

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

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**IN THE FAMILY COURT
AT ASHBURTON**

**I TE KŌTI WHĀNAU
KI HAKATERE**

**FAM-2021-003-000062
[2022] NZFC 1666**

IN THE MATTER OF THE PROTECTION OF PERSONAL AND
PROPERTY RIGHTS ACT 1988

BETWEEN [NA]
[PB]
Applicants

AND [JB]
Person In Respect of Whom the Application
Is Made

Hearing: 25 February 2022

Appearances: C Robertson for the Applicants
R Powell for the Subject Person

Judgment: 10 March 2022

RESERVED JUDGMENT OF JUDGE D P DRAVITZKI

[1] This is an application under the Protection of Personal and Property Rights Act 1988 to appoint property managers for [JB]. The applicants are [JB]'s mother, [PB] and [JB]'s sister [NA].

Background and Application

[2] There is no controversy that jurisdictional matters are satisfied in terms of [JB] lacking capacity. There is conclusive medical evidence about that on file.

[3] [PB] and [NA] have recently been appointed as joint welfare guardians for [JB].

[4] When that appointment was made, Her Honour Judge Hambleton considered the application for appointment of property managers at the same time and issued a direction as follows:¹

The matter of the Property Manager application is more complex. I make the following comments without any intended criticism of the Applicants, but with a sense of caution that this is complex and needs careful consideration.

The Trust was formed prior to the application but the Trust Deed has not been produced in the evidence provided to the Court in support of the application. Counsel for the Subject Person notes that [JB]'s sister is a Trustee and the Final Beneficiary. Counsel further notes that there is no provision limiting the Trust's distribution to being for [JB]'s sole benefit during his lifetime.

Counsel for the Subject Person notes that the Trust avoids the need for a Will, but it is unclear why a Will in conjunction with the appointment of Property Managers, is considered inferior to the settlement of assets on the Trust, particularly when the disposition of the majority of [JB]'s assets to the Trust avoids all of the protections provided in the Act for [JB].

[5] Her Honour accordingly set the matter down for a submissions-only hearing and directed the filing of written submissions in advance of that hearing.

[6] I am grateful for the comprehensive and helpful submissions filed for the matter and, in particular, the submissions of Dr Powell as the lawyer appointed to act for [JB] in these proceedings.

The New trust

[7] The first matter to note is that the applicants have considered and taken on board Judge Hambleton's minute and the specific concerns raised about the form of

¹ Memorandum of Judge dated 10 November 2021

the trust deed. A new trust has been established. That is the [JB] Family Trust (“the trust”). It was established by deed dated 6 December 2021. Specific steps have been taken within that trust deed to ensure that, during [JB]’s lifetime, he is the only beneficiary of the trust. These include the following:

- (a) The primary beneficiary of the trust is [JB].
- (b) The only discretionary beneficiary of the trust is the primary beneficiary – that is, [JB].
- (c) Under clause 3.1 and 3.2 of the deed, income and capital of the trust may only be distributed to the discretionary beneficiary (that is, [JB]), and no one else, while he is living.
- (d) There is no provision in the deed to enable the trustees to add additional beneficiaries. That would require an application to the High Court.
- (e) The vesting date for the trust is the date of [JB]’s death. The trustees may bring the vesting date forward to an earlier date (clause 2.3) but if they do the assets of the trust must be distributed to [JB] (Clause 3.6 (a)).

[8] I am satisfied those provisions of the trust deed mean that, during his lifetime, the only potential beneficiary of the trust is [JB]. [NA] is the final beneficiary of the trust but the ability to benefit her only arises after [JB]’s death.

Facts in support of the application

[9] Mr Robertson submits that the proposed trust structure is a reflection of the particular family arrangements for [JB]. Those are:

- (a) For all of his life [JB] has lived in a small rural community in mid Canterbury.

- (b) [JB] has lived with [PB] (and, until his death, his father, [MB]) all of his life and they have provided all of the necessities of life for him.
- (c) [JB] has also been well-supported and is well-known within the small community that he lives in.
- (d) There is no suggestion of [PB] and her late husband providing anything other than loving care for [JB] throughout his life. They have managed his finances in an appropriate way and for [JB]'s benefit.
- (e) The application has come about because [PB] is elderly (in her mid-80s) although I understand she maintains good health and is still actively involved in caring for and, to the extent necessary, managing [JB]'s money.
- (f) [NA] is [JB]'s only sibling. She lives just outside Christchurch, approximately an hour's travel away. I understand she has previously been employed in financial/banking roles although she is not currently working in that area. She understands finances and there is no suggestion she would act inappropriately if managing [JB]'s money.
- (g) There is, it is submitted, no evidence to suggest that [PB] or [NA] are inappropriate persons to be appointed to manage [JB]'s property for his benefit. That is borne out by the long history of [PB], in particular, caring for [JB], including financially, over his whole life. It is clear that [PB] and her late husband have provided significant support for [JB] financially. [JB]'s only income is his State benefit. However, [JB]'s benefit entitlements have accumulated over the years so that he currently has financial resources of approximately \$120,000. Clearly, his finances have been carefully managed by [PB].
- (h) There is nothing to suggest that will not continue if and when [NA] fills the property manager role solely.

Application of s 62 of the PPPR Act

[10] The submissions filed, in particular by Dr Powell, argued that an appropriate course might be to direct the settlement of [JB]’s assets on the new trust pursuant to s 62 of the Act. There was discussion about that at the hearing. Dr Powell’s view is that s 62 provides a broad ability to settle the property of incapacitated persons on trust when that is appropriate. Dr Powell responsibly acknowledged that view contradicted academic commentary in the area. But her inquiries did unearth at least two cases where Family Court judges have made settlements onto family trusts of incapacitated person under the section.

[11] However, there is a particular difficulty with utilising the section in [JB]’s situation (which did not apply in the other cases). That is because the submission was made a part of a broader proposal that to settle [JB]’s property on the trust in this way would reduce his assets to a value under the statutory threshold so that an order to administer property (under s 11 of the Act) could be made at the same time. There would be no need for a property manager to be appointed under s 31. There are some benefits, particularly in terms of simplicity of managing [JB]’s affairs and reducing reporting requirements, that mean an order under s 11 may be preferable and less onerous for a person managing [JB]’s finances.

[12] The difficulty with that submission is that s 62 is expressly limited to settling property (including on a trust) “of a person subject to a property order”.² An order to administer property under s 11 is not a property order. Jurisdiction to invoke s 62 would therefore not arise unless a property manager is appointed under s 31 at the same time. That would bring with it the more onerous reporting requirements of property managers under s 31.

Proposal

[13] In those circumstances, the applicants, and Dr Powell, submit that the appropriate course is the appointment of [PB] and [NA] as joint property managers

² Protection of Personal and Property Rights Act 1988, s 62.

under s 31 but for a shorter period of three months to affect the transfer of assets to the Trust, and then to review the position, and determine the appropriate orders to be made. By that point, [JB]'s assets will have been transferred to the trust and it is likely an order to administer property under s 11 could be made.

[14] The real issue is whether that course is appropriate for [JB] in his particular circumstances.

[15] The Protection of Personal and Property Rights Act 1988 is established to help manage the lives of incapacitated persons, both in terms of their welfare and their property. It is an Act to protect some of the most vulnerable members of our society. In doing so it seeks to intervene in the person's life in the least restrictive way possible and to protect and promote the person's autonomy to the greatest extent possible.³

[16] I agree entirely with the sentiments expressed by Her Honour Judge Hambleton when initially considering this matter. The obligations imposed under the Act on property managers, including the obligation to report annually in relation to the persons finances, are there for good reasons. They are to provide a degree of oversight for the benefit of very vulnerable people to ensure they are not being taken advantage of. It is appropriate to be cautious about proposals such as this which see assets which are currently in [JB]'s sole name being removed and placed in a trust outside the specific overview provided for under the PPPR Act.

[17] However, I am satisfied that it is appropriate in this case.

[18] That is because of [JB]'s specific circumstances and of the underlying principles of the Act which include only intervening in his life to the least extent necessary.

[19] The specific circumstances that I consider relevant are the matters which I have already referred to above which have been, put forward by the applicant in support of the application and set out in paragraph [8] (a) to (h) above. It is entirely relevant in my view that the applicants' care of [JB] has been lifelong, supportive and beneficial.

³ Protection of Personal And Property Rights Act 1988, s 8.

That includes management of his finances. There is nothing to suggest that will change.

[20] It is also clearly relevant that the trust deed, as revised, now makes it impossible to benefit anybody other than [JB] during his lifetime.

[21] I consider it relevant that this is a structure which this family, who have provided good care for [JB] for his life, have settled on (after receiving legal advice) as appropriate for them and their circumstances. It is the structure they wish to pursue. It would seem to me that, against that background, there would need to be a clear and persuasive reason why the Court would not approve that.

[22] I do not see that there is any risk to [JB] in terms of the proposed structure, either on the basis of any risk [PB] or [NA] would not act in [JB]'s best interests or even that could be a possibility now given the revised terms of the trust so that it can only benefit [JB].

[23] I also consider this approach is the least restrictive or intrusive approach that can be taken in relation to [JB]. That meets the primary objectives of the act under s 8. It essentially allows the family to get on with what they have been doing for all of [JB]'s life which is to provide care and support for him. I consider that is appropriate.

Reporting requirements under the Trusts Act 2019.

[24] There was some discussion at the hearing about the obligations of trustees under the Trusts Act 2019. That requires trustees to provide certain information to beneficiaries of a trust, or at least for the trustees to consider whether in the particular circumstances of that trust and those beneficiaries, it is appropriate to provide the information.

[25] The intention of the requirements under the Act are to ensure protection for beneficiaries so that the trustees may be held to account for their actions. There is a real difficulty with that in this case because, for the good reasons I have already referred to, the trust's only beneficiary will be [JB] during his lifetime. [JB] is not,

because of his incapacity, in a position to understand any information provided, or meaningfully hold the trustees to account.

[26] The submission to address this issue is that, at the time of review of any orders under the PPPR Act, a direction should be made that information about the financial situation of the [JB] Family Trust is to be provided to the lawyer appointed to act for [JB] for that review. I consider that to be a wholly appropriate and suitable condition to impose on the order. While I have not identified any risk to [JB] with the proposal, this requirement would be a further protection for him.

[27] I make the following orders and directions:

- (a) [NA] and Ms [PB] are appointed as joint property managers pursuant to s 31 of the PPPR Act 1988 for [JB] for a period of three months from the date this decision is issued. They shall have the following powers:
 - (i) The power to settle such portion of [JB]’s savings as they see fit onto the [JB] Family Trust (established by deed on 6 December 2021), to be held for the benefit of Mr [JB] and subject to the terms of that trust deed.
 - (ii) The specific powers granted to Ms [NA] and Ms [PB] pursuant to s 38 of the Act are those set out in schedule 1: (a) to take possession of property; (b) to apply and expend property; and (c) to invest property.
- (b) Within the three-month period, the property managers are to prepare a report as to the financial position of [JB] and the financial position of the [JB] Family Trust and to file those in court and to serve them on Dr Powell, as lawyer for [JB].
- (c) Within 21 days of receipt of the property managers’ report, Dr Powell is to file a report with the Court seeking directions for advancement of the matter.

- (d) I indicate that the expectation is that, at that time:
- (i) [JB]'s funds will have been transferred to the trust for his benefit.
 - (ii) His own personal funds will therefore be under the threshold which will enable the appointment of an administrator of property under s 11 of the Act.
 - (iii) Only one administrator is able to be appointed. It is accepted, given [PB]'s age, that it is appropriate that be [NA]. No objection is raised to that by the applicants.
 - (iv) That appointment would be for the standard three-year period.

[28] It is also anticipated that, at the time of review of that appointment in three years, a direction would be made that the lawyer appointed to Act for [JB] for that review is to be provided with any relevant banking/financial information for [JB] and for the [JB] Family Trust for the three-year period of the appointment.

[29] The application is resolved in the interim accordingly.

[30] The reports of the property manager and of Dr Powell that are to be provided within the three-month period are, when received, to be referred to me in chambers for determination and to advance this application.

D P Dravitzki
Family Court Judge

Released on 11/03/2022 at 10 am