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

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IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2020-009-001135
[2021] NZFC 5967

IN THE MATTER OF	THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988
BETWEEN	[RR] Applicant
AND	[BL] Person In Respect of Whom the Application Is Made

Hearing:	21 May 2021
Appearances:	Mr G Broden for the Applicant Mr E Tait for the Subject Person
Judgment:	28 June 2021

RESERVED DECISION OF JUDGE J K HAMBLETON

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[1] On 6 August 2020, [RR], a registered social worker at [the mental health facility] in [location deleted], applied for orders under the Protection of Personal and Property Rights Act 1988, for [SK] to be appointed as Welfare Guardian and to Administer Property for [BL]. [BL] and [SK] are sisters.

[2] In the family, [BL] is known as [BL], and so that is how I shall refer to her from now on. I shall also refer to her sister, [SK], by her first name.

[3] In response to the application, the Court appointed Mr Tait as Counsel for the Subject Person. At the hearing, Mr Brogden appeared as Counsel for the Applicant.

[4] The matter went to fixture for reasons that are described in the minute of Her Honour Judge S M R Lindsay of 13 April 2021. The dispute was as to the appointment of Welfare Guardian; there appeared to be acceptance that [BL] met the jurisdictional threshold (as to both capacity and asset level) for a Property Administrator to be appointed and no issue with [SK] being appointed in that role. As to the Welfare Guardian appointment, Counsel for the Subject Person's advocacy was that [BL]'s rest home had concerns about [SK] being appointed. It was said that [BL] opposed the appointment with some vehemence. Capacity was challenged; that is whether [BL] was incapacitated to the extent that the Court had jurisdiction and/or that orders were required. It was also suggested that there were other means for decisions to be made, such that a Welfare Guardian appointment was not required.

[5] At the hearing, evidence was given by Dr Beth O'Connor (Consultant Psychiatrist at [the mental health facility]), Ms Lee Roundtree (Clinical services manager at [Rest Home A], where [BL] lives) and finally, [BL]'s sister [SK]. I also note that at the hearing, the Applicant was represented by Mr Brogden.

[6] An issue arose in the lead-up to the hearing, where Counsel for the Subject Person included, in a report to the Court, advice from medical staff caring for [BL], and then those medical staff indicated that the report was not accurate. This issue was touched on in Dr O'Connor's report of 6 April 2021. Three days prior to the hearing, Counsel for the Subject Person served witness summons on Ms Lee Roundtree and Retired RN Jo Tyree. Ms Tyree attended Court for the hearing but was released from giving evidence during the afternoon, as Counsel for the Subject Person acknowledged that the medical evidence established that [BL] lacked the requisite capacity. Ms Roundtree was required under the witness summons to produce documents, being all emails, notes or correspondence between herself, the Applicant and Dr O'Connor. Ms Roundtree brought those to Court but objected to them being disclosed as she was

concerned in doing so that [BL]'s privacy would be breached to an extent beyond that required for the Court to determine the application. After discussion between Counsel, I decided that the documents would not be produced; the correspondence related to a side issue and was not relevant to the issues requiring determination.

[7] At the conclusion of the hearing, I determined the Court had jurisdiction, that orders should be made and, further, that [SK] was a suitable person to be appointed.

[8] I therefore made orders appointing [SK] as Welfare Guardian and Administrator of Property for her sister, [BL], but reserved my reasons for making those orders. I will now set out those reasons in detail.

Background

[9] [BL]'s family members are:

(a) Her husband [AL]; they married each other in 1978 and lived together until February 2020;

(b) Three younger siblings; [SK], who lives in Gisborne, two others who live in Australia; and, two older maternal half siblings (one lives in Wellington and one in [Europe]).

[10] [SK] is the only sibling that [BL] has a relationship with. Evidence was given that [SK] would visit [BL] every couple of years and make telephone calls to her, via [AL].

[11] [BL] does not have any children.

[12] [BL] was first admitted to hospital in 1979. [SK] recalls that [BL] was having issues before she met [AL]. A report provided indicates [BL] was diagnosed with schizophrenia in 1980. [BL] was admitted to hospital on multiple occasions during the 1980's and thereafter was supported to live in the community. Her relationship with [AL] would have been integral to that. The impact of schizophrenia on her, has though, fluctuated during her lifetime.

[13] Evidence was given that [AL] helped and supported [BL], but also that they tended to live isolated from others. [SK] described them as "existing in the community" and "having an unusual life", while Dr O'Connor referred to them as "managing".

[14] [BL] does not have any Enduring Powers of Attorney in place.

[15] [AL] was diagnosed with a dementia condition in January 2020 and admitted to [Rest Home B] in February 2020. Consequently, [AL], sadly, no longer can support and care for [BL], as he has done previously. He does not have capacity to make decisions for [BL].

[16] Following [AL]'s admission [BL]'s condition worsened (which I elaborate on in more detail later in this decision).

[17] [BL] was admitted to [the mental health facility] on [date deleted – date 1] 2020. She had some pills in her pocket. [BL] said she was taking the pills, but there was some uncertainty as to if that was the case. Following admission, she was recommenced on her usual antipsychotic and antidepressant medication.

[18] [SK] lost contact with [BL] and sought the Police's assistance to locate her. [BL] was then at [the mental health facility].

[19] [BL] was diagnosed with lung cancer on 9 March 2021, with the onset of that condition estimated at January 2020.[1] Dr O'Connor's evidence is that [BL] was advised of that diagnosis on 21 May 2020. [BL]'s diagnosis was of advanced lung cancer, which is not curative. Prognosis was in the region of months. As it happens, [BL]'s cancer has progressed more slowly, so that she has lived longer than the initial prognosis.

[20] [BL] was discharged from [the mental health facility] on [date deleted – date 2 (4 months after admission)] 2020 and since then has lived at [Rest Home A]. It is anticipated that [BL] will remain living in supported care for the remainder of her life.

[1] [Dr A] letter as above

The Law

[21] The Protection of Personal and Property Rights Act 1988 provides for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs. The legislation provides a framework for assistance and decision making by others in the alternative, balanced against promotion of protection of the person's rights.

[22] Some of the principles underpinning the Act are:

(a) A person is presumed to be competent to manage their affairs and so capable of making decisions with respect to their personal life. The onus of proof is upon those who wish to argue the contrary;

(b) There are safeguards in the legislation. One of those is the principle of least restrictive intervention meaning that, having regard to the degree of a person's incapacity, the Court must follow the course of action or grant an order that intervenes in the least possible way in the life of that person;

(c) The Courts and those appointed by the Courts to act on behalf of the person, must enable and encourage self-reliance to the greatest extent possible; and

(d) The Court shall have as a primary objective to advance the welfare and best interests of the person subject to orders.

[23] Section 12 of the Act provides the jurisdiction for appointment of a Welfare Guardian:

> (1) Subject to the succeeding provisions of this section, on an application for the exercise of a court's jurisdiction under this Part, the court may make an order appointing a welfare guardian for the person in respect of whom the application is made in relation to such aspect or aspects

of the personal care and welfare of that person as the court specifies in the order.

(2) A court shall not make an order under subsection (1) unless it is satisfied—

(a) that the person in respect of whom the application is made wholly lacks the capacity to make or to communicate decisions relating to any particular aspect or particular aspects of the personal care and welfare of that person; and

(b) that the appointment of a welfare guardian is the only satisfactory way to ensure that appropriate decisions are made relating to that particular aspect or those particular aspects of the personal care and welfare of that person.

(3) A court may make an order under subsection (1) in respect of a person of the kind referred to in section 6(2) if, but only if,—

(a) no parent or guardian of that person is then living; or

(b) no parent or guardian of that person is in regular contact with that person, and the court is satisfied in all the circumstances that it would be in the interests of that person to appoint a welfare guardian for that person.

(4) No person under the age of 20 years, and no body corporate, shall be appointed a welfare guardian under this section.

(5) A court shall not appoint any person as a welfare guardian under this section unless it is satisfied—

(a) that the proposed appointee is capable of carrying out the duties of a welfare guardian in a satisfactory manner, having regard to the needs of the person in respect of whom the application is made, and the relationship between that person and the proposed appointee; and

(b) that the proposed appointee will act in the best interests of the person in respect of whom the application is made; and

(c) that there is unlikely to be any conflict between the interests of the proposed appointee and those of the person in respect of whom the application is made; and

(d) the proposed appointee consents to the appointment.

(6) The court must not appoint more than 1 welfare guardian for any person unless the court is satisfied that it would be in the best interests of the person to do so.

(6A) If the court appoints more than 1 welfare guardian for the same person, those welfare guardians must regularly consult each other.

(7) So far as is practicable in the circumstances, a court shall ascertain the wishes of the person in respect of whom the application is made when determining whom to appoint as welfare guardian under this section.

(8) In any order under this section, the court shall specify a date, being not later than 3 years after the date of the order, by which the welfare guardian is required to apply to the court for a review of the order.

Issues to be determined

[24] The issues for determination, were then:

(a) Does [BL] wholly lack the capacity to make or communicate decisions as to her personal care and welfare?

(b) Is the appointment of a Welfare Guardian the only satisfactory way to ensure that appropriate decisions are made for [BL]'s personal care and welfare?

(c) If the Court has jurisdiction and it is found that a Welfare Guardian should be appointed, is [SK] capable of carrying out the duties of a Welfare Guardian in a satisfactory manner?

Does [BL] wholly lack the capacity to make or communicate decisions as to her personal care and welfare?

[25] It is relevant to consider [BL]'s ability to care for herself in the community prior to admission, because this is the most recent period where [BL] lived independently and so would have relied on the capacity she had, to the greatest extent.

[26] As noted earlier, Dr O'Connor describes [BL] as "managing" to live in the community, prior to her husband's admission. It was suggested that her husband was responsible for day-to-day decisions. For instance, that he ran the finances and [BL] never had a phone or any independent means of communication. There is uncertainty as to what extent her husband managed her personal care but there were observations on her files of staff being concerned it was a controlling relationship. [BL]'s life experience may have given her little opportunity to make decisions on a day-to-day basis.

[27] Following her husband's admission to dementia level care, [BL] had continued to live in the community but without that same level of support. Her diet was said to consist of pies and chocolate milk purchased from a dairy. As a result of the Covid lockdown, dairies stopped selling pies. Consequently, [BL]'s diet was then said to consist of lollies. [BL] was found walking the streets in bare feet and in light clothing, when it was raining. She was malnourished. When [BL]'s home was checked, it was found that she had cleared out all her belongings; everything had been put in rubbish bins. Only a piano was left.

[28] Dr O'Connor said that at the point of admission [BL] was in a state of self-neglect and unable to care for herself.

[29] At the rest home, some of [BL]'s behaviours, evident from when in the community, continue to need to be managed. [BL]'s clothing is not kept in her room, as otherwise she will take clothes and leave them in a rubbish bin as she walks down the street. The same is required for the management of toiletries because she will either put them in the rubbish or down the drain.

[30] Since [BL] was admitted to hospital, her condition has improved but not to the point where there had been any consideration of her returning to live in the community.

[31] For the application before the Court, [BL]'s capacity has been assessed by two psychiatrists and one general practitioner.

[32] Dr O'Connor is a consultant psychiatrist at [the mental health facility]. She was involved in [BL]'s assessment for admission [on date 1] 2020 and has been [BL]'s outpatient psychiatrist since her discharge from [the mental health facility] to [Rest Home A] on [date 2] 2020. Dr O'Connor remains [BL]'s responsible clinician. Dr O'Connor provided a report on 6 April 2021. She met with [BL] on 1 April 2020 and most recently reviewed her care on 29 April 2021, prior to the hearing.

[33] Dr O'Connor noted that Dr Jamieson also met with [BL] and assessed her before providing a report to the Court in July 2020.

[34] Both psychiatrists are of the opinion that [BL] lacks the capacity to make decisions about her personal care and welfare. Dr Jamieson assessed [BL] as partially lacking capacity. Dr O'Connor assessed [BL] as having a total absence of capacity. I note that Dr O'Connor's report of 6 April 2021, states that [BL] has demonstrated over multiple assessments that she does not have the capacity to understand the nature and consequences of decisions relating to her personal care and welfare.

[35] That position is confirmed by [name deleted – Dr A] . [Dr A] is a General Practitioner and has been [BL]'s doctor since 18 July 2020. His letter to Dr Beth O'Connor states that [BL] is not competent to make informed decisions about her medical care.

[36] Dr O'Connor was asked to explain what capacity consists of. Dr O'Connor said it was being able to understand information, weigh up risks and benefits, make reasonable decisions and have a consistent opinion of thought over time.

[37] Dr O'Connor noted that [BL] was not able to retain information about her diagnosis or how her condition may develop in time. Dr O'Connor is aware of this because she has previously given [BL] information which [BL] has not retained.

[38] Examples were provided where [BL] has demonstrated the absence of understanding of her physical health, medical conditions and the treatment options.

[39] Dr O'Connor's report of 6 April 2021 refers to [BL] having been told she has lung cancer on 21 May 2020. On 7 August 2020, [BL] told Dr O'Connor that she thought her chest pain was caused by an infection. On 18 February 2021, [BL] referred to some physical symptoms and when asked what she thought was wrong, her explanation was that she "has a wee bit of TB" which the doctors at the rest home had "helped with" and it was "almost cleared up". Dr O'Connor's report goes on to say that [BL] thought she had TB due to her mother leaving heaters on. I note that [BL]'s mother passed away approximately 4 years ago. Dr O'Connor's evidence then was that on 29 April 2021, [BL] talked about having been seen by the respiratory doctors. [BL] said it was "too complicated". She understood the CT undertaken by those doctors for diagnostic purposes, was a form of treatment.

[40] [BL] struggles to understand the role of a welfare guardian. [Dr A] noted in his letter,

> "For example, if her sister were to be appointed her welfare guardian she asked if that meant that she would have to travel up to the North Island also. She was reassured that was not needed".

[41] Similarly, Dr O'Connor said that if [SK] was appointed as Welfare Guardian, [BL] would be told, but she was unsure if [BL] would fully understand it; just like she does not understand her diagnosis of lung cancer.

[42] [BL] had referred to "you people" as making care decisions for her. When asked who [BL] was referring to, Dr O'Connor explained she understood the reference was to the doctors involved in [BL]'s medical care. Dr O'Connor's opinion is that would not be an appropriate outcome.

[43] In Dr O'Connor's opinion, [BL]'s diagnosis of schizophrenia means she is more vulnerable generally and at a risk of neglect. Dr O'Connor noted that there is research supporting that schizophrenics have a general cognitive decline over time, in addition to the disorder of psychosis and that this is a longitudinal decline.

[44] Dr O'Connor said there has been no improvement in [BL]'s capacity whilst she has been a patient.

Is the appointment of a Welfare Guardian the only satisfactory way to ensure that appropriate decisions are made for [BL]'s personal care and welfare?

[45] This issue requires consideration of any other means to meet [BL]'s need, and it was a focus of Counsel for the Subject Person's testing of the evidence given by the witnesses.

[46] Counsel for the Subject Person particularly queried whether there is a need for a Welfare Guardian when [BL] is resident in a rest home, has a team of clinicians and oncologists, and is likely to be provided with palliative care only. He suggested it was unlikely that medical interventions would be at a level such that consent would be required. He also queried whether an appointment was required given decisions had

been made for [BL], while the proceedings had been underway and waiting a hearing date.

[47] Dr O'Connor's evidence was that there was a role for a Welfare Guardian to make decisions for [BL]. [BL] has been diagnosed with lung cancer and that condition will progressively worsen. Dr O'Connor's evidence was that there will be decisions to be made, even if it is not to consent to surgical intervention.

[48] When first diagnosed, [BL] was given months to live. A respiratory physician then advocated for other treatment options for [BL], including radiation for palliative care. However, the clinicians could not offer that treatment without informed consent, which they assessed [BL] as being unable to provide. Dr O'Connor explained that radiation can be very important for lung cancer palliative care treatment, particularly where the cancer had spread through to being bone cancer or where the tumours are placing pressure on the lungs. She said that medical drug treatment will not address those matters satisfactorily and whilst radiation will, the patient must be in a position to provide consent. A report from the respiratory clinicians was then produced to the Court[2]. As [BL] was assessed not to have capacity and there was no Welfare Guardian appointed for her, that palliative care option has not been available to [BL].

[49] Dr O'Connor went on to give evidence that [BL]'s Welfare Guardian could be called upon to make decisions about the administration of pain medicine and the suitability of care and placement.

[50] Ms Roundtree's evidence referred to the role the Welfare Guardian has for residents in the Rest Home. She said it was preferred for residents coming into care to have either an Enduring Power of Attorney in place for PPPR Act orders. She spoke of wanting to ensure residents are represented well, particularly given increasing levels of care. She said it was important that the resident's views were represented. She referred to Welfare Guardian appointments being of assistance if a resident wanted to leave the rest home or when a patient was refusing medication, where something unexpected happened or when a change was required such as to pain management.

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[2] Exhibit "A" – Letter from [Dr B] and [Dr C] dated 21 May 2020

[51] Ms Roundtree was challenged as [BL] has been receiving care so far and absent a Welfare Guardian. It was put to her that the medical team had been making decisions so far and that it might be better to leave them doing that with no Welfare Guardian. Ms Roundtree was unequivocal in her disagreement with that proposition; [BL] needs a Welfare Guardian for her ongoing and future care.

[52] Counsel for the Subject Person suggested that [BL] could be assisted to put in place a comprehensive plan or future directive. Counsel noted that some people with a terminal condition put such plans or directives in place. Counsel was positing the proposition that such a plan would supplant the need for [BL] to have a Welfare Guardian.

[53] However, Dr O'Connor's evidence was that [BL]'s lack of understanding of her condition, absence of capacity, and the brief windows of lucidity are such that preparation of a plan would be beyond [BL]'s ability. Dr O'Connor said that [BL] would not be able to make a sensible reasoned plan.

[54] [SK]'s evidence touched on this possibility. She considers [BL] to be lucid about 5% of the time. [SK] did not believe that [BL] could make a plan and referred to her "going off on a tangent", "fluctuating" and both her understanding and view changing all the time.

[55] Dr O'Connor advocated for both the appointment of a Welfare Guardian for a person in [BL]'s circumstances and for the appointee to be family, if possible. Her evidence was that it is very important for family to take a role in supporting a person. This is particularly because family members have the longitudinal view of [BL]'s life, whereas the clinicians such as Dr O'Connor and the staff at the rest home only met her last year.

[56] Ms Roundtree also recommended the appointment of a family member as Welfare Guardian because they have long term knowledge of the person.

[57] Ms Roundtree also gave the example of a Welfare Guardian appointment helping with communication between the specific family member appointed and the

care team, if there were to be a falling out between the person and family. Ms Roundtree illustrated this by saying that presently, if [BL] chose to, she could tell the Rest Home not to share information with her sister. The rest home would have to respect the confidentiality and not provide [SK] with information, which would impact on the care [BL] received.

[58] Dr O'Connor's evidence was that there was no other way of addressing [BL]'s needs other than the appointment of a welfare guardian, and that the appointment of someone other than a family member was substandard.

If the Court has jurisdiction and it is found that orders should be made, is [SK] capable of carrying out the duties of a Welfare Guardian in a satisfactory manner?

[59] [SK] is over the age of 20 years old, is not a body corporate and consents to the appointment. What remains to be considered are the component parts of s12(5)(a) to (c).

[60] [Dr A]'s letter to Dr O'Connor states:

> "My impression is that her sister would be a reasonable welfare guardian for [BL]. As she is not competent the way she answers this question is dependent on the way it is asked. It has taken some time for the rest home staff to know her. Although she has verbally declined her sister to be who welfare guardian to her lawyer when asked indirectly, she is accepting of this. She also said that she did not want her mother to be a welfare guardian even though she has long passed. When [SK] visits, she seems to get along well with her and staff note they do activities together."

[61] I have earlier referred to Dr O'Connor's evidence in support of a welfare guardian being a family member, if possible.

[62] [SK] (who lives in Gisborne, where she works as a Sports Massage Therapist) is the only family member that has shown interest in [BL]'s life; she is the only family member who has visited her in recent months. [BL] does not have contact with her other siblings.

[63] Dr O'Connor's report to the Court notes that [SK] phones [Rest Home A] weekly to speak to [BL] and visited 5 times between June 2020 and February 2021, staying for 2 to 3 days each time.

[64] It was put to Dr O'Connor that [BL] is adamantly or vehemently opposed to her sister being appointed as Welfare Guardian.

[65] Dr O'Connor referred again to [BL]'s mental health diagnosis and indicated there is a part that might play in any opposition, including that [BL] suffers from persecutory delusions. By way of example, [BL] has alleged that [SK] is poisoning her food and so if [SK] gave [BL] food [BL] wouldn't eat it. The rest home manages this by being the intermediary; [SK] gives them food such as lollies, that they then distribute to [BL]. [BL] is on medication but the delusions continue.

[66] Dr O'Connor said it is not unusual for those caring for the elderly and/or unwell, to encounter conflictual family relationships, and they are able to manage this.

[67] In her report Dr O'Connor had referred to comments made by [BL] about her family, that they were retarded and in respect to [BL]'s late mother. Dr O'Connor was adamant [SK] is not retarded (on my own observation [SK] plainly is not). Dr O'Connor said it was an indicator of the difficulties that [BL] was experiencing, that she did not know if her mother was dead or alive. [SK] also referred to [BL] not remembering that their mum had died.

[68] Dr O'Connor said that on 29 April she asked [BL] about her preference for a welfare guardian and [SK] was mentioned, [BL] said [SK] is nice and that she knew [SK] and that the doctors were talking to each other and she was ok with [SK] making decisions with the doctors. It followed, that Dr O'Connor did not accept that [BL] was vehemently opposed to [SK] being appointed. It was acknowledged that the comments are vague and [BL] is inconsistent; sometimes [BL] will say that [SK] is a retard and at other times she will say she is nice.

[69] [SK] is described, by Ms Roundtree, as visiting [BL] regularly. They are observed to engage very well. There is no observable animosity and they go out

together from the rest home. [BL]'s expressed opposition to [SK] on one occasion took Ms Roundtree by surprise; that goes to the inconsistency observed of her.

[70] [SK] said that [BL] would not have thought about or understood the concept of a Welfare Guardian but "she understands family, we are Greek, family is community". [SK] spoke of being the youngest girl in the family, and that [BL] had watched over her. There was a clear sense that it was [SK]'s time to repay that sisterly oversight and watch over [BL].

[71] [SK] described [BL] as being happy to go out with her. [SK] enjoys her company. She described [BL] as being happy to go out for dinner with her or happy to go shopping.

Conclusion

[72] [BL]'s capacity has been assessed by three experienced clinicians for the purposes of this proceeding. Those multiple assessments confirm [BL] wholly lacks the capacity to make or communicate decisions as to her personal care and welfare. I found Dr O'Connor's evidence and assessment of [BL] to be careful, considered and methodical.

[73] Whether the appointment of a Welfare Guardian the only satisfactory way to ensure that appropriate decisions are made for [BL]'s personal care and welfare, was texted in various ways during the fixture. Counsel for the Subject Person put to Dr O'Connor and Ms Lee Roundtree, suggestions as to how decisions could be made by [BL], or with [BL], short of the appointment of a Welfare Guardian. As noted above, Dr O'Connor and Ms Roundtree were confident in their evidence that:

(a) The appointment of a Welfare Guardian for [BL] was not without utility. They both considered it likely that a Welfare Guardian appointed for a person in [BL]'s circumstances would be called upon to make decisions about the person's care and welfare; and

(b) [BL] did not have capacity to prepare or be supported to prepare a future directive or plan that would suffice instead of the appointment of a Welfare Guardian.

[74] A pertinent illustration of the benefit for [BL] of having a Welfare Guardian appointed, is the palliative care alternatives; particularly the radiation treatment referred to in the letter from [Dr B] and [Dr C]. I was distressed when the evidence indicated that [BL] could have benefitted from such treatment, but had been unable to be provided with it, because of the lack of resolution of these proceedings. It is a measure of grace, that [BL]'s condition has not progressed to the extent initially anticipated and so the absence of that palliative care alternative has not been to her detriment.

[75] It was also of significant assistance to have a witness as experienced in elderly care as Ms Roundtree. Her expertise gained from 15 years working in aged care, meant she was able with ease to elaborate on the circumstances or occasions when not having a Welfare Guardian appointment for a person in [BL]'s circumstances would hinder her carers to provide the standard of care they would want. She was very concerned to ensure that a Welfare Guardian was in place for future and ongoing care; particularly given that [BL]'s condition will decline and [BL] would need increasing levels of care.

[76] In his closing submissions, the Court's obligation to make the least restrictive intervention, led him to enjoin the Court to consider other alternatives. Counsel referred to commentary where reference was made to the legal context as having changed, so that a paternalistic approach should not be taken. Counsel went on to submit there was irony in a situation where a woman who has suffered from schizophrenia, lived in the community for 40 years, made decisions with her husband, and now when facing death wants to continue to make decisions, yet was coming within the jurisdiction of the Act, when there was no evidence that she was materially worse now than she was 20, 30 or 40 years ago, but there was no thought of a Welfare Guardian then. Counsel also reminded the Court that the existence of a mental health condition did not mean a presumed incompetence to making decisions consenting to treatment.

[77] I heard evidence as to [BL]'s life within the community. Dr O'Connor and [SK] made observations about the quality of that life with the benefit of hindsight. I take Counsel for the Subject Person's point that whatever [BL]'s capacity was then, she was supported by and did live in the community, with her husband. However, I cannot take that as far as his submission sought, because there has been a material change for [BL], and that is that she cannot live with the support of her husband in the community now. It is apparent from her circumstances before she was admitted to [the mental health facility] that she was unable, when living by herself, to make decisions that would ensure her well-being. I also do not understand the evidence to be that she wants to make decisions for herself now. Lastly, Dr O'Connor's evidence as to the research supporting that schizophrenics have a general cognitive decline over time, in addition to the disorder of psychosis suggests that [BL]'s capacity will decline from the level it is at now.

[78] Taking all those matters into account, I find that the appointment of a Welfare Guardian is the only satisfactory way to ensure that appropriate decisions are made for [BL]'s care and welfare.

[79] The final issue then, was is [SK] capable of carrying out the duties of a Welfare Guardian in a satisfactory manner, and I find that she is.

[80] Both Dr O'Connor and Ms Roundtree gave evidence that a family member is the optimum appointment as Welfare Guardian.

[81] [SK] is [BL]'s only family member with whom [BL] has an ongoing relationship. She is the only family member who can undertake the role and who has enduring knowledge of [BL].

[82] [SK] has already shown her commitment to her sister; by maintaining a relationship when sibling bounds elsewhere in the family with [BL] have foundered. [SK] talked in her evidence about family, and [BL] having looked out for her, when she was younger. I understood [SK] to be saying that her present commitment to [BL], was the reciprocation of the care that [BL] had taken of her.

[83] I am satisfied from hearing [SK] but also from the evidence of those who have observed [SK] and [BL] together, that [SK] is capable of carrying out the duties of a Welfare Guardian, that she will act in [BL]'s best interests and that there will not be any conflict between [SK]'s interests and [BL]'s interests.

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Judge JK Hambleton
Family Court Judge

Date of authentication: 28/06/2021
In an electronic form, authenticated electronically.