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IN THE FAMILY COURT
AT MORRINSVILLE

I TE KŌTI WHĀNAU
KI MORENAWHIRA

FAM-2019-039-000125
[2020] NZFC 7851

IN THE MATTER OF	THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988
BETWEEN	[KN] of [location and occupation deleted] Applicant
AND	[TN] of [the first location], retired Subject Person

Hearing:	7 September 2020
Appearances:	Mr G Brant for the Applicant Mr M Earl for the Subject Person
Judgment:	14 September 2020

RESERVED JUDGMENT OF JUDGE D A BLAIR

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[1] [KN] ("the Applicant") is the donee to an enduring power of attorney in relation to property made by her brother [TN] on 17 August 2007. The enduring power of attorney provides that the authority given to [KN] shall have effect only if [TN] becomes mentally incapable.

[2] On 25 November 2019, the applicant applied for an order pursuant to s 102(1)(b) of the Protection of Personal Property Rights Act 1988 ("the Act") determining whether [TN] is *mentally incapable*. If answered that he is mentally incapable, the applicant applies for an order pursuant to s 102(2)(j) authorising [KN] to execute a Will for [TN], if the criteria in that subsection were to be satisfied, that is for present purposes, that the donor *lacks testamentary capacity*.

[3] There is no express provision to the contrary for a direction for a Will in the enduring power of attorney which is another criterion for a s 102(2)(j) direction.

[4] [TN] was born on [date deleted] 1950. He has two siblings, one of whom is the applicant.

[5] [TN] has never married and does not have children. He now lives at [a Rest Home] in [the first location].

[6] In the applicant's affidavit sworn 13 September 2019, she described [TN] as somewhat intellectually disabled, having struggled with reading and writing and his future always being a major concern for their parents when they were alive. When younger [TN] worked [in the family business].

[7] In 2016 [TN] experienced a stroke. [FC] of the [first location] Medical Centre completed a Health Practitioner's Certificate of Mental Incapacity dated 21 November 2016. The form gives little detail but refers to an examination of [TN] on 7 October 2016 and circles "Statement A", therefore giving the opinion the donor is mentally incapable as he lacks the capacity to make a decision about "personal care and welfare".

[8] No other information is given in the form other than a hand written reason for the opinion being "patient's mental capacity has been reduced post stroke".

[9] On the basis of the Health Practitioner's Certificate the applicant activated the enduring power of attorney in relation to property. [TN] took no issue with this and

nor does he still. He has an excellent relationship with the applicant and appreciates her input.

[10] [TN] settled the [Family Trust] by Deed of Trust dated [date deleted] 1999 and has continued in his role through to the current point as a trustee of the Trust. The current trustees of the Trust are [TN], [KN] and [a law firm]. At no point has there been any consideration of [TN] needing to be removed or replaced as a trustee on a ground of incapacity.

[11] In 2018 [TN]'s other sibling [EN] issued Family Protection Act 1955 proceedings in relation to the estate of a parent. The present applicant [KN] and [the law firm] were appointed as litigation guardians for [TN] in relation to those proceedings. It is understood that appointment would have been approached on a consent basis. Those proceedings settled.

[12] In February 2019 [TN] requested via his sister [KN], that he meet with his usual solicitor [TR] to discuss alterations to his Will. [TN] had at the time a Will dated 8 July 2011. There had been eight Wills prior to this, dating back to 1980.

[13] [TR] attended on [TN] at the [Rest Home] on 21 February 2019 and made a file note of the meeting which has been attached to [TR]'s affidavit sworn 6 November 2019 filed in relation to these proceedings. Instructions were given for the variation of the Will and [TR] considered that [TN] understood his intentions and was clear in expressing them. The discussion included the need for the Will to cover the appointment of a substitute person, the applicant, to hold any power of appointment pursuant to the Trust following the death of [TN].

[14] [TR] returned to [the Rest Home] on 1 March 2019 with the prepared Will. [TR] discussed the amendments with [TN] and he approved them. [TR]'s affidavit records that he did not receive any impression that [TN] failed to understand what the proposed Will said or that he failed to understand what the Will would achieve. [TR] had taken his wife to the rest home to act as a witness for the Will and he sought the assistance of a nurse at the rest home to be the second witness. The nurse indicated to

[TR] that [TN] had been assessed as not having mental competence. [TR] proceeded with the signing of the Will, intending to subsequently obtain [KN]'s instructions as attorney in relation to any application to the court to confirm the Will.

[15] The current Will of [TN] is therefore dated 1 March 2019.

[16] [TN] was subject to a further Health Practitioner's Certificate (in relation to personal care and general welfare) on 29 July 2019 by [EB] of [a Clinic] in [the first location]. In [EB]'s opinion [TN] is "mentally sound" and capable to make decisions about his personal care and welfare.

The Proceedings

[17] I have summarised the applications made by [KN].

[18] Mr Earl has been appointed as counsel for the subject person, [TN]. Mr Earl filed a report dated 10 February 2020 and describes his attendance with [TN] at the [Rest Home] on 8 February 2020. In summary of the description of the meeting:

(a) [TN] knew of these proceedings and that it was about his ability to make his own Will;

(b) [TN] told Mr Earl around the circumstances of [TR] attending with him for the new Will and he could describe who the witnesses for the Will were;

(c) [TN] explained why he had made the new Will and described having made Wills before and he understood the purpose of a Will which was to say where his property went in the event of his death;

(d) [TN] discussed his relationships with each of his siblings and their children;

(e) [TN] discussed his hope of being able to leave the rest home at a future point and have a place of his own where he could look after himself.

[19] Mr Earl concluded the conversation was fluid, open, consistent and logical and that everything [TN] had said was consistent with the documents filed in the proceedings. Mr Earl emphasised that [TN] was able to tell him about the circumstances of his Will and why he had made it and that he had good reasons for holding the views that he held and those were consistent with the (Family Protection Act 1955) litigation in 2018. [TN] asked that Mr Earl request that the court hold that his Will of March 2019 is valid.

[20] The proceedings were considered before his Honour Judge Collin on 18 May 2020. The court noted the issue of whether [TN]'s brother [EN] and those nephews and nieces who were beneficiaries under a previous Will should be served with the current proceedings and given an opportunity to be heard. It was concluded that on the issue of whether [TN] was competent to execute the 2019 Will, there was no need for other service to occur. If [TN] was competent, he was entitled to make such Will as he considered appropriate. I add to this that even if this Court finds that [TN] is not wholly competent to manage his own property affairs and is therefore mentally incapable in PPPR terms as to the enduring power of attorney, the court could still omit to find that he *lacks testamentary capacity* and therefore [TN] can elect to make a further Will if he chooses. This would not involve anyone other than [TN] and his solicitor [TR]. It would be if the s 102(2)(j) process were to result in a new Will being directed that potentially the siblings and their children would require service and an opportunity to be involved in that process.

[21] The proceedings were directed for hearing.

[22] Counsel for the applicant and counsel for the subject person have filed submissions. The applicant's position throughout has been to bring these issues to the attention of the court by way of her application and to not actively promote an outcome either way. The applicant was not cross-examined. [TR] was sworn in and cross-examined by Mr Earl. At the suggestion of Mr Earl and [TN], [TN] was sworn in so that he could speak to the court. Mr Earl asked open ended questions of [TN] and I then asked him questions.

[23] The decision was reserved.

Legal structure under consideration

Protection of Personal and Property Rights Act 1988 ("the Act")

[24] Section 93B(1)(a) provides for the presumption of competence for [TN]. He is:

> Presumed, until the contrary is shown, … to be competent to manage his … affairs in relation to his … property.

[25] Section 93B(2) provides:

> A person must not be presumed to lack the competence described in subsection (1)(a) just because the person manages or intends to manage his or her own affairs in relation to his or her property in a manner that a person exercising ordinary prudence would not adopt in the same circumstances.

[26] In the circumstances of this case, there is no suggestion [TN] has done anything in the management of his property affairs which others might not adopt in the same circumstances. Even if he had, it would not lead to a presumption of a lack of competence.

[27] Section 94(1) provides:

> For the purposes of this Part, the donor of an enduring power of attorney is mentally incapable in relation to property if the donor is not wholly competent to manage his or her own affairs in relation to his or her property.

[28] Section 97(4)(b) applies in this case. The enduring power of attorney has effect only if the donor becomes mentally incapable.

[29] Section 97(5) provides:

> If subsection (4)(b) applies, the attorney must not act in relation to the donor's property unless a relevant health practitioner has certified, or the court has determined, that the donor is mentally incapable.

[30] Section 99D requires that a certificate of the donor's mental incapacity must contained the prescribed information.

[31] Section 100A of the Act addresses the situation of a donor who has been, but is no longer, mentally incapable. A donor who is no longer mentally incapable may suspend, pursuant to s 100A(1) the attorney's authority to act under the enduring power of attorney by giving written notice to the attorney. The suspension then takes effect unless a relevant health practitioner has certified, or the court has determined, that the donor is mentally incapable – s 100A(2).

[32] A suspension does not revoke the enduring power of attorney.

[33] Additionally, if a donor is mentally capable, he or she can revoke the enduring power of attorney – s 100A(4).

[34] In the circumstances of this case, if [TN] is no longer mentally incapable (if he was when the enduring power of attorney was activated) he has not given notice to suspend or revoke it.

[35] The statutory sequence then results in the present application pursuant to s 102(1)(b) by [KN] as to whether [TN] "is mentally incapable".

[36] If [TN] is "mentally incapable" the court will be asked to embark upon the process set out in s 102(2)(j) for the authorisation of the applicant to execute a Will for [TN]. The subsection in this regard requires the court to be satisfied that:

> (i) The donor lacks testamentary capacity; and
>
> (ii) There is no express provision to the contrary in the enduring power of attorney.

[37] The structure in s 102 therefore anticipates that a person can be "mentally incapable" for enduring power of attorney purposes, but still have testamentary capacity to make a Will. Establishing a *lack of testamentary capacity* is a step beyond the court finding someone is mentally incapable, before a Will can occur on that person's behalf.

[38] These provisions as to an enduring power of attorney in relation to property and potentially, a Will being executed by the attorney, reflect the provisions in the Act

for the appointment of a property manager and the ability of the court pursuant to s 55 to authorise the manager to execute a Will.

[39] Section 54(1) provides that a person subject to a property order shall not, by reason only of being subject to that order, be incapable of making testamentary dispositions. Therefore, the threshold as to the requisite lack of capacity in relation to property can be made out providing jurisdiction for the appointment of a property manager, yet this does not necessarily mean the person is incapable of making testamentary dispositions.

[40] Section 55(1) enables the court to authorise the manager to execute a Will if the court is satisfied that such a person lacks testamentary capacity.

[41] The legislative structure therefore distinguishes threshold tests for activation of an enduring power of attorney or the appointment of property manager, with whether or not a person lacks testamentary capacity.

Testamentary capacity

[42] Mr Earl submits that the leading authority and source of the base definition of testamentary capacity is considered to be *Banks v Goodfellow*[1] A testator must "have a sound and disposing mind and memory". What is required is for a testator to understand the nature of his business, know of the property he is intending to dispose of and to whom and how he intends to do so. It is not necessary for a testator to "view his Will with the eye of a lawyer" but rather to understand the elements of the Will and the ultimate result in their simple forms.

[43] *Loosley v Powell*[2] addresses the issue of testamentary capacity. In assessing testamentary capacity for a deathbed Will, the court held:

(a) The nature and reasons for a major change in a deathbed Will are part of the relevant factual matrix for assessing capacity. An apparently

[1] *Banks v Goodfellow* (1870) LR 5 QB 549.
[2] *Loosley v Powell* [2018] NZCA 3.

rational change can support a claim of capacity while apparently irrational changes could undermine it.

(b) It is good practice for a solicitor to enquire of the Will maker about the reason for changes in the Will. It would be wrong to deny capacity only because of a failure by a solicitor to so enquire.

(c) Where there is evidence that raise the Will maker's capacity as a tenable issue, the onus then falls on the parties seeking to support the final Will to discharge the onus.

[44] Mr Earl refers to *Re v White (dec'd)*[3] on the issue of competency and capacity of a testator in knowing "what he is about, have sense and knowledge of what his property was and who those persons were that then were the objects of his bounty"[4].

[45] In *Bishop v O'Dea*[5] Justice Tipping summarised the matters to be satisfied in order to determine capacity:

(a) that he or she was making a will and the effect of doing so ("the nature of the Act and its effects");

(b) the extent of the property being disposed of; and the moral claims to which he or she ought to give effect when making the testamentary dispositions.

[46] Mr Earl refers to another relevant consideration discussed in *Re Rhodes* in relation to the extent of a change to a Will or the deviation from usual moral dictates:

> Where property is disposed of fairly, and in accordance with moral dictates, then only a small amount of capacity is needed. But with abrupt and unfair changes, fuller and clearer evidence of capacity is required.[6]

[47] Further,

> By itself, old age or general physical or mental enfeeblement is certainly not conclusive against the will maker.

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[3] *Re White (dec'd)* [1951] NZLR 393.
[4] Page 409.
[5] *Bishop v O'Dea* (1999) 18 FRNZ 492.
[6] Paragraph 40.

[48] Counsel for the subject person refers to *Carrington v Carrington*[7]*; "*a property order does not extinguish testamentary capacity".

[49] Counsel emphasise the distinction as to threshold for activation of an enduring power of attorney (or for appointment of property manager) and the test for testamentary capacity.

[TR]'s attendances with [TN] for the new Will in 2019

[50] I set out in full [TR]'s file note dated 21 February 2019 with respect to his attendance with [TN]:

> I called on [TN] in the resthome part of [the rest home]. He recognised me before I spoke to him – he was sitting in the lounge and took me to his bedroom. He indicated that he knew why I had come to see him.
>
> I said he expected to see [KN] this weekend.
>
> He led off by saying that after the Court case he wanted to remove all interests of [EN]'s children as beneficiaries in respect of his or the Trust' assets. [EN]'s children, like [EN], had not had any contact with him since the Court case was settled. He talked of the Court case for a bit, and showed a good grasp of the events and the outcome.
>
> He recalled that he had worked as a gardener for [the rest home] for a while following his leaving the [family business], that he had left that employment due to the poor attitude of the then owners of the resthome. He also raised the fact that his mother had been in care for some time before she died, and that his father had died following a stroke.
>
> His location movements are slow, and his speech is at times a little difficult to follow (although if I asked him to repeat anything he repeated it in what I recognised was an exact but clearer re-statement of what he had originally said), but it appeared to me that he had full comprehension and full ability to communicate his thoughts.
>
> I went through his existing Will with him; he instructed that the quarter shares should be changed to third shares, and be given just to [KN], [and her children], and that the provision for [EN]'s children was to be removed.
>
> I showed him copies of the existing Powers of Attorney – both property and care & welfare, appointing [KN] – he is content with those.
>
> I showed him the changes previously made to the trustees under the Trust Deed – he remains happy with the current trustees.

[7] *Carrington v Carrington* [2014] NZFLR 571 at [25].

> I then showed him the two changes that had been made to the Trust Deed in the past:
>
> 1. The first in 2001 under which the discretionary beneficiaries had been restricted to [TN], [KN], and [KN]'s children and the final beneficiaries restricted to [KN] with her children as alternates, and
>
> 2. The second in 2011 in which the power of appointment of trustees had been vested in both of [TN] and [KN] or the survivor of them (and provision for both of them or the survivor of them to appoint by Deed some other holder), and if [TN] and [KN] had passed on before the Trust was wound up then in anyone nominated by [TN] in his Will, and if no such nomination or the nominee having died or relinquished the power beforehand then in [TN]'s estate executrs (sic) and administrators.
>
> I suggested that for simplicity it might be worth nominating an alternate holder in his Will of the power of appointment of trustees, if [KN] had died before [TN] – he agreed and proposed that [KN]'s [daughter] should hold the power.
>
> [TN] confirmed that it was in order for me to provide [KN] with details of the proposed change to his Will and his decisions in regard to the terms of the Trust deed.

[51] As set out in [TR]'s affidavit, he called upon [TN] with the Will on 1 March 2019. [TR] discussed the amendments with his client and those were approved. [TR] did not receive any impression that [TN] failed to understand what the proposed Will said or that he failed to understand what the Will would achieve. [TR] explains in his affidavit how the Family Protection Act 1955 proceedings in 2018 were considered by [TN] to be unjustified. [TR] and [TN] discussed [EN]'s action and talked in general terms about the claim. [TR] deposes that [TN] was well able to form and express an opinion and he understood what he was talking about and understood the consequences of his decisions. The reason [TN] changed his Will was as a consequence of the Family Protection Act claim [EN] had made and the absence of contact by him and his children since.

[52] [TR]'s evidence at the hearing confirmed he has been [TN]'s lawyer since 2007, having purchased at that time his brother's legal practice. [TN] had been a client of that practice since 2000.

[53] At the hearing [TR] described his visit to the rest home in February 2019 to take instructions for the Will. [TN] recognised him and took him to his room. There was no difficulty in conversation or anything to alert [TR] to a lack of capacity. [TR]

conceded he did not specifically discuss the specifics or size of [TN]'s estate with him in the context of the Will instructions. There had been discussions previously with respect to an earlier Will and [TR] assumed the financial situation had not changed and did not need specific reference. On the issue of whether any moral duty was identified or discussed for reference in the Will, [TR] emphasised in his response that his client has no spouse or children.

[54] At the hearing [TR] reiterated the purpose behind the revised Will being the removal of [TN]'s brother and his children due to the Family Protection Act proceedings. The issue of [TN]'s Trust was discussed during the visit, what that was about and the need for the clause in the Will.

[55] At the hearing [TR] spoke about having been in practice as a lawyer since 1974 with a significant background in the preparation of Wills for clients. [TR] takes the ongoing view that [TN] had capacity.

[56] During the visit on 1 March 2019 for the signing of the Will, [TR] went through it with his client, [TN] confirmed he was happy with it and there was another discussion about the reasons for the change. As a result of the stroke, [TN] was at times difficult to understand but would then repeat himself in a clear voice.

[57] On the day of the hearing, [TR] said he had spoken briefly to [TN] prior to court starting and advised the Court that he seemed to be the same as during the previous visits. There was no suggestion [TN] did not recall [TR]. [TR] confirmed on the basis of his observations that day, he would regard that [TN] would have capacity to do a further Will currently.

[TN]'s evidence at the hearing

[58] [TN] answered open questions from Mr Earl. [TN] confirmed he is resident at [the rest home] and is retired and when asked about how many previous Wills he has done, he answered three or four he supposes. [TN] confirmed that [TR] has come to see him several times about matters and he remembered the February 2019 discussion to do with the new Will he wished to do. [TN] explained his reasons for requesting

the varied Will being he was not happy regarding the court case brought by his brother. [TN] did not wish to go into the details of why he had become unhappy with his brother.

[59] [TN] was asked questions about his Trust. He said he does not know much about the Trust and spoke about not having been to the bank for a while, finding it difficult to get around with his stroke symptoms.

[60] Mr Earl asked [TN] for his understanding about a Will generally. [TN] advised it is carried out by his trustees, he thinks as soon as he passes away. [TN] reiterated that his current Will does not provide for his brother and his brother's children and that he has his reasons for this but does not wish to go into those. He confirmed feeling quite confident regarding his latest Will.

[61] When asked about his financial circumstances, [TN] referred to having sold his property [in the first location] and the money going to the bank. [TN] could not describe the exact extent of the assets held in his name personally or by the Trust. From Mr Earl's communicated position to the court, it is his client's understanding that he has lots of money. On the summary of the asset base, Mr Earl submits the belief about having lots of money is accurate.

[62] [TN] acknowledged his sister manages the funds and she is very good. He said if he didn't have a sister he does not know what he would do. [TN] expressed that his memory is quite reasonable and he referred to the latter parts of his working life as a gardener prior to his stroke.

[63] [TN] confirmed his sister is a trustee of the Trust.

[64] [TN] was asked about his income situation. He explained his income being paid directly to the rest home by way of "automatic payment".

[65] I asked [TN] about his age. He could not recall exactly, indicating he is around 60. He explained his birthday is this month and when asked for the date, he advised the correct details being [date deleted].

[66] [TN] was a co-operative and expressive witness who wished to be taken seriously when it comes to matters of his own autonomy. That said, he acknowledges the place of his sister in his general management of his property affairs pursuant to the enduring power of attorney. [TN] requests to have the right to make his own Will.

First issue – is [TN] mentally incapable for PPPR purposes?

[67] This question is relevant in relation to s 97(5) because the attorney must not act in relation to the donor's property unless a relevant health practitioner *has certified, or the court has determined*, that the donor is mentally incapable.

[68] The question is relevant for s 102(1)(b) purposes and the flow-on affects within that section. The court has jurisdiction to determine whether or not the donor or an enduring power of attorney is mentally incapable. It is only if the donor *mentally incapable* that the court could then embark upon a further process for the execution of a Will (if the donor lacks *testamentary capacity*).

[69] [TN] has the presumption of competence in his favour.

[70] That there is only limited medical information is unhelpful. [FC]'s report dated 21 November 2016 finds only that [TN] is mentally incapable to make a decision about personal care and welfare. This is on the grounds his mental capacity has been reduced post stroke. That information does not relate to property, therefore lacks any direct detail upon which an assessment could be made.

[71] [EB]'s letter dated 29 July 2019 concludes that [TN] is mentally sound and capable to make decisions about his personal care and welfare. There was no reference to considerations as to managing his property, but the mentally sound comment is important.

[72] The question is therefore whether the court is able to determine on the basis of the information available, that [TN] is mentally incapable. This is if [TN] "is not wholly competent to manage his own affairs in relation to his property".

[73] I am able to find that [TN] is not *wholly* competent to manage his affairs in relation to his property for these reasons:

(a) [TN] would find it difficult to retain a practical overview and control of his asset base. He would be unable to engage in electronic or personal management of his funds. [TN] would be reliant upon another for either method.

(b) [TN] does not have a detailed understanding of his exact asset structure or amounts held. That said, [TN] does have some good understandings, such as some of his funds are held by the Trust and that his house property was sold and the funds are now held.

(c) In terms of competence, [TN] would sometimes find it difficult to communicate decisions or expectations around his property. Realistically, this forms a part of property management.

(d) By finding that [TN] is not wholly competent to manage his own affairs in relation to his property, this equates to a finding that there is a partial lack of competence. There are aspects where [TN] is competent such as knowing and understanding that his residential rest home costs are paid directly from his income by automatic payment, that he has funds on investment and owned by a trust structure. [TN] knows that when he dies his trustees will deal with his estate. [TN] would expect as much autonomy as possible, as reflected in his hopes to be set up in his own home in due course. There is no suggestion [TN] has ever acted inappropriately with his financial situation and has only ever been a careful individual financially.

The 2019 Will and any s 102(2)(j) determinations

[74] The primary issue for me to determine in this respect is whether the donor [TN], "lacks testamentary capacity".[8] This is a current inquiry.

[8] PPPR Act 1988, s 102(2)(j)(i).

[75] Despite having determined that [TN] is not wholly competent to manage his own affairs in relation to his property, I am not satisfied on the balance of probabilities that he lacks testamentary capacity. I reach this decision for the following reasons:

(a) [TN] has an adequate understanding of the nature of his business, the property he is intending to dispose of and to whom and how he intends to do so. [TN] knows he has lots of money, although as identified, he does not know the exact specifics. He does know that a portion of his invested funds result from the sale of his house property at [the first location]. [TN] understood in his discussions with [TR], that the Trust vehicle exists and that the Will needed to take care of Trust issues as well.

(b) [TN] understands about to whom he intends to dispose of his funds, which will be to one of his siblings and that person's children. [TN] knows that he will make this disposition by way of his Will.

(c) If there is a weakness in the above criteria, it is [TN]'s lack of a detailed understanding about the extent of his invested funds, either personally or by way of the Trust. I do not find that this factor should result in a determination that [TN] lacks testamentary capacity.

(d) In accordance with *Bishop v O'Dea*, [TN] understands the making of a Will and the effect of doing so, in the simple form. [TN] could give specific advice as to his understanding about his trustees carrying out his Will when he passes away. As to whether [TN] has demonstrated an understanding of any moral claims to which he ought to give effect when making the testamentary dispositions, I agree with the submission of Mr Earl that there may be none. [TN] has not married and does not have children.

(e) [TN]'s ongoing intention to provide in a Will for his sister and her children indicates nothing about an abrupt or unfair change which might otherwise require fuller and clearer evidence of capacity to be

provided.[9] [TN] has been requesting since February 2019 to have a Will which continues to provide for his sister and her children but no longer for his brother as a result of the earlier court proceedings and the lack of contact. [TN] has continued to articulate his reasoning.

(f) In itself, old age or general physical and mental enfeeblement is not conclusive against the Will maker. To a moderate extent, those elements could be said to apply to [TN] and in my assessment, should not count against his overall testamentary capacity as a will maker.

(g) I take into account the fact of [TN] continuing in his role as a trustee of the family trust, as opposed to anyone considering it necessary to apply to the High Court for his removal and/or replacement pursuant to the Trustee Act 1956.

(h) I place weight upon the letter of [EB] dated 29 July 2019 confirming the opinion that [TN] is "mentally sound and capable to make decisions about his personal care and welfare". The statement about this person being "mentally sound" based upon an assessment less than five months after the making of the 2019 Will and relatively current to the present date lends weight to the testamentary capacity issue. The medical finding that [TN] was capable of making his own decisions about personal care and general welfare is telling. It means in 2019 [TN] was competent to make decisions about where he lived, any treatments medically and the range of other important personal decisions a person makes about oneself. It would be artificial to find that despite [TN] having that level of capacity, there might be reason to find he lacks testamentary capacity.

(i) There is nothing upon which the court could base a finding there has been a deterioration for [TN] since [EB]'s letter of 29 July 2019.

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[9] *Re Rhodes.*

[76] The court is therefore unable to make any direction for a process to commence for the creation and execution of a new Will pursuant to s 102(2)(j). There is not a finding that [TN] lacks testamentary capacity.

[77] My conclusion is that on the information available surrounding the circumstances, reasons and discussions for the making of the 2019 Will and [EB]'s opinion about [TN] being "mentally sound" as at 20 July 2019, it was likely he had testamentary capacity for the purposes of the instruction for and signing of the Will dated 1 March 2019.

[78] However, the specific jurisdiction of this court rests in the inquiry pursuant to s 102(2)(j)(i) as to whether the court is satisfied in a current context that the donor lacks testamentary capacity. The inquiry is for the statutory purpose of the court being able to direct the execution of a Will in the event the donor lacks testamentary capacity (having first been found to mentally incapable).

[79] In the event there is not jurisdiction for this court to make a specific finding about [TN]'s testamentary capacity when he made the 2019 Will, it is an option for [TN] to embark forthwith upon providing instructions to [TR] for the making of an updated Will and execution of it. This has been one approach indicated by counsel for the applicant and counsel for the subject person, so as to ensure a valid and enforceable Will is in existence in the event there would be any doubt around the 2019 Will.

[80] If [TN] makes a new and updated Will now, this judgment has concluded that the court is not satisfied that [TN] lacks testamentary capacity. The corollary is he currently has testamentary capacity.

Conclusion

[81] The donee applicant is able to act in relation to the enduring power of attorney, the court having determined that the donor [TN] is "mentally incapable". This is with reference to the definition that he is not *wholly* competent to manage his own affairs in relation to his property for the reasons given.

[82] There has been no finding that [TN] lacks testamentary capacity pursuant to s 102(2)(j)(i).

[83] [TN] should consider attending to any updated Will forthwith.

Counsel for the applicant and counsel for the subject person are to file memoranda (jointly where possible) addressing the issue of their costs and whether it is requested that those are met from the funds of the subject person. The file should be referred back to me in chambers for consideration.

D A Blair
Family Court Judge