Court Judge

Signed at am/pm this day of 2017