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

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**IN THE FAMILY COURT**
**AT AUCKLAND**

**I TE KŌTI WHĀNAU**
**KI TĀMAKI MAKAURAU**

**FAM-2020-090-000453**
**[2023] NZFC 1477**

| | |
|---|---|
| IN THE MATTER OF | THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988 |
| AND ALSO IN THE MATTTER OF | [JR] |
| BETWEEN | [NP]<br>Applicant |
| AND | [JR]<br>Respondent |

| | |
|---|---|
| Hearing: | 22 November 2022 and 13 & 14 February 2023 |
| Appearances: | P Lavus for the Applicant<br>J Surgenor for the Respondent<br>T Mullins for Mr [MP]<br>T Kelly for [KS] (Property Manager) |
| Judgment: | 4 May 2023 |
| Reissued: | 9 May 2023 |

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**RESERVED JUDGMENT OF JUDGE KEVIN MUIR**

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I am reissuing this Judgment on 9 May due to the MNC number being incorrect.
All other content remains as per.

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[1] [JR] was born [JP] on [date deleted] 1925. She is the beloved aunt of [DP]. [DP] was principally responsible for [JR]'s familial care and support for at least a decade. He generally saw his aunt twice a week or so and he assisted her with medical appointments, financial matters and the like. His work on her behalf is commendable. During that time [DP] was instrumental in a number of significant transactions where property or money belonging to [JR] came to be owned or used by [DP]. It is claimed that the value of the benefits that [DP] received might exceed $1,700,000.

[2] On 15 May 2014, [JR] granted an enduring power of attorney (EPOA) to [DP], appointing him as her attorney for both property and welfare issues.

[3] [DP] essentially says that all of the transactions to his benefit were at [JR]'s initiative – that [JR] was mentally competent and able to make informed decisions at all relevant times. He denies that he was acting under the EPOA when receiving benefits from his aunt and denies that he owed duties to his aunt as her attorney – or he at least denies that he breached any duties that he did owe her.

[4] I must decide whether [JR] was "*partly lacking in competence*" at the time of each of the transactions.[1] If [JR] was partly lacking in capacity at the time a transaction was effected by [DP], then I must decide if it is reasonable to review the decision or transaction effected by him and if so, what if any remedy is appropriate.[2] The essential issue will be whether [DP] has breached his duties as an attorney to his aunt's detriment in such a way as to justify compensation.

[5] [JR] and her three siblings [TP], [MP] and [KP] were born in [West Auckland]. [JR] married in [1976], but her husband Dr [CR] died in 1985. From 2000 [JR] lived at [location 1], Auckland. Her sister [TP] who lived at [location 2] died on [date deleted] 2013 and [JR] inherited that property from her. [JR] then lived alone, supported by [DP], by DHB home help staff and to a lesser extent by other family and friends.

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[1] Alternatively, "*partly lacking in capacity*". The terms competence and capacity are used interchangeably in the Protection of Personal and Property Rights Act 1988.

[2] Section 103 of the Protection of Personal and Property Rights Act 1988 (the Act).

[6] [JR] has lived at the [Village] Rest Home since May 2020. On 5 May 2020 she was certified as wholly lacking mental capacity to manage her property affairs or to make decisions as to her personal care and welfare.[3]

[7] [JR]'s cognitive decline was first documented during a hospital admission in January 2014.[4] An expert psychogeriatrician who was appointed by the Court, Dr Casey is of the view that after March 2014 "*technically the diagnosis of dementia could have been made*".[5]

[8] The EPOA that [JR] executed in favour of [DP] as to property came into effect immediately following its execution on 15 May 2014 and was to continue to have effect if [JR] as the donor became mentally incapable.

[9] [JR]'s niece [NP] ([DP]'s sister) is the applicant in this matter. She seeks a review of decisions she says were made by [JR]'s attorney [DP]. Under s 103(4) I may, if I think it is reasonable to do so in all the circumstances, review any decision made by [DP] as property manager when [JR] was mentally incapacitated and make any order that I think fit. [KS], a lawyer, was appointed as [JR]'s property manager under s 31 of the Act on 18 May 2021.[6] The Family Court directed [KS] to enquire into the history of [JR]'s property portfolio and finances from the date [DP] was appointed under the EPOA dated 15 May 2014.

[10] The key transactions which are challenged are detailed in paragraph [33] below. In general, [DP] does not accept he was acting under the EPOA before May 2020.[7] He said [JR] was "*in charge of nearly all aspects of her daily living, and prior to May 2020 I did not make any financial decisions concerning her property without discussing them with her first and obtaining her agreement*".[8]

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[3] V2/571 [DP]'s brother [MP] says that until 2013 he was the one who looked after a lot of [TP] and [JR]'s requirements and that [NP] who lived close by was always willing to assist them.
[4] V1/008 report of Dr Casey.
[5] V1/009 para 53, report of Dr Casey.
[6] Ms [KS] was first appointed as temporary property manager on 21 October 2020 in place of [DP]. [DP] did not oppose that order.
[7] [DP] said "… the EPOA was not activated on 15 May 2014 and indeed, remained that way until May 2020" – V2/262, affidavit of [DP] sworn 23 December 2020 at para 29.
[8] V2/264, affidavit of [DP] sworn 23 December 2020 at para 30.

[11] An issue that will be relevant to my decision as to whether to review any decisions and what if any orders should be made, will be whether or not [JR] was subject to undue influence in relation to any of the challenged transactions.

## The Purpose of this Review

[12] The Act is described as "*an Act to provide for the protection and promotion of the personal and property rights of persons who are not fully able to manage their own affairs*".[9] As Keane J explained in *CMS v Public Trust*[10] "*the full purpose is, as the long title confirms, both to protect and promote those rights; the rights of "persons who are not fully able to manage their own affairs". In its objectives, principles and purposes, the 1988 Act sets out to protect such persons and, as far as can be achieved, to promote their autonomy, all the while according to them, when any decision is to be made, the most complete right to be heard*".

[13] Section 5 of the Act provides:

> **5 Presumption of competence**
>
> For the purposes of this Part, every person shall be presumed, until the contrary is proved, to have the capacity—
>
> (a) to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; and
>
> (b) to communicate decisions in respect of those matters.

[14] The review that I am being asked to conduct under s 103 appears in Part 9 of the Act which deals with EPOA. The presumption of competence is echoed in s 93B of Part 9:

> **93B Presumption of competence**
>
> (1) For the purposes of this Part, every person is presumed, until the contrary is shown,—
>
> (a) to be competent to manage his or her own affairs in relation to his or her property:

[9] PPPR Act commencement.
[10] *CMS v Public Trust* [2008] NZFLR 640 at [21].

(b) to have the capacity—

(i) to understand the nature of decisions about matters relating to his or her personal care and welfare; and

(ii) to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; and

(iii) to communicate decisions about those matters.

(2) 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.

(3) A person must not be presumed to lack the capacity described in subsection (1)(b) just because the person makes or intends to make a decision in relation to his or her personal care and welfare that a person exercising ordinary prudence would not make in the same circumstances.

(4) A person must not be presumed to lack the competence described in subsection (1)(a) or, as the case may be, the capacity described in subsection (1)(b), just because the person is subject to compulsory treatment or has special patient status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

[15] There is thus a presumption that everybody has capacity and is competent to manage their own affairs.[11] The question of whether or not [JR] has "*capacity*" or "*competency*" should be determined on a decision specific basis. The question that I will need to address is whether [JR] had capacity to make a particular decision at the time the decision was made.[12]

[16] Section 102 of the Act specifically gives the Court jurisdiction to determine whether or not the donor of an EPOA is mentally incapable.[13]

[17] The purpose of Part 9 is stated in s 93A of the Act. Part 9 of the Act enables [JR] to appoint another person (in this case [DP]) under an EPOA to act in relation to her property affairs "*(i) if the donor becomes mentally incapable; or (ii) while the donor is mentally capable and if the donor becomes mentally incapable*."[14]

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[11] *CMS v Public Trust* supra at [22].
[12] Brookers Family Law, Protection of Personal and Property Rights, pp 5.03.
[13] Section 102(1)(b) of the Act.
[14] Section 93(1)(b) of the Act.

[18] [DP] as [JR]'s attorney had a number of duties imposed on him under Part 9 of the Act. In addition, [DP] was subject to important ethical obligations which were discussed by the Court of Appeal in *Vernon v Public Trust*:[15]

> [37] … The nature of the statutory power does not exclude the imposition of equitable obligations … unless the instrument or statute requires otherwise, the agent must discharge his or her duties towards the principal with the utmost loyalty, honesty and good faith. He or she must ensure that he or she does not benefit himself or herself at the donor's expense. And he or she must always act in the donor's best interest, in particular where a power is granted for the purpose of preserving and managing the donor's property.
>
> [38] … In this context the donor's mental capability does not militate against the existence of obligations. Indeed, their imposition and proper performance are essential where the donor, even if mentally capable, is elderly, vulnerable and has granted the power for the obvious reason that his ability to protect his property interests is impaired or diminished. The factors of trust and reliance, recognised by the judge within the wider findings of a fiduciary duty, must predominate. (citations omitted).[16]

[19] Once appointed under the EPOA, [DP] had authority to do anything on behalf of [JR] that [JR] could lawfully do by an attorney.[17] The EPOA which appointed [DP] contained no relevant restrictions.

[20] [DP]'s primary duty as [JR]'s attorney is set out in s 97A(2):

> "The paramount consideration of the attorney is to use the donor's property in the promotion and protection of the donor's best interests, while seeking at all times to encourage the donor to develop the donor's confidence to manage his or her own affairs in relation to his or her own property."

[21] Under s 99A, [DP] had a duty to consult with [JR] as far as practicable.[18] Section 99A(3) provides as follows:

> **99A Attorney's duty to consult**
>
> …
>
> (3) The attorney may follow any advice given under subsection (1), or any advance directive given by the donor, and is not liable for

[15] *Vernon v Public Trust* [2016] NZCA 388; [2016] NZFLR 578.

[16] See also *McKay v Sandman* [2018] NZCA 103 where the fiduciary duties owed to a donor in executing an EPOA are discussed and *Smith v Ball* [2020] NZHC 944 where the fiduciary duties of the attorney are discussed and particularised.

[17] Section 97(2) of the Act.

[18] Section 99(2) and (3) allows [DP] to have regard to any "*advance directive given by ([JR])*".

> anything done or omitted in following that advice or directive, unless done or omitted in bad faith or without reasonable care.

[22] If it is established that [DP] has followed advice given by [JR] at a time when she was of sound mind then [DP] may not be liable for anything that he has done or failed to do unless he has acted in bad faith or without reasonable care or has otherwise breached his duties as her attorney.

[23] Section 95C of the Act requires an attorney to "… *keep records of each financial transaction entered into by the attorney under the Enduring Power of Attorney while the donor is mentally incapable*."

[24] The power of review under s 103 of the Act is both protective and supervisory. Its clear purpose is to ensure there is a mechanism for decisions made by an attorney to be reviewed. In reviewing the decisions of the attorney, the Court needs to be guided by the principles and presumptions in the Act including the presumption of competence. However, the focus of the review must be on ensuring the attorney has complied with their equitable and statutory duties. There is necessarily a particular focus on ensuring that the attorney has at all times acted in good faith with the welfare and interests of the donor to the fore and with the ultimate view of protecting and preserving the donor's assets for the benefit of the donor.

[25] I can only review decisions that were made while [JR] was "*mentally incapable*". I must necessarily consider the nature of the decision including its complexity and the context in which it occurred, the time it occurred and any facts which impact on [JR]'s ability to understand the implications of the decision and its impact on her. I must consider in particular, its impact on her property and her ability to maintain her financial independence.

[26] In considering whether [JR] was mentally incapable at the time of any particular decision, s 25(4) of the Act gives me jurisdiction to "*have regard to the degree to which the person is subject, or is liable to be subjected to undue influence in the management of his or her own affairs in relation to his or her own property*."

[27] In deciding whether [JR] was mentally incapable so as to give the Court jurisdiction under s 103, I must have regard to s 25 of the Act which sets out the Court's jurisdiction over the property of any person subject to the Act. Under s 25(2)(b) jurisdiction arises in relation to any person "*who in the opinion of the Court lacks* ***wholly*** *or* ***partly*** *the competence to manage his or her own affairs in relation to his or her property …*" (emphasis added)

[28] The fact that [JR] might have managed her affairs in a manner that a person of ordinary prudence would not adopt given the same circumstances is not in itself sufficient ground for me to exercise my jurisdiction.[19] I can only intervene if I am satisfied there is evidence of actual incompetence or incapacity, that is evidence that [JR] was wholly or partly incapable of managing her own affairs in relation to any property transaction in question.[20]

[29] In *Foster v Foster*[21] Judge Brown emphasised the need to avoid conflating the jurisdictional test in s 25 relating to whether a person has the competence to manage property with the question of undue influence.

**The Principles of Undue Influence**

[30] The principles relating to undue influence were comprehensively discussed by Winkelmann J in *Green v Green*:[22]

> [100] The principles I apply as to the law of undue influence are as follows (I adopt here principles from the *House of Lords in Royal Bank of Scotland v Etridge* [2002] 2 AC 773 (HL), approved by the Court of Appeal in *Hogan v Commercial Factors Ltd* [2006] 3 NZLR 618 (CA) at [36])
>
> (a) The overall burden of proof rests on the person seeking to establish undue influence

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[19] Section 25(3) of the Act.

[20] See *Jones v Te Maro* [2013] NZFC 8555 where an order which had been made because the subject person was partially incompetent and was likely to spend money irrationally was revoked. The Court found the fact that the subject person had different ideas to the property manager as to how to spend his money did not necessarily mean that he lacked competence.

[21] *Foster v Foster* [2014] NZFLR 931 at [39].

[22] *Green v Green* [2015] NZHC 1218 at [100]. That decision and Winkelmann J's summary of the relevant principles was subsequently approved by the Court of Appeal in *Green v Green* [2017] 2 NZLR 321.

(b) The burden of proof is the balance of probabilities. I accept Mr Waalkens' submission (counsel for the defendant in the probate proceedings) that where the allegation made is serious (such as an allegation of dishonesty or criminal offending), the Court will require strong evidence to be satisfied on the balance of probabilities that that occurred. *Re H (Minors)* [1996] AC 563 (HL); *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

(c) The person asserting undue influence must show that the alleged influence led to the making of the impugned transaction, and that the influence was undue in the sense that the transaction was not the result of the free exercise of an independent will on the part of the person at whose expense the transaction was made.

(d) The question of whether a transaction was brought about by undue influence is a question of fact. A party can succeed in establishing this either directly by proving "actual undue influence" or recourse to an evidential presumption which arises where it is established that:

   (i) the person said to have been subject to undue influence placed trust and confidence in the other; and

   (ii) the transaction called for explanation.

(e) Whether there is a relationship of trust and confidence can either be established factually or by reference to a class of specific relationships such as lawyer/client; parent/child; doctor/patient. In the latter category the law presumes irrebutably that one party had influence over the other. The presumption is only as to proof of influence. The person alleging undue influence will still need to establish a transaction calling for an explanation.

(f) Whether a transaction calls for an explanation depends on the circumstances of the case. The question is simply whether "failing proof to the contrary, [the transaction] was explicable only on the basis that undue influence had been exercised to procure it". *National Westminster Bank Plc v Morgan* [1985] AC 686 (HL) at 704, cited in *Royal Bank of Scotland v Etridge (No 2)*, above n 49 at [25].

(g) Once the person claiming undue influence has established both the relationship of trust and confidence and a transaction calling for explanation, the evidential burden shifts to the person seeking to uphold the transaction to show that the transaction was not the result of undue influence. This however should not obscure the position that the overall burden of proof will always rest on the person alleging undue influence

(h) The presence of independent advice is one of many factors that may be taken into account in determining whether undue influence is proved. Whether the independent advice helps to establish that the transaction was the result of a person's free will depends on the facts of the case. Independent advice can help establish that a person understood the decision they were making. But establishing that a person fully understood the act is not the same as establishing that the

act was not brought about by undue influence. A person can fully understand an act and still be subject to undue influence

(i) Allegations of undue influence may succeed in relation to the exercise of powers not just the transfer of property. *Harris v Rothery* [2013] NSWSC 1275.

[31] In *K R v M R*[23] Miller J referred to four factors that are particularly important in determining whether the person has capacity to make a relevant decision:

> "… Ability to communicate choice; understanding of relevant information; the appreciation of the situation and its consequences; and manipulation of information – in other words, the persons ability to follow a logical sequence of thought in order to reach a decision."

[32] In *K R v M R*, Miller J approved the statement made by Judge Inglis QC in *Re G (PPPR: jurisdiction)*[24] at page 648:

> "It is sufficient to show that the subject's capacity to understand the nature and to foresee the consequences of alternatives or options available for choice is so limited by intellectual disability or by mental illness or both that any choice between such alternatives or options which the subject may make cannot responsibly be recognised as effective."

## The Disputed Transactions

[33] In the report provided to the Court by [JR]'s property manager, [KS], on 17 August 2022,[25] Ms [KS] identified eight transactions or series of transactions which she considered called for "*explanation and/or reimbursement from Mr [DP]*". They are:

**(a) Gift of the [location 2] Sale Proceeds**

On 26 November 2016 [JR] signed a Deed of Gift under which the entire net proceeds of sale of the home that had been lived in by her sister [TP] at [location 2] were gifted to [DP]. Prior to the sale the costs of maintenance, minor property renovations and marketing were paid for from [JR]'s account with all of that work being directed by [DP]. Given that immediately after the sale [DP] received a "*gift*" of the entire

[23] *K R v M R* [2004] 2 NZLR 847.
[24] *R G (PPPR: Jurisdiction)* (1994) 11 FRNZ 43.
[25] V1/014.

proceeds of sale, Ms [KS] expresses the view that the benefit obtained by [DP] from the sale included the (unspecified) costs incurred prior to sale.[26]

**(b) Gift of $81,774.12**

Between 18 February 2016 and 30 November 2020, [DP] transferred funds from various accounts to his own account in the total sum of $133,000. He claims that he is entitled to retain $81,774.12 of that sum. He says that is because it was [JR]'s intention to gift him "*the entire proceeds of sale*" of [location 2]. The home when sold had a mortgage to the BNZ of $81,774.12 which was repaid. [DP] claims that [JR] told him that because that debt had been incurred largely as a result of gambling by her and [TP] she did not think it fair that he did not receive that money. [DP] says that [JR] signed a document labelled "*Power of Attorney Instructions*" on 15 December 2015. That document provided:

> "It has come to my attention that not all proceeds from the sale of my property at [location 2] have been passed onto [DP], as per my wishes. My intention being that the entire proceeds from the property sale, minus expenses incurred during the sale, were to be passed onto [DP].
>
> I wish [DP] to receive the full proceeds, that being $1,416,116.98.
>
> I instruct my power of attorney to ensure that this happens."

[DP] accepted that the document was prepared by him and although it was executed by [JR], it was not given or shown to anyone including [JR]'s solicitors at any time. He produced a number of handwritten receipts as Exhibit L to his affidavit of 23 December 2020 for payments made which generally contained words such as "*to be offset against debt owed by [JR]*". Those receipts were written, signed and dated by him alone. He kept them. [JR] was never provided with copies nor was anyone else.

[26] V1/205 report of [KS].

**(c) ATM Withdrawals of $90,150**

ATM withdrawals were made from [JR]'s bank accounts totalling $90,150. Those withdrawals were made using [JR]'s EFTPOS card between 19 February 2015 and 28 April 2020. The withdrawals were made at BNZ ATMs situated in St Heliers, Kumeu, Albany and Link Drive. [DP] lived in [location deleted]. [DP] accepts that he made all of those withdrawals but claims he was authorised by [JR] to make the withdrawals and that she accompanied him "*the majority of the time*".[27] He says he left the cash in her home.

**(d) Transfers from [JR]'s Account to [DP]'s Accounts of $153,284.12.**

Funds were taken directly from [JR]'s account and paid to [DP] with the notation "*savings*" or "*td*" appearing in [JR]'s bank account. Those transactions total $153,289.12. The transfers were made between 9 May 2016 and 8 April 2020 in 47 separate transactions.

**(e) Payment of Legal Fees – $43,957.02**

[DP] made payments from [JR]'s bank accounts totalling $81,622.07 to Atmore & Co Solicitors and John Wain, Barrister from [JR]'s bank account. He voluntarily repaid the sum of $37,665.05 to [JR] on 30 August 2021 which related to legal fees paid to Mr Wain in 2020 "*defending his position as an attorney in these proceedings and seeking to enforce the sale of [location 1]*".[28] The balance outstanding is $43,957.02, funds that were paid to Mr Atmore and Mr Wain between 17 December 2016 and 20 September 2020.[29] In parts of his evidence [DP] has said that the legal services were incurred personally by him and not in relation as his role as attorney for [JR]. In oral evidence he

[27] Of the 27 ATM withdrawals, 36 occurred outside of [location 2]. [DP] claimed that [JR] accompanied him to most of the [location 2] withdrawals but it is clear that she was not with him "the majority of the time" as he accepted she did not accompany him when any of the withdrawals outside of [location 2] were made. He did however say that all of the withdrawals were made at her instruction or with her consent (NOE, p 327).

[28] V1/029 report of [KS] dated 17 August 2022 at [62].

[29] The fees include $9,775 paid to barristers Mr Dalkie and Ms Watson as disbursements in a bill dated 19 April 2017.

claimed he had [JR]'s consent to pay his legal fees using her money. He said this was "… *just a general*" instruction, he kept a "*tally*" but never discussed with [JR] how much of her money he was spending on legal fees.[30]

(i) As part of the review, I will need to decide whether any of those payments were for [JR]'s benefit;

(ii) If not for [JR]'s benefit, whether she consented to any of them being made; and

(iii) If she did consent, whether she was competent to consent.

**(f) Gift of a Car and Vehicle Running Costs**

Between October 2014 and July 2020, $33,841.89 was deducted from [JR]'s bank accounts by [DP]. Those expenses related to the maintenance and running costs of [JR]'s Audi and a Peugeot vehicle that had been owed by [TP] but which was left to [JR]. [JR] was not driving either of those vehicles at the time. [DP] says the Peugeot was gifted to his sons and he drove the Audi. He says [JR] authorised him to use the Audi and to pay the costs of driving the Audi from her accounts because he was driving from [his home to JR's home] and carrying out tasks on [JR]'s behalf. He says [JR] authorised the payment of costs in relation to the Peugeot, even of costs incurred after the Peugeot was gifted to his sons and not used for [JR]'s benefit in any way. I need to decide in relation to those expenses:

(i) Whether they were in fact incurred with [JR]'s consent;

(ii) If so, whether she was competent to give consent at the relevant time; or

(iii) Whether the cost was substantially for her benefit.

---

[30] NOE, p 362.

The property manager was only able to locate receipts for costs totalling $10,629.05 of the $33,849.89 total, which indicates that [DP] did not comply with his obligation under s 95C of the Act to maintain adequate records.

**(g) Fridge Purchase**

$949 was applied from [JR]'s bank account towards a fridge [DP] purchased from Noel Leeming for a total of $2,449.

**(h) EFTPOS Purchases**

Purchases totalling $1,354 were made by [DP] using [JR]'s EFTPOS card between 4 September 2017 and 3 February 2020. Ms [KS] says those payments require explanation or reimbursement. In addition, the applicant [NP] identified a $129.76 purchase using [JR]'s EFTPOS card at Mitre 10 Westgate on 14 November 2019 to acquire hand tools and chocolate which [NP] says was not for [JR]'s benefit.

**(i) Rates Penalties**

[KS] has identified rates penalties totalling $2,055.15 incurred during the time that [DP] was responsible for paying, and did pay, all of [JR]'s living expenses including her Auckland Council land rates.

**(j) Puka Park Resort**

Finally, the sum of $544.15 features an invoice dated 27 February 2017 for one night's accommodation in two rooms at Puka Park Resort in Coromandel. The cost was paid from [JR]'s BNZ bank account and is not listed in [DP]'s table of expenses which he "*credited*" against the $81,744.12 debt that he claims [JR] owed him. [DP] has not explained this expenditure. It is clear that it was not for [JR]'s benefit.

[34] It is also alleged that some of [JR]'s jewellery has gone missing while [DP] was acting as the EPOA. The value of the missing jewellery is $61,840. Compensation is sought from [DP].

[35] There was also a significant transaction which was initiated by [NP] on 30 November 2016. The interest in her home at [location 1] was transferred from [JR] as a two-thirds owner and [NP] as a one-third owner as tenants in common in equal shares. However, [NP] has agreed with [JR]'s property manager [KS] that the title to that property should be restored so that [JR] will remain as a tenant in common with a two-thirds share and [NP] a tenant in common with a one-third share.[31]

## History of [JR]'s Decline

[36] The history of [JR]'s mental state with particular emphasis on any medical reports as to her competence is highly relevant to my determination of this issue. It is clear from the evidence that I have heard, that [JR]'s mental state was in decline and that her competence in general decreased progressively at least from the date of the death of her beloved sister [TP] in [2013].

[37] However, [JR]'s competence also needs to be examined in relation to each of the material transactions that are challenged. It is clear from the evidence that [JR], like many people in her situation, remained competent for some purposes but not for others. [DP] said that he believed [JR] remained competent to manage her own affairs until 5 May 2020 when [JR] was certified as "*not wholly competent to manage her own affairs*" and "*mentally incapable as she lacks the capacity to make or communicate decisions about long term care needs and medical treatment decisions*". In giving the certificate of mental incapacity Dr Antonia Birry said, "*On today's assessment she has severe dementia*".[32] In his oral evidence, in support of his belief [JR] was competent [DP] repeatedly cited the fact that [JR] was able to live, as he described it, "*independently*" in her home at [location 1].[33]

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[31] This transaction would fall outside my jurisdiction under s 103 in any event as it was not a decision made by [DP] as [JR]'s attorney.
[32] V2/242.
[33] It should be noted that [JR]'s ability to live independently was supported by significant help in the form of carers from the DHB attending her morning and evening, the delivery of Meals on Wheels and frequent visits from [DP] who attended to all of her financial and administrative requirements.

**[JR] and Her Family**

[38] [JR] was a remarkably independent woman who was able to live in her own home, albeit with considerable assistance until her 95$^{th}$ year. [JR] was from a close family, she grew up in [West Auckland] where her father owned orchard land and had acquired an impressive portfolio of property. She is the sole survivor of her brothers [MP] and [KP] and her sister [TP]. [MP] was the father of [DP], [NP] and [MP] Jnr. [KP] and [TP] never married or had children. [JR] was widowed after a decade of marriage and she had no children herself.

[39] [JR] remained very close to all of her family for most of her life. The provisions of [JR]'s Wills reflect my impression of the fond relationship that [JR] had with her niece and nephews. In the Will that she executed on 1 December 2009 she left the former family home at [location 3] and her share at [location 2] equally to [DP], [MP] Jnr and [NP] in the event [TP] did not survive her. Her share in her home at [location 1] was gifted to [NP].

[40] [JR] was one of the trustees and a settlor of the [Family Trust] ([the Family Trust]) which was settled in 1999. One of [JR]'s most significant assets is a debt that is owed to her by the [Family Trust] of approximately $1,740,000. Interest is payable on demand at the rate of 7 per cent per annum. Interest had been demanded for the years 2017, 2019, 2020 and 2022. $81,653 was paid for 2017, being the interest after deduction of withholding tax. As at the date of hearing $244,919 was outstanding being interest for 2019, 2020 and 2022. The principal is not payable until 4 April 2038.[34]

[41] [DP] was a trustee of the [Family Trust] and of a Trust established by [KP] and [MP] Snr in 2005, the [Trust], and he was extensively responsible for management of those Trusts. Disputes arose between [DP] on the one hand and [KP], [MP] Snr, [MP] Jnr and [NP] on the other hand. There were evidently allegations that [DP] had taken or received benefits from the Trust funds that he was not entitled to – allegations [DP] denies.

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[34] V2/111, Exhibit R, affidavit [NP], 21 October 2020.

[42] [DP] considers that [MP] Jnr and [NP] have benefitted unfairly from [KP]'s Will to his exclusion. He views himself as aligned with [JR] in opposition to the other members of the [family].

[43] He claims that for the past 20 years he has been the only family member who has shown any interest in [JR]'s welfare. At least for the past decade [MP] Jnr and [NP] had limited their contact with [JR], although I accept their evidence that there is a strong bond of mutual familial affection between them and their aunt. They say that was in part to avoid conflict with [DP]. I accept that [DP] has been a frequent visitor and a considerable source of personal comfort to [JR] for at least the last decade. It is clear from [DP]'s evidence that [JR] had come to heavily rely on him even before the EPOA was executed. He says he regularly visited, did errands for her, took her to appointments and "*took care of financial matters when she asked me to*".[35]

[44] [JR] purchased the property at [location 1] in 2000 in good part so she could be close to [TP] who lived at [location 2]. [JR]'s home was acquired as Tenants in Common by [JR] as to a two-third share and her niece [NP] as to a one-third share.

[45] [TP] and [JR] used to share meals, with one cooking the meat and the other the vegetables. They would carry pots between each other's houses and eat together. They enjoyed a range of outings and interests together. It is clear and it is understandable that [JR] and [TP] were emotionally reliant on each other and that to some extent, [TP] enabled [JR] to continue living independently until she was well into her 80s.

**Dr Casey's Report and Medical Records to February 2014**

[46] Dr Casey prepared a report dated 21 December 2020 as a result of a direction by this Court under s 76 of the Act. The report gives a detailed overview of [JR]'s competence and capacity. Dr Casey reviewed medical records as well as the evidence filed to that date in this court proceeding for the purposes of her opinion.

[35] V2/131, Affidavit of [DP], 20 October 2020 at para 30.

[47] Volume 6 of the agreed bundle of documents comprises 95 pages of relevant medical records including cognitive assessments, and clinical observations about [JR]'s competence and cognition between October 2013 and December 2020.

[48] On 4 October 2013 there are notes of attendance by a District Nurse in her home. The District Nursing Initial Assessment indicated possible cognitive issues including time orientation and "*inappropriate history*". There is a query in relation to confusion/dementia. The notes record:

> "88 y.o. lady in apparent good health up until recently but despite affability kept straying off subject, had difficulty with years "8 years ago" referring to an event in the 1980s. Kept changing subject. Appeared to be confabulating. … Repeated statements, questions, unable to state which medications she was taking or why – unable to recall with clarity past medical events. Vague.

[49] The nurse noted that [JR]'s GP, [name deleted], would telephone [JR] as to her mental status and there would be a joint referral of [JR] and her sister [TP] to Gerontology.

[50] In November 2013 [JR]'s home was noted as being very cluttered and it was recorded that she would benefit from some home help and that a Needs Assessment would be required.

[51] On 2 January 2014 [JR] suffered a fall at home and was hospitalised. She remained in hospital until 13 February 2014. During that hospitalisation she was diagnosed with mild cognitive impairment.[36] It was noted that her memory and insight into her safety fluctuated with an Addenbrooke's Cognitive Assessment – Revised (ACE–R) Test, giving a score of 85/100. [JR] was discharged with recommendations for significant assistance including daily personal cares and wellness checks for medications, Meals on Wheels, a continence referral, physiotherapy and "*family discuss EPOA*".[37]

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[36] V/008 Dr Casey's s 76 report.
[37] V6/014.

[52] On 18 January 2014 [NP] found a note at [JR]'s home which was evidently intended to record her intentions as far as her Estate was concerned. It is common ground that the note is in [DP]'s handwriting. It reads:

> "– [JR]'s to [NP].
> – [TP]'s place to [JR].
> – [location 3] to [JR].
> – [TP]'s place to [DP]."

[53] On 13 March 2014, [JR] was administered another ACE–R cognitive examination with the result of 72/100.

[54] In explaining the significance of those "*scores*" Dr Casey described the ACE–R test as a bedside cognitive screening test which is particularly sensitive and specific to Alzheimer's type dementia. The "*cut off*" is generally considered to be 82/100. Below 88/100 a diagnosis of mild cognitive impairment is given which Dr Casey said, "*in the old days*" was called "*benign senile forgetfulness*". A number in the 80s, particularly in someone who was premorbidly intelligent, indicates that there has clearly been a decline in their previous functioning. 82 or below indicates dementia but a diagnosis of dementia also requires there to be a change from baseline indicated by a change in functioning.

[55] Dr Casey was of the opinion that mild cognitive impairment was often diagnosed for [JR] despite the level of her cognitive impairment appearing significantly compromised in cognitive tests, because a collateral history was given to the hospital that she was functioning.[38] The collateral history was usually provided in good part by [DP] who accompanied [JR] to many of the examinations and who appears to have been the primary source of the history recorded in the relevant hospital notes and other medical notes.

[56] Dr Casey also explained scores in Montreal Cognitive Assessment (MoCA) Tests. She said a score of 22 out of 30 or below is indicative of cognitive impairment. MoCA is a test for people with dementia – Alzheimer's or vascular dementia generally. When the score is 17/30 or 18/30 there is considered to be a definitive diagnosis of

[38] NOE, p 68.

dementia. Those results are again dependent upon factors such as the timing of the test, the subject's premorbid education, their cultural background and the level at which they are able to function.

[57] On 18 March 2014 [JR] underwent an Allen Cognitive Level Screen (ACLS) in [DP]'s presence. That test is described as a standardised assessment of current cognitive functioning. The result was a score of 4.2. An occupational therapist report noted, "*with a score of 4.2 24-hour supervision is usually recommended*". [JR] was likely to need assistance with solving non-routine problems such as changes in medication. Safety issues and precautions were mentioned. Under the heading "*Money and Time Management*" it was noted "*money management might require complete or close supervision*". The report also noted that [JR]'s history of falls differed from what was documented in notes and reported by family members. It was noted that she had reduced insight into her abilities including the reasons for having recently fallen, "*[JR] has noted memory deficit which has implications for her ability to learn and retain new information*". A note on 19 March 2014 stated, "*Information provided to patient, nephew ([DP]) and extra copy for niece*".[39]

[58] By 24 December 2014 [JR]'s ACE–R score had improved to 88/100. That result was indicative in Dr Casey's opinion of a continuing cognitive decline where [JR]'s cognitive functions might plateau or even improve modestly for short periods of time as part of an overall pattern of diminishing cognitive function.

**[JR]'s May 2014 Will**

[59] [JR]'s longstanding [general practitioner] performed an assessment on aspects of [JR]'s capacity to decide on or around 25 February 2014. [JR's general practitioner] was of the opinion that [JR] had the broad capacity to decide in relation to property, health and welfare and to make a Will, although he expressed reservations about her ability to continue as a Trustee.

[60] [JR's general practitioner]'s opinion of 25 February 2014 was provided to [JR]'s solicitors Hesketh Henry and on 15 May 2014 [JR] executed a Will which was

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[39] V6/028.

witnessed by two solicitors. That Will was materially different from [JR]'s previous Will executed on 1 December 2009.

[61] In the 2009 Will she had given a series of relatively small cash gifts to family members and two charities, the Hope Foundation for research on ageing and the Order of St John Northern Region Trust Board. She left her chattels to her sister [TP], but if [TP] did not survive they were to be left to [MP] Jnr, [DP] and [NP] for division as they agreed. She forgave the debt owed by the [Family Trust]. The residue of her Estate she left to [TP] if [TP] survived her. In the event that [TP] did not survive her she left [location 1] to [NP], and [location 2] to [MP] Jnr, [DP] and [NP] and [location 3] (the former family home) was to be held for [KP]'s use and occupation during his life. On his death or in the event he did not survive her it was left equally to [MP] Jnr, [DP] and [NP].

[62] In the 2009 Will she was evidently of the view that [NP] had a special claim in relation to [location 1] as a part owner who had provided funds to assist [JR] in purchasing it. She otherwise treated her niece and her nephews equally.

[63] In the Will of 15 May 2014 she gave the home that had been occupied by [TP] at [location 2], to [DP]. The gift of [location 1] to [NP] was maintained. The chattels at [location 3] were left to the Trustees of the [Family Trust]. All her other chattels were left equally to [MP] Jnr, [DP] and [NP] except for any vehicles she owned which were to be left for [DP]. She forgave the debt owed to the [Family Trust] and directed that the residue of her Estate be held for the benefit of the [Family Trust].

[64] The 2014 Will came about after [DP] sent an email to [JR]'s solicitor John Dunlop at Hesketh Henry on 14 April 2014 in which he attached "*[JR]'s instructions regarding her Will. [JR] would like him to act as her Power of Attorney and her Executor*." The instructions had been typed by [DP] but were signed by [JR]. [JR] did not possess or use a typewriter or computer.

[65] [DP]'s email referred to an overdraft "*of around $100,000 (that [JR]) owes to the bank*". He said that he had suggested to [JR] that he would take "*responsibility for this overdraft*". He said:

> “*Therefore, I believe the following needs to happen:*
>
> *1. I be added as guarantor on the overdraft loan documents.*
>
> *2. I be added to the title of [location 2] with [JR].*
>
> 3. *The property at [location 1] be removed as security from the loan documents. No real need to have this property on there as security fund to be responsible for the debt.*”

**Execution of EPOA**

[66] On 15 May 2014, [JR] executed the EPOA as to property and an EPOA as to personal care and welfare. In both documents [DP] was appointed as her attorney with [NP] as an alternate in the event that [DP] was dead or incapable of fulfilling the function.

[67] Rebecca Collins of Martelli McKegg attended on [JR] to advise her on the EPOA on 15 May 2014. [JR] discussed members of her family and matters from her childhood history with Ms Collins. In going through the EPOA in relation to property Ms Collins recorded, “… *She said that she trusted [DP] absolutely. He already acts for her – she signs cheques and he will bank them for her. I explained that [DP] could have absolute control over all her assets but she said she trusted him*.”

[68] It was Dr Casey’s opinion that [JR] would likely have had the necessary cognitive ability and capacity to complete the EPOAs for both property and personal care and welfare.

[69] On 19 February 2015, an ATM withdrawal was made from [JR]’s EFTPOS card at BNZ St Heliers. It was the first withdrawal since 2013.

**[JR’s general practitioner]’s April 2015 Opinion**

[70] On 13 April 2015 there was a file note by Loren Gerbich, a solicitor at Hesketh Henry. She had been telephoned by [DP] and had been told, “*[JR] wants to give [DP] her property at [location 3]*”. Ms Gerbich noted that they would need to check testamentary capacity and check that they could act. [DP] inquired, “… *If worth transferring ([JR]’s) property at [location 2] and [location 3] to him now to avoid claim against Estate*”. There was a record of advice being given about possible claims

under the Family Protection Act, Testamentary Promises Act and a note about the need to look at testamentary capacity "*covering off by assessment*". Ms Gerbich noted:

> "*Not worth putting into Trust as if there was testamentary promises claim moving house to Trust wouldn't stop claim being successful. Compensation could be granted from other assets in her Estate*."

[71] On 14 April 2015, Ms Gerbich wrote to [JR's general practitioner] advising that [DP] would make an appointment time for him to assess [JR]'s testamentary capacity. The letter said:

> "*The legal tests for testamentary capacity is that the Will maker has sufficient understanding of three things:*
>
> 1. *That she is making a Will in the effect of doing so.*
> 2. *The extent of her Estate.*
> 3. *The moral claims to which she ought to give effect when making a testamentary disposition*."

A fourth point was added in pen:

> "*4. Influence*."

And the letter went on to say:

> "*The Will maker should also be free from any mental illnesses that influence the making of gifts in the Will which would otherwise not be made*."

[72] [JR's general practitioner] met with [JR] on 23 April 2015. He wrote to Hesketh Henry enclosing a hospital summary from the previous year, noting:

> "… *Testing formally showed only cognitive impairment; certainly to a level where one would expect her to make appropriate & Considered decisions at a normal level;*
>
> *Hearing is not good; my assessment of this is that she has not significantly deteriorated in this area over the last year. She has no psychiatric illness.*
>
> *I spent some time discussing and asking questions on events, times, situations, allowing for her hearing, her answers were appropriate; delivered quickly and showing good insight and awareness of general situations.*
>
> *The Extent of Her Estate*
>
> *I gathered that: although she is a trustee, that she took little part in the supervision, and was in fact not really certain of the extent and supervision of the Trust;*

> *She asked her nephew for some information to answer my questions.*
>
> *Moral Claims? I'm not certain on this at all; she said that there had been some tension within her family; but did not enlarge on this;*
>
> *I would have felt this would certainly be increased if there was a conception of unfair or unjustified distribution of her Estate;*
>
> *Influence; on most occasions that I see [JR] she has [DP] with her; I believe that he lives some distance away; but always appears to be very caring [and I'm sure that he is]; and a great help to [JR]; This would produce some obvious but perhaps unspoken influence if she sees [DP] more than other family members;*
>
> *I did not receive the second email until after they had departed; what had been described as a relatively small change in the Will [by [DP]] is somewhat more than that;*
>
> *In Summary; I believe [JR] is mentally able to make a decision; and that she has the cognitive ability to do so; the answers to the other questions are not so clear; it is reasonable that an elderly lady incapacitated by severe osteoarthritis leaves the Trust management to others; she did not appear to have full awareness so the Trust and its extent and its contents.*
>
> *The moral claims; I would be unsure; not knowing the extent of beneficiaries; and problems that exist; and influence? I never see (sic) [DP] be any more than a perfect kind family member; that in itself would give influence; due to her dependence on him. But what I cannot comment if these changes have been suggested by him at times when they are in outside of my office. Certainly I understand your concern; (sic) and I cannot medically confirm the factors required for items 2, 3 and 4*."

[73] In his concluding remarks [JR's general practitioner] was effectively saying that he could not medically confirm that [JR] was aware of the extent of her Estate and of any moral claims that she should give effect to when making a testamentary disposition. He was not able to confirm that she was free of any undue influence.

[74] The reference in [JR's general practitioner]'s letter of 23 April to the "*second email*" not received was to an email that Ms Gerbich sent to his medical practice on 23 April advising the doctor that they had instructions "*from [DP] to prepare a new Will for [JR] leaving her property at [location 3] to him. In her current Will, [location 3] is left to the [Family Trust]*". Ms Gerbich told [JR's general practitioner] in the second email that when she spoke to [JR] on the telephone to confirm her instructions she needed prompting to recall that she wished to change her Will and what it was regarding. [JR] had wanted to talk to [DP] as she could not recall the changes. Ms Gerbich explained that [JR] had been confused about whether or not she had already

left [location 3] to [DP]. The letter concluded, "*As the instructions did not come from [JR], when you assess her testamentary capacity could you please confirm, in your opinion, that she is also free from any undue influence*".

[75] It is evident from that exchange that both [JR]'s lawyers Hesketh Henry and her doctor, [JR's general practitioner], were concerned at the influence that [DP] might have over [JR] – albeit believing perhaps that the influence might well have been benign. [JR's general practitioner] was evidently concerned that [DP] had *"downplayed*" to him the significance of the changes that [JR] wished to make to her Will.

**The April 2015 Codicil – [location 3]**

[76] On 21 April 2015 Ms Gerbich had telephoned [JR] and recorded in a file note that she had asked [JR] if she wanted to make a change in her Will. [JR] said she did but "… *when I asked her what changes she wanted to make she couldn't remember*" and "*I had to prompt [JR] that [DP] had advised that it was in relation to [location 3]. [JR] could not remember who she wanted to give [location 3] to, but she was able to tell me that she didn't want to leave it anymore to the [Family Trust]*."

[77] [JR] indicated that she wanted to talk to [DP]. Ms Gerbich advised her that [DP] had said she wanted to leave [location 3] to him. Ms Gerbich noted: "*She didn't really say anything about that other than she would like to talk to [DP]*". [JR] had expressed concern to Ms Gerbich that she "*didn't hear from anyone over Easter so she felt she no longer wanted to leave them anything*". She said she would be leaving it to the [Family Trust] for sentimental reasons. She could remember that [location 3] was the home they had lived in. Ms Gerbich noted that when she told [JR] that [DP] had said that she wanted to leave [location 3] to him, [JR] asked her if that had been done some time ago. Ms Gerbich explained that [JR] had left [DP] [location 2] in her current Will, but that [location 3] was going to the [Family Trust]. [JR] was also reminded that she was leaving [location 1] to [NP] and all the rest was going to the [Family Trust]. Ms Gerbich noted, "*she didn't want, [MP's wife] to get her hands on anything so advised her that [MP's wife] was not a Trustee or a beneficiary of the*

*Trust*". [JR] told Ms Gerbich that she had been in hospital and that she had been caught unaware and put on the spot with asking her what changes she wanted with the Will.

[78] Ms Gerbich recorded a second file note containing much the same material. Added to that in handwriting was, "*Clear that she no longer wishes to leave to [Family Trust]*".

[79] Despite real concerns as to possible influence on [JR] and her capacity, a first codicil to [JR]'s 15 May 2014 Will was prepared and it was executed on 4 May 2015. That codicil deleted Clause 4 of the Will and replaced it with a new Clause 4 which left [DP] the property at [location 3] as well as the property at [location 2].

[80] There is no evidence that [JR]'s testamentary capacity was tested in any other way before that codicil was executed. It is clear that the initial instructions to prepare that codicil came from [DP]. If [JR] had ever genuinely intended to leave [location 3] to [DP] before the codicil was executed, she must have forgotten before she spoke to Ms Gerbich. The change to her Will was a significant change and was significantly in [DP]'s favour. There is a real question as to whether [JR] had the ability to hold the relevant competing moral claims in her mind at that time. The Will was executed at a time when [JR] was having regular contact with [DP] – on his evidence at least twice weekly visits – and relatively little contact with the rest of her family.

**Medical Records from August 2015 Onwards**

[81] It was [DP] who was inquiring about the prospect of claims against [JR]'s estate, an issue which was very much in his interest. As Dr Casey pointed out, [JR] was unable to provide details of her Estate or of the [Family Trust] to [JR's general practitioner].

[82] In August 2015 there was a geriatric assessment and a MoCA was carried out with a score of 18/30. Dr Casey noted that in [JR] the tests results indicated a significant impairment in memory, concentration, arithmetical ability and executive function. "*The diagnosis of a Dementia was established albeit tentatively made*." Dr Casey notes that there is evidence in relevant literature that arithmetical ability

correlates with financial capacity. "*Furthermore, impairment and episodic memory in perceptual speed; the ability to make time efficient mental comparisons and selections between competing choices, impacts on financial judgment.*" Dr Casey was of the opinion that [JR] was impaired in these relevant cognitive functions by late 2015.

[83] On 26 August 2015 [JR] was seen by Dr Kumar to assess her capacity to consent to a total hip joint replacement. Dr Casey noted that despite [JR] having previously seen both the orthopaedic surgeon and an anaesthetic registrar she still had not yet "*retained or appreciated the significant risks associated with major surgery*". It took considerable time and discussion with [JR] for her to understand and to use and weigh the relevant factors to enable her to arrive at a decision. Dr Casey said, "*this would suggest that for other significant decisions around this time, there would have needed to be careful & considered discussion, with repetition and reframing of the options, and appropriate guidance, for [JR] to be able to reach the necessary threshold in the capacity to decide*."

[84] Previously Dr Emily Morton had noted that [JR] had not comprehended the risk of impairment and the possibility that she might not be able to return home after the procedure and during a second visit had noted that [JR] was confused. In a letter to [JR's general practitioner] on 14 September 2015 following a consultation with [JR] and [DP] on 26 August 2015, Dr Kumar, who is a community geriatrics registrar, had said, "*[JR] has a decline in her condition consistent with cognitive impairment and possibly an early dementia. She is in a supported environment and her family keep a close eye on her*." The letters written by the specialist medical advisors at this time indicate that [DP] was appropriately concerned for [JR]'s ability to maintain her independence at home if the operation proceeded.

**The Gift of the [location 2] Proceeds**

[85] In around August 2015 [JR]'s property – [TP]'s former home – at [location 2] was readied and listed for sale. Invoices in relation to work carried out were directed variously to [JR] and to [DP], but they were all paid from [JR]'s account. It is clear that any direct communication with solicitors or real estate agents would not have been instigated by [JR] at this time but rather by [DP]. There is no indication in any of the

evidence or documents of [JR] ever calling any professionals associated with the sale independently. At one point the real estate agent instructed, Marie-Anne Molloy of Barfoot, noted that she had been asked by [DP] not to discuss the auction with [JR], but "*as she is the vendor I did*". The agent was evidently concerned at the reserve of $1.5 million which she recorded, "*[DP] is adamant*" about. Ms Molloy was recommending a reserve of $1.2 million or at most $1.3 million.

[86] On 3 November 2015 [DP] emailed Ms Gerbich at Hesketh Henry, attaching what he said were typed instructions from [JR]. Again, it is a document that was clearly typed by [DP], although it has what appears to be [JR]'s signature at the bottom of it. The letter referred to the sale of [location 2] and noted:

> "*As you are aware, I've bequeathed this property in my Will to my nephew [DP]. In light of this recent sale and in keeping with my wishes, and my late sister [TP], I would like to now gift the proceeds from the sale of [location 2] to [DP] for the benefit of he and his family.*
>
> *Can you please make the necessary arrangements for this to happen*?"

[87] The instruction to Hesketh Henry dated 3 November 2015 purportedly signed by [JR] was submitted to the New Zealand Police Document Examination Section by [JR]'s property manager. They issued a report dated 20 May 2021. They compared that document and a later document with signatures known to be by [JR] dated between 13 August 1976 and 16 November 2015. They only had photocopies to work with.

[88] In relation to the 3 November letter they expressed concern at the poor reproduction quality. They noted there were similarities in features such as style, size, relationships and letter constructions, "*where these could be assessed*". They noted the reproduction quality of the signature on the letter was markedly poorer than that of the machine printed text. They could not determine whether it related to different reproduction histories of these elements (consistent with manipulation of the signature from another document) or as the result of poor line quality and inking on the original signature.

[89] They concluded that the similarities they observed could be explained either by the letter having been genuinely signed by [JR], or the signature having been

produced by a copying/simulation process such as tracing using a genuine signature as a model or that the signature was genuinely signed by [JR] on another document and transferred to this letter by manipulation such as either manual or electronic "*cut and paste*".

[90] They were unable to determine which of the possible explanations was more likely but said that the letter "*should not be relied on as a document genuinely signed by [JR]*".

[91] Ms Gerbich recorded a file note in handwriting on 16 November 2015 when she visited [JR] to sign the Client Authority and discuss the proposed gift. She noted, "*[JR] wishes to give half the net proceeds of sale to [DP]]*". Within less than a fortnight [JR]'s oral instructions to Hesketh Henry were significantly different from the written instruction [JR] had purportedly given on 3 November. There is no evidence that there was any additional examination of [JR]'s cognition or capacity at this time.

[92] On 19 November 2015 the sale of [location 2] settled and the net proceeds of $1,334,342.86 were deposited into [JR]'s BNZ account.

[93] Rebecca Collins of Hesketh Henry attended on [JR] on 27 November 2015 to advise in relation to a Deed of Gift, giving $1,334,342.86 to [DP]. [JR] advised Ms Collins that the house had sold for $1,416,000 which was accurate. Ms Collins discussed with [JR] why she was giving the money to [DP]. She recorded, "*She said he does a lot for her. His brother and sister however, do not help her as much and she did not think they would spend the money wisely*." Ms Collins discussed what other assets she had and whether she would have enough to live on if she gave away the money. She noted, "*She advised that she had not touched the money since she had received it and she had no need to spend the money. She has sufficient money in her bank account for her to live and the home that she lives in*." Since settlement had only occurred eight days earlier, it is unsurprising [JR] "*had not touched the money*".

[94] Also discussed was that the payment was in substitution for a gift she had left in her codicil and that [DP] was receiving the money immediately instead of receiving

the property following her death. "*She was fully aware that she was giving the money away immediately and that [DP]'s brother and sister could be upset but she wanted to continue regardless*."

[95] The gift was effected by [DP] transferring $1,334,342.86 from [JR]'s BNZ savings account, to the bank account that he held jointly with his wife, on 30 November 2015.

**The Gift of $81,774.12**

[96] In the course of discovery as part of these proceedings, a document typed by [DP] was disclosed labelled "*Power of Attorney Instructions*". The document reads:

> "*It has come to my attention that not all proceeds from the sale of my property at [location 2] has been passed onto [DP], as per my wishes. My intention being that the entire proceeds from the property sale, minus expenses incurred during the sale, were to be passed on to [DP].*
>
> *I wish [DP] to receive the full proceeds, that being $1,416,116.98.*
>
> *I instruct my power of attorney to ensure that this happens*."

[97] It concluded with a space for [JR] to sign and the date of 15 December 2015. The document is signed "*[JR]*". To my untrained eye the signature to that document appears notably different to the signature on the instruction dated 3 November 2015 and to the signatures that appear on [JR]'s Wills on 1 December 2009 and 15 May 2014.

[98] That document is significant because [DP] claims that [JR] realised that he had not received the "*full net proceeds*" of sale because a mortgage owing to BNZ of $81,774.12 had been deducted. He says that she realised this when she read a settlement statement. He says that it was her wish that he be gifted an additional $81,774.12.

[99] The document that was purportedly signed by [JR] on 15 December 2015 was prepared by [DP], allegedly signed by [JR] in his presence, and kept by [DP]. It was not sent to her solicitors. [DP] evidently did not leave a copy of it with [JR]. [JR] was not referred for any independent legal advice.

[100] In this proceeding [DP] maintains that he prepared the document because "*that was what [JR] wanted*". That is an answer that he repeatedly gave when cross examined in relation to many transactions carried out by [JR] that were for his benefit.

[101] In the Police Document Examination Report of 20 May 2021, it was noted that the signature to that document was "*pictorially similar to the specimens attributed to [JR]*". However, there were a number of "*gross and subtle differences*". In particular:

> "*The apparent pressure, heaviness of the link line and degree of pen control are inconsistent with the light, tremorous quality seen in the specimen signatures from November 2015. The apparent pressure is also at odds with the habitual pressure patterns produced by this writer ([JR]) over several preceding decades. In addition, this question signature is remarkably different in appearance compared to the other question signature which is dated a month later*."

[102] The senior document examiner Trish James, who prepared the report did consider whether the heavy appearance of the ink line might be explained by the use of a thicker writing instrument but was of the opinion that would not account for the other subtle differences observed when compared with the consistency in all other specimens over a very long period.

[103] Possible explanations included that the signature resulted from a "*copying/simulation process such as tracing using a genuine signature as a model*". Without the ability to examine the original ink signature it was not possible to conclusively determine whether copying had occurred. Nor was it possible to determine whether there was manipulation such as cutting and pasting. In the absence of the original document which has the signature in ink it was not possible to infer any particular explanation, but report concluded that the power of attorney instructions "*should not be relied on as a document genuinely signed by [JR]*".

[104] [DP] says that he did not retain the original of that document, so it is not possible for the original to be examined. It is also not possible to determine when the document was typed, although it was prepared on a computer and therefore it might be possible to examine, the "*native file*". However, [DP] said through his lawyer that the computer the document was prepared on had "*long been discarded*". He said there

was no reason to save the document and the photocopy he had discovered was "*the only version of this document that has been in [DP]'s possession*".

[105] [DP] says he relied upon the "*Power of Attorney Instructions*" to subsequently draw significant funds from [JR]'s bank account without obtaining her consent to the individual transactions. [DP] says that in February 2016 he "*came up with a fresh proposal which I discussed with [JR]*". Rather than [JR] paying him the $81,774.12 he would use funds that were in her account, but only in small amounts that she could afford that would not leave her short of funds. The total that [DP] withdrew between 18 February 2016 and 30 November 2020 and attributed to this "*debt*" was $105,272.21.[40]

[106] [DP] says that he issued receipts for each withdrawal that he made. He exhibited as Exhibit L to his affidavit of 23 December 2020, various handwritten receipts. The receipts had been written by him and signed by him. He said he had kept them but he did not give copies to [JR] nor anyone else. Some of them record that they were payments "*in lieu of debt owed by [JR]*" or "*to be offset against debt*". Notes on the receipts which mention the debt appear on all of the receipts up to 11 December 2018. Beyond that date there are various notations on the receipts.

[107] Exhibit M to [DP]'s affidavit of 23 December 2020 is an Excel spreadsheet which records at the top "*Payments made to offset debt owed by [JR] from [location 2] proceeds – amount owed $81,774.12*". Then it lists a total of 65 transactions, most of which represent payments made direct from [JR]'s bank account to [DP]'s bank account. All of those payments were implemented by [DP].

[108] [KS], as Property Manager, sought and obtained the "*native*" copies of that exhibit and of Exhibits O, P and Q to the affidavit which were also Excel spreadsheets.

[109] The electronic properties in the "*native*" format demonstrated that all of the spreadsheets were created between 23 October 2020 and 1 November 2020. That was after a first temporary order appointing [KS] as Property Manager and an order for discovery had been made against [DP] on 21 October 2020.

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[40] V2/371, Exhibit M, affidavit [DP], 23 December 2020.

[110] In cross examination [DP] claimed that he had prepared Exhibit M from a handwritten document that he had maintained and said that he had made the relevant entries at the time the funds were withdrawn from [JR]'s bank account. He said that he had destroyed the original handwritten document after the discovery order was made and when he created the Excel spreadsheet. He did not explain why that had happened.

[111] [KS] had noted from her examination from [JR]'s bank account that there were many withdrawals which had the notation "*td*" or "*savings*". All of those transactions involved withdrawals from [JR]'s bank account and payments into the account [DP] held jointly with his wife. The first payment was made on 9 May 2016 and the last payment on 8 April 2020 with a total of $153,289.12 transferred. [KS] initially assumed the payments referenced with "*td*" or "*savings*" represented fund payments or transfers into term deposits or an interest-bearing bank account in the name of and for the benefit of [JR].

[112] [DP] was unable to explain why he used the notation "*td*". He claimed he used the notation "*savings*" to indicate that money was being paid into his savings account. He reluctantly accepted when cross examined that the entries were misleading and that they did not accurately explain the nature and purpose of the transaction.

[113] It is clear that [DP]'s record keeping was inadequate. He said in his evidence that on or about 13 December 2018 the various payments he had made from [JR]'s account reached the total of $81,774.12. He says he made more payments without realising he had gone over the limit but that when he discovered what had happened, he told [JR] about it and immediately said he would repay the money. He said, "*She said to me there was no problem with this and that she was happy to assist me. Throughout 2019, I therefore made a number of payments out of [JR]'s account which I treated as loans from her to me, and all of which I have subsequently repaid*."

[114] [DP]'s explanation for the alleged additional gift of $81,774.12 did not ring true. He claimed that [JR] had told him the mortgage had been for an overdraft that she and [TP] had used "*for their gambling at the Casino*". She said that she was not happy that "*their gambling debts*" had been deducted and that [DP] had been "*short*

*changed*". He also said that she was happy with his suggestion that he record the payment as a debt and that she happily signed the "*Power of Attorney Instructions*" dated 15 December 2015.

[115] The first withdrawal marked "*savings*" was taken from [JR]'s bank account and paid to [the bank account] on 9 May 2016. The total withdrawn on that date was $21,662.86. That entry coincides with the first "*repayment*" of the alleged debt/gift of $81,774.12 recorded by [DP] in the Excel document he prepared. The first "*repayment*" was noted as "*Accting, Accting [P]*" in [JR]'s cheque account statements.

[116] [JR] was admitted to Older Persons Health on 21 June 2016. On admission her initial MoCA score was 11/30 but it improved to 17/30 by 4 July 2016. There was a discussion with [DP] about [JR]'s cognitive impairment and her ability to cope at home.

**The Gift to [NP]**

[117] On 24 November 2016 [JR] signed a note in [NP]'s presence "*Giving [NP] full ownership of my property at [location 1] …*".

[118] [NP] subsequently instructed a solicitor Rico Horsley to act for her and for [JR] to transfer the property from Tenants in Common in unequal shares to [JR] and [NP]'s joint names. [JR] signed a Deed of Declaration and Authority and Instruction forms on 29 November 2016.

[119] When [DP] learnt about this transaction he was understandably concerned. He said in an affidavit he swore in High Court proceedings on 20 October 2020, "*At no time did [NP] advise Mr Horsley that I was attorney for [JR] or of the existence of the Power of Attorney …*" [DP] instructed Atmore & Co, who had long been his solicitors. They wrote to Patterson Hopkins who acted for [NP] on about 29 November 2016 saying, "*[DP] as you know, keeps an eye out for [JR] and also holds Enduring Powers of Attorney for her*". In a follow up letter on 10 December 2016, Atmore & Co wrote, "*We write to you under [DP]'s instructions, [DP] exercising his Power of Attorney in this regard*." Again, on 26 January 2017 Atmore & Co wrote, "*We are instructed by*

*[DP] under his Power of Attorney in respect of the affairs of [JR] in the transfer of part ownership of [JR]'s home that took place late last year for no consideration*".

[120] On 16 May 2017 [JR] was again admitted to Older People's Health. On admission the medical notes recorded "*cognitive impairment well established previously … a MoCA attempt would be futile and unlikely to yield a meaningful score*". However, a MoCA was subsequently completed that day with an adjusted score of 14/30.

[121] On 1 November 2017 there was a telephone call between [DP] and his lawyer Graeme Atmore where it was recorded "*phone call with [DP] with [JR]'s assessment and Will making capacity, suggested making will now and booking in a psych geriatrician*."

**Proposed Sale of [location 3]**

[122] In December 2017 [DP] made arrangements to sell [JR]'s childhood family home at [location 3]. Angus Rogers of Martelli McKegg lawyers visited [JR] in January 2018 to discuss the possible sale. He noted that [JR] made it "*abundantly clear*" that she wanted to retain [location 3] throughout her life. He said:

> "*Although on other matters she was a little vague during that meeting. She was quite clear about that and I consider that, even if she is no longer capable of managing her own affairs and her enduring attorney steps in and manages her property for her it would NOT be in her best interest to sell that property. If it is sold during her lifetime and she finds out, it will cause her emotional distress*."

He also noted:

> "*I revisited her on 22 February and noticed some deterioration in her mental ability to the extent that I consider that she should not now be managing her own affairs. Her mind wandered during our conversation and she could not follow a continuous stream of thought to a conclusion*."

[123] Those concerns were set out in an email from Mr Rogers to [DP]. On 28 February 2018 Mr Atmore recorded a telephone call from [DP] where he "*wants to make sure he isn't in danger of being accused of benefitting from the power of attorney,*

*check and confirm to [DP] the attorney applies whether [JR]'s mentally incapable or not*".

[124] It is clear that by this stage [JR]'s competence and capacity were significantly reduced. On 24 May 2018 [JR] pressed her medical alarm. She appeared to be confused when talking to the 111 Centre. When the ambulance crew arrived, [JR] had no recollection of calling them and did not know why. She claimed that she had been phoned by emergency services rather than the other way around. It was noted, "*Patient not aware of recent events. Does not know what year we're in or common short–medium term questions. Long term recall about family in previous years appears somewhat intact*."

**The Law Society Complaint**

[125] [DP] says that [JR] instructed him to make a complaint to the Law Society against Rico Horsley about the transfer of [location 1] in November 2016. Atmore & Co acted in relation to the complaint. It is clear that Mr Horsley was acting in a conflict-of-interest situation when he implemented the transfer of [location 1] from Tenants in Common to a Joint Tenancy.

[126] In support of the complaint Mr Atmore sent a letter to the lawyers who were prosecuting the complaint on 10 November 2017. Referring to MoCA tests that [JR] had completed and to a meeting of Trustees of the [Family Trust] in 2015 Mr Atmore wrote:

> "*I think the key point is that although her scores are somewhat variable, they are consistently below normal, and certainly from my own time observing [JR] (at) a meeting of Trustees, it was obvious that her cognition was less than normal. This should have been apparent to any lawyer*."

[127] Shortly after that letter Mr Atmore wrote to [DP] on 9 February 2017 discussing aspects of [JR]'s Will. The letter noted:

> "*So if any money was recovered from Metro Law, under the current Will it would end up in the residue of [JR]'s Estate and therefore go to the [Family Trust] – unless gifted by [JR] to you while [JR] is alive*."

[128] His advice to [DP] was that a codicil to the Will would be required to avoid the residue of [JR]'s Estate, including cash reserves, going to the [Family Trust]. He concluded the letter with:

> "*Just a thought – you mentioned [JR] gave you a large sum of money a while ago. Is there any paperwork confirming it was a gift, not a loan? It would pay to have this gift documented by [JR]'s lawyer to prevent shall we say less cooperative family members asking difficult questions, especially given you hold the Power of Attorney. I think this is actually very important*."

[129] In an affidavit that he swore on 8 March 2018 in support of the complaint to the Law Society, [DP] said:

> "*In my view, [JR]'s statements only confirm how confused [JR] was and is by this matter, and reinforce my concerns that, in light of her age and capacity, it should have been abundantly clear to Mr Horsley in the circumstances that obtaining [JR]'s informed consent would be an issue.*
>
> *My opinion as to [JR]'s capacity have been confirmed by the results I have received of [JR]'s cognitive assessments at Auckland City Hospital dated [2016] and [2017]*."

**Mr Atmore's Position and Legal Fees**

[130] The significance of those statements by Mr Atmore and [DP] in the context of the complaint against Rico Horsley, is that subsequently an affidavit sworn in these proceedings on 1 June 2021. Mr Atmore said that despite the existence of the Power of Attorney he "… *believed that [JR] remained in control of her property affairs and that [DP] was not her property manager*". He said for that reason he had [JR] sign the letter that he had sent to Metro Law confirming that the letter expressed her wishes. He did not meet with [JR].

[131] In cross examination Mr Atmore said that he had met with [JR] only once in the course of an informal mediation involving members of the [family] in about 2015. Many of Mr Atmore's invoices were addressed to "*[DP] as Attorney for [JR]*". Many of Mr Atmore's fees were paid directly by [JR]. Mr Atmore in the affidavit said, "*Certainly no funds were paid to my Trust Account by [JR]*." Clearly that evidence was wrong. [DP] was paying Mr Atmore's legal fees from [JR]'s account for the work he was doing for [DP], or doing on [DP]'s instructions.

[132] In a file note dated 16 June 2020, Mr Atmore recorded, "*[[DP]] will pay legal invoices from [JR]'s work from his own funds and reimburse himself from [JR]'s funds and record this in bank statements*." In a file note dated 8 June 2020, "*[DP] confirmed that if for any reasons payments received from [JR] of my and John's invoices have to be refunded, he will pay the money that we have to pay out*."

[133] Mr Atmore knew that many of his accounts had been paid by [DP] directly from [JR]'s bank accounts before he swore his affidavit of 1 June 2021. Despite that he said that as far as he was aware all of his invoices were paid by his client [DP].

[134] Mr Atmore remained a solicitor on the record for [DP] throughout the proceedings. He did not appear to recognise that he was in a conflict of interest even when he was being cross examined as a witness in Court. When it was put to him that he was conflicted his response was that would depend on whether a finding was made that [DP]'s actions were approved, "*Well if he's right, there isn't any conflict though is there. You know like if what he says is accepted as valid*".[41]

[135] The issue that this conflict raises for [JR] in terms of her competence and capacity is that Mr Atmore was at times giving advice about [JR]'s issues to [DP] in his capacity as her attorney. At the same time he was advising [DP] on matters concerning his interests such as how to protect himself from potential claims from [JR]'s estate and how to ensure that gifts he had received from [JR] were not challenged. [JR] was thus deprived of the opportunity to have independent legal advice or an independent "*voice*" representing her.

[136] [DP]'s position throughout these proceedings has been that he was not acting under the Power of Attorney for property at any time until [JR] was formerly declared to be wholly incompetent in May 2020. That position is at odds with the correspondence from Mr Atmore at the time of the complaint against Rico Horsley.

[137] [DP] was aware of the fiduciary position that he was in and of the need to ensure that [JR] was adequately and independently advised so that her interests were protected. In an email that Angus Rogers sent to [DP] on 27 February 2018,

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[41] NOE, p 129.

Mr Rogers noted concerns that he had about [JR]'s capacity and the need to have her assessed by a geriatrician:

> "*… to determine whether the property powers should be activated. If it is activated and you have to deal with the repairs at [location 3] yourself for her, I strongly recommend that you take independent legal advice before doing anything which might appear to others that you as attorney are getting her on her money to make improvements to the house that you will ultimately inherit. As attorney your fiduciary duties are high and you cannot afford to be challenged as to whether you are taking advantage of your powers, especially in light of family arguments to date*."

[138] Despite receiving that advice [DP] continued to carry out financial transactions when he claimed he was acting on [JR]'s instructions or simply doing what [JR] wanted. Those transactions included paying legal expenses that he had incurred, using money that he said was "*loaned*" from [JR] and withdrawing substantial cash sums from the EFTPOS account – cash which he said he was paying to [JR].

[139] On 6 August 2018 [DP] sent an email to [NP]. Notwithstanding the substantial evidence of [JR]'s decline – which [DP] knew about as a result of his attendance at various medical appointments – he was still asserting, at times, that she was competent. He wrote:

> "*At this stage, unlike [KP], whose capacity has been questioned and documented, the same cannot be said about [JR] and her ability to still continue to perform her role as Trustee of the [Family Trust]*."

[140] In that letter he did however agree to have [JR] assessed for capacity. That assessment was carried out by Dr Phil Wood on 25 August 2018. There was evidence of significant cognitive impairment with deficits in orientation, memory, arithmetic, video special function, verbal fluency and abstract thinking. It was noted [JR] did not have a broad understanding of the nature and extent of her estate, the family tree or who her natural beneficiaries were. He concluded that [JR] did not have testamentary capacity.

[141] Dr Alexa Srzich, a psycho geriatrician, assessed [JR] on 21 September 2018. In his report dated 6 October 2018, he noted that [JR] did not know of the existence of any family trusts when asked directly. It is clear that even when prompted [JR]'s answers about trust issues were vague. She could not explain what a trustee or the

beneficiary of a trust were. Dr Srzich concluded that [JR] lacked the mental capacity to continue as a trustee, or to retire voluntarily or to continue to hold her power of appointment or to renounce that power.

[142] On 5 May 2020 [JR] was certified as wholly lacking in capacity with the report writer Dr Birry noting, "*On today's assessment she has severe dementia*".

## When was [JR] Mentally Incapable?

[143] Against that background of medical and factual evidence I must decide when [JR] was mentally incapable. This is because s 103 allows the Court to review any decision made by an attorney acting under an EPOA while the donor is or was mentally incapable.

[144] Because [DP] was acting under a Power of Attorney in relation to property it is not necessary to find [JR] was wholly incapable of managing her own affairs at the date of any particular transaction, only that she was partly incapable. The level of cognition and understanding that is required for [JR] to be deemed "*capable*" or "*competent*" in relation to a transaction will vary depending upon the complexity and circumstances of each particular transactions. The level of capacity that is required for [JR] to competently authorise her attorney to carry out a routine function such as paying a rates or telephone bill will not be the same as the level of competence that is required for [JR] to authorise her attorney to make a gift which disposes of a significant proportion of her assets or carry out another complex transaction.

[145] It was [DP]'s position at the hearing that he did not believe he was acting under the Power of Attorney at any time prior to 5 May 2020. He says that he did not believe that the Power of Attorney was operative until [JR] was declared to be wholly incompetent. He is wrong, the Power of Attorney had immediate effect and I find on balance of probabilities that he was advised about that and he knew that. It is advice that he would have received at the time the Power of Attorney was first executed. It is advice that was repeated to him at other times. His consistent response when he was challenged about any transaction that [JR] had carried out – particularly where his

actions were for his benefit and to her detriment – was that he was doing what [JR] wanted.

[146] A repeated response to the suggestion that [JR] clearly lacked capacity to give consent was that she was still living independently until her admission to the [Village Rest Home] on [2020]. He appeared to consider that because [JR] was able to attend to some of her own day to day self-cares she was generally competent. [JR] was only able to continue to live at [location 1] following [TP]'s death with significant assistance. She had extensive home help morning and evening. She had Meals on Wheels delivered. [DP] was attending on her at least twice a week. From 2014 [DP] was responsible for every financial transaction that was carried out on [JR]'s behalf. [JR] could not and did not operate internet banking. She was unable to travel to a bank or ATM machine by herself. She was unable to drive or walk any significant distance. She did not possess a computer or typewriter so the various written instructions that were given on her behalf were all prepared by [DP]. Her house was cluttered and disordered. She herself was increasingly confused and forgetful.

**Dr Casey's Opinion**

[147] Dr Casey extensively reviewed the medical evidence. Dr Casey had access to the relevant Court records up to the date of her report in December 2020. She is a highly qualified and experienced consultant psychologist and psychogeriatrician. I accept her evidence that in March 2014 technically the diagnosis of dementia could have been made. The cognitive assessments that were administered during [JR]'s hospital admission in March 2014 confirm that as does the assessment by the occupational therapist who had concerns about [JR]'s function and safety in her home environment at that time.

[148] Certainly, by the time of [JR]'s assessment by [JR's general practitioner] on 25 April 2015, her partial incapacity/incompetence was very evident. [JR's general practitioner] observed [JR] looking to [DP] for answers, he noted her dependence on him, and he was unable to conclude that she understood the extent of the moral claims on her estate or that she was free of undue influence.

[149] [JR]'s partial incapacity in early 2015 is confirmed by the fact that [JR] was unable to recall or confirm [DP]'s advice to Ms Gerbich that [JR] wanted to make a new Will. She had to be prompted to remember that it was in relation to [location 3]. She could not remember who she wanted to give [location 3] to.

**Dr Fisher's Opinion**

[150] [DP] filed evidence from Dr Fisher who is a consultant psychiatrist. I accept that Dr Fisher has impressive qualifications and extensive experience. He has worked in psychogeriatrics for 25 years as well as having expertise in other aspects of psychiatry. Dr Fisher was specifically asked to express a view as to whether [JR] had capacity in 2015 to enter into a transaction selling her property at [location 2] and gifting the sale proceeds to [DP]. He was asked to give an opinion about whether [JR] was under any influence in relation to that transaction.

[151] Although Dr Fisher had a copy of Dr Casey's report, the information that Dr Fisher had access to was more confined than the information that Dr Casey had. Dr Fisher was instructed by John Wain, Barrister, to advise as to [JR]'s capacity to grant the EPOA in May 2014 and to sell [location 2] and gift the proceeds to [DP] in October 2015. He was also asked to consider whether [JR] "*was under any influence*". In his letter of instruction Mr Wain said:

> "*The property transactions or matters referred to above were the only "property transactions since May 2014" that [JR] was involved in apart from a certain transaction which took place in November 2016 concerning [JR]'s property at [location 1].*"

[152] Dr Fisher was evidently not told that [JR] was involved in a number of other significant property transactions to [DP]'s benefit. They included the transfer of a total sum of $153,289.12 from [JR]'s bank accounts to [DP]'s account between the period 9 May 2016 and 8 April 2020. There are also ATM transactions between 15 February 2015 and 2020 totalling $90,150. Dr Fisher said that he was asked to assess her capacity in relation to two matters only and was not asked to make an assessment in general property management or financial capabilities. He accepted however, that information about her general capacity and other financial transactions would be relevant to an assessment of capacity in relation to particular transactions.

[153] Dr Fisher was not told about the purported gift of $81,774.12 from [JR] to [DP]. He did not receive all of [DP]'s affidavit sworn 23 December 2020, only selected parts with an emphasis on the medical evidence. He said that he received additional material after he had prepared his report and it did not alter his opinion. He accepted that he did not understand [JR]'s financial position at the time that she made the purported gift of $1,334,342.86 and the subsequent gift of $81,774.12. He said he was focused on her mental state and her clinical situation and while information about her overall financial position at the date of significant gifts might have been "*interesting to note*" that was not his focus. Dr Fisher said, "*the complexity and the risk attached to any question does raise the threshold for holding capacity*" but he accepted he was not aware how much [JR] had in her personal bank account or anything of that nature.

[154] In assessing [JR]'s capacity to enter into the 20 October 2015 transaction involving [location 2] and the purported gift to [DP], he was not asked to make any assessment of her testamentary capacity when executing the 2014 Will. He was not given information about [JR]'s prior Wills for example.

[155] Dr Fisher placed particular weight on the fact that the decision to gift [DP] proceeds of sale of [location 2] was in his view, consistent with the intention in her Will to leave it to him after her death. One concern that I have is that if Dr Fisher was finding support for [JR]'s capacity from the fact that the gift was consistent with her Will, the issue of whether or not she had testamentary capacity when the Will was made must also have been relevant.

[156] In any event, a decision by [JR] to make an immediate gift during her lifetime for such a substantial amount of money had significant implications which were different to the implications arising from a decision to leave it by Will. The gift may have had an immediate and possibly irremediable impact on her duty to others who might have had claim on her estate, but more importantly, the gift immediately deprived [JR] of access to funds that she might need for her lifestyle and care in the future.

[157] In his report Dr Fisher referred to [JR's general practitioner]'s opinion of 25 April 2015. He noted [JR's general practitioner]'s statement that "*I believe [JR] is mentally able to make a decision; and that she had the cognitive ability to do so*." He does not appear to have had the letter from Ms Gerbich which specifically asked [JR's general practitioner] to confirm whether [JR] had significant knowledge about her estate, the moral claims on her estate and whether [JR] was subject to undue influence. He did not appear to appreciate that it was [JR's general practitioner]'s conclusion as at 25 April 2015 that he could not confirm that [JR] had testamentary capacity in relation to any of those three aspects. He did not have the second email from Ms Gerbich expressing concern that [JR] could not recall what changes she wanted to make to her Will when Ms Gerbich spoke to her.

[158] I do not accept the view that Dr Fisher expressed when cross examined that [JR's general practitioner] was "*confusing Trust matters with the knowledge of one's Estate*". [JR's general practitioner]'s letter expresses an opinion in relation to both issues. Dr Fisher is wrong when he says that [JR's general practitioner] was "*expressing his concerns about testamentary capacity without seems to me knowing quite what he's supposed to say*". In the context it was written the meaning of [JR's general practitioner]'s letter is clear. He was concerned about possible and actual influence by [DP] on [JR]. He was not satisfied [JR] was aware of the extent of her estate. He was not satisfied [JR] was aware of the extent of any moral claims on her.

[159] Dr Fisher's conclusion that [JR] had capacity to appoint [DP] as her attorney is not contentious. Dr Casey concurs. In relation to her decision to gift the proceeds of sale of [location 2] to [DP], which was made on 26 November 2015, I do not accept his opinion that [JR] had capacity to gift those proceeds. He arrived at that view without having a picture of [JR]'s financial situation at that date. He arrived at that view despite the significant volume of medical information that existed prior to that indicating real concerns about [JR]'s capacity.[42]

[42] Including the ACE–R score of 72/100 on 13 March 2014, the ALLEN COGNITIVE LEVEL SCREEN of 4.2 given by the occupational therapist who concluded "*24-hour supervision is usually recommended" and "Money management might require complete or close supervision*".

[160] I note that Dr Fisher's report did not address the issue of [JR]'s capacity at any time after the gift was made on 19 November 2015. I also note his view that on balance of probabilities [JR] would have been somewhat vulnerable to influence with her cognitive difficulties being her main vulnerability.

[161] Where their opinions diverge I prefer the expert opinions of Dr Casey. She was appointed by the Court and had access to a wider range of relevant evidence. Dr Casey's evidence is more consistent with contemporaneous opinions including [JR's general practitioner]'s assessments.

**Transaction 1: Gift of the [location 2] Sale Proceeds**

[162] The evidence satisfies me that [JR] was partly lacking in financial competence by November 2015 when this gift was made. It is clear from the opinion of [JR's general practitioner] that her testamentary capacity could not be confirmed in May 2015, the date she executed the codicil which left [location 3] to [DP].

[163] Her cognitive decline was significant by October/November 2015. Dr Kumar had described her as "*pleasantly confused and mildly tangential*". When she was seen by Dr Emily Morton on 6 October 2015, she was having difficulty comprehending her impairment and the likely impact of surgery on her ability to return home after the procedure.

[164] It is clear that [DP] was instrumental in initiating the sale and managing the sale process for [location 2]. His instructions to the real estate agent, Ms Molloy, that she should only discuss reserve issues with him establishes that he considers he had authority to act on [JR]'s behalf at that time.

[165] The typed "*instructions from [JR]*" that were sent to Ms Gerbich on 3 November 2015 were prepared by [DP]. I have only [DP]'s evidence that [JR] signed it.

[166] The Document Examination Report of 20 May 2021 casts doubts on the authenticity of that signature. I accept the report is hearsay and that the document

examiner was not available for cross examination, but I consider that I am in a position to admit the document and to accord some weight to it pursuant to s 12A of the Family Court Act 1980. It is evidence that will assist me in determining this proceeding. It is from a sufficiently independent source for me to consider it is reliable and that I can accord some weight to the opinion in the report.

[167] I appreciate that a Deed of Gift was subsequently prepared by Hesketh Henry and that [JR] executed that document on 26 November 2015. From the note that Rebecca Collins made when she attended on [JR] to execute the Deed of Gift, it appears that there was a discussion about the other assets that [JR] had. However, the information that is recorded there is very brief. "*I discussed what other assets she had and whether she would have enough to live on if she gave away the money. She advised that she had not touched the money since she had received it and she has no need to spend the money. She has sufficient money in her bank account to live and the home that she lives in*."

[168] [JR] was not asked what her savings total was at that time. Excluding the proceeds of the sale of [location 2], she had only $30,154.41 as at 4 December 2015.[43] She was not receiving any interest on the debt owed by [Family Trust], and the principal was not repayable until 4 April before 2038. The immediate gift of $1,334,342.86 left [JR] with relatively little in the way of liquid funds to meet any urgent or medium term future accommodation or care costs.[44] I accept that at one level she was simply giving immediate (albeit irrevocable) effect to a testamentary gift that she had already made when she executed her new Will on 15 May 2014. However, given the concerns that had arisen in cognitive assessments carried out in October 2013, January 2014 and March 2014 her testamentary capacity at that date may well be in doubt. I note the Will was executed after the date when, in Dr Casey's opinion, "*technically the diagnosis of dementia could have been made*".[45]

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[43] V1/099, Statement of Accounts as at 4 December 2015.

[44] V2/479, [DP] has subsequently said that in 2020 he was concerned that there might be insufficient funds to obtain an aged care apartment for [JR], and for that reason he sought advice on setting aside the transfer of [location 1] to [NP]. That was a concern which he apparently did not reflect on when he received the proceeds of sale of [TP]'s former home at [location 2].

[45] March 2014, V1/209, para [53] report of Dr Casey.

[169] My concern as to whether [JR] had capacity to make the gift is reinforced by the fact that when she first spoke to Hesketh Henry she indicated she wished to gift only half the proceeds of sale to [DP]. I am unable to find on balance of probabilities that the written instruction dated 3 November 2015, labelled "*Instructions from [JR]*" was signed by [JR] and I am unable to find that it represented her genuine instructions or intentions. The Police Document Examiner could not exclude the possibility of "… *manipulation and/or simulation*" and concluded that the document should not be relied on as a document genuinely signed by [JR].

[170] I note that [JR]'s instructions were typed by [DP] approximately six months after he sought advice from Hesketh Henry as to whether transferring [JR]'s properties at [location 2] and [location 3] to him now would "*avoid a claim against [JR]'s Estate*".

[171] [JR] was heavily reliant on [DP] for practical and emotional support at this time. [DP] had been trying to exclusively manage the process of sale of [location 2], a matter that concerned the real estate agent when [DP] tried to insist that he not [JR] should be consulted over the reserve price. The cost that was incurred and the work that was carried out in preparing the property for sale was indirectly for [DP]'s benefit not [JR]'s, given that he was to receive the property under her Will at the time the work was carried out and given that he subsequently received the proceeds of sale as an immediate gift.

[172] I find on balance of probabilities that by November 2015, without a specific assessment of her capacity relevant to this transaction and absent very careful, tailored and detailed advice [JR] lacked the capacity to hold in her mind and weigh all of the issues that arose out of the gift including its impact on moral obligations that she may have felt other members of the [family] and the potential adverse impact on her liquidity and financial position.

[173] I accept that [JR] had other assets in the form of her interest in [location 1] and the [location 3] property, but it was always her intention to retain [location 3] for the rest of her life and it was her clear intention to remain living in [location 1] for as long as possible and to gift her interest in that property to [NP] in her Will. The significant

reduction in her available assets as a result of the gift left her in a precarious position in that it reduced the assets in future funds that she had available for supported care or to enter into retirement village/rest home facility in the future.

**Undue Influence and [location 2]**

[174] I address the issue of undue influence by [DP] in relation to this application using the criteria set out at [100] in *Green v Green*.[46]

[175] In relation to Issue (a) the overall burden of proof, it is a little artificial to discuss where the burden of proof rests in the context of an inquiry under s 103 of the Act. [DP] was unrepresented during the hearing as a result of breaches of an "*unless order*" and a decision made on 28 April 2022 that he was debarred from defending the application. However, in the context of the inquisitorial process under s 103, I have been careful to ensure that there is sufficient evidence to support a finding of undue influence and that I have considered the explanations that were offered by [DP] in his evidence and by the order of 28 April 2022.

[176] Turning to Issue (b), the burden of proof is on the balance of probabilities. I accept that an allegation such as the use of undue influence to favour the holder of an EPOA is a serious allegation to make. I note the observation by the Court of Appeal in *Green v Green* that:

> "In our view, the correct position is as stated in more recent Australian authorities, mainly that before the Court can be satisfied undue influence has been proved, it must be satisfied that the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole."[47]

[177] I consider that the evidence as to [DP]'s influence over his aunt, his actions, his motivation and the benefit he gained provide strong support for the thesis that this gift was the result of undue influence by him. The fact that [JR]'s initial instructions to her lawyers were inconsistent with the written instructions that [DP] provided corroborates that thesis.

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[46] *Green v Green* (HC) see n 20 above.

[47] *Green v Green* [2017] 2 NZLR 321 at [47] – footnotes and authorities omitted. Confirmed in *Gorringe v Pointon* [2023] NZCA 42 at [77].

[178] Issue (c) is the need to establish a causative link between the influence and the impugned transaction I am satisfied that the transaction was not principally the result of the free exercise and independent will on [JR]'s part. Her capacity was significantly reduced by the date of this gift. [DP]'s influence on her was a pervasive factor in her life. She had placed complete trust in him for the management of all of her financial affairs for many years. I do not accept his evidence that the decisions to make an immediate gift of the proceeds of sale, the decision to spend money on renovating the home and to sell it – all ultimately for [DP]'s benefit – was the result of [JR] exercising her free will without undue influence by [DP].

[179] Referring to Issue (d), while I find on balance of probabilities that there is sufficient evidence to establish "*actual undue influence*" here, the evidential presumption applies because [JR] placed significant trust and confidence in [DP] and this immediate gift, which left [JR] in a parlous financial position, calls for an explanation which has not been adequately provided.

[180] Turning to Issue (e), this is a situation where the relationship of trust and confidence is established factually. [DP] himself accepted that [JR] placed considerable trust and reliance in him. His position as the holder of her EPOA reinforces his "*relationship of influence*".[48] As donee of [JR]'s EPOA [DP] was in a relationship of an "*overtly fiduciary nature*".[49]

[181] As for Issue (f), I consider the transaction calls for explanation because:

(a) [JR] had significantly reduced capacity;

(b) The transaction was significantly to her disadvantage;

(c) The transaction might have been viewed as otherwise unnecessary, [DP] was to receive the property under her Will and he had no apparent immediate need for support;

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[48] "*Relationship of influence*" is the phrase used by the Court of Appeal in *Gorringe v Pointon* [2023] NZCA 42 at [21].

[49] The concept of a relationship of an "*overtly fiduciary nature*" was discussed by Ellis J in the High Court in *Sinclair v Sinclair* [2019] NZHC 2640 at [61]. It is likely that a presumption of influence is raised in these circumstances but I find [DP] exercised actual influence over [JR].

(d) [DP] was in a fiduciary position and received a substantial benefit to his aunt's detriment.

[182] As for Issue (g), I find that the explanations that [DP] offers – that this was the result of the free exercise of [JR]'s will and her initiative – are not credible. His evidence in that regard is unreliable and I reject it. However, I am not distracted by [DP]'s implausible explanations from my principal task, which is to assess whether the evidence meets the burden of proof required.

[183] As for the presence of independent legal advice discussed in Issue (h) in *Green v Green*, I have some concerns that there was no affidavit or oral evidence from Ms Collins about her discussions with [JR] when the Deed of Gift was executed nor about the advice she gave. The file notes that were produced indicate that neither [JR]'s capacity to make the gift, nor whether the gift was a true exercise of her free will, were vigorously investigated or interrogated by Ms Collins. Ms Collins' file notes indicate that [JR] had some understanding of the gift but there is insufficient information to satisfy me that she had really thought about or understood its impact. The fact that she had not needed to spend the money in the short time since the sale had settled was not relevant to her future needs. There is no indication of what "*sufficient money in her bank account*" was in [JR]'s mind. I find that a single meeting even with a skilled and experienced lawyer with no recent prior assessment of capacity, would not have been sufficient to overcome the significant and long-lasting influence that [DP] held over [JR]. I find on balance of probabilities that the independent advice was not sufficient to overcome that influence.

[184] I find on the balance of probabilities that the decision to sell [location 2] and the decision to gift the proceeds to [DP] were decisions that were made by [JR] under significant and undue influence from her trusted nephew [DP]. It was a decision that was clearly contrary to [JR]'s interests given the financial position that it left her in.

[185] Dr Fisher was of the view that at the date of this transaction [JR] would have been quite "*somewhat vulnerable to influence, with her cognitive difficulties being her main vulnerability*". I agree. However, I do not accept Dr Fisher's opinion that [JR] had capacity to make the decision to gift the proceeds to her nephew [DP] and I find

that any capacity she did have was overcome by the undue influence of [DP] on this occasion.

**Was [location 2] a Decision Made by [JR]'s Attorney?**

[186] Given that the gift was made when [JR] lacked capacity, I am therefore in a position to exercise the power of review under s 103. However, in order to do so I must be satisfied of two things. Firstly, that the decision to gift the funds to [DP] was a decision made by [DP] acting under the EPOA (s 103(1)) and secondly, that it is reasonable for me to review the decision.

[187] It was [JR] who signed the Deed of Gift, not [DP]. The Deed of Gift was prepared by Hesketh Henry. It gave [DP] an immediate and enforceable right to $1,334,342.86. It is therefore arguable that the gift was not a decision made by [DP] as [JR]'s attorney and is therefore not subject to review. However, the evidence satisfies me on balance of probabilities that [JR]'s "*decision*" to gift the funds to [DP] immediately were a direct result of [DP]'s undue influence on her and at a time when she lacked the relevant capacity. It would be artificial in those circumstances to regard execution of the Deed of Gift and [JR]'s confirmation to Hesketh Henry that she wished to make a gift as a decision made by [JR].

[188] The electronic banking transaction that led to the transfer of the funds from [JR]'s account to [DP]'s account was completed by [DP]. In doing that, [DP] was acting in breach of his fiduciary obligations and in particular, his obligation to ensure that he did not benefit himself at [JR]'s expense and that he acted in [JR]'s best interest at all times.[50] He was also acting in breach of his duty under s 97A(2) of the Act where:

> "The paramount consideration of the attorney is to use the donor's property in the promotion and protection of the donor's best interest …"

[189] Knowing the circumstances in which the Deed of Gift was executed, a responsible and truly independent attorney acting in [JR]'s best interest would have declined to complete the transaction by transferring the funds. [JR] would have had a

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[50] *Vernan v Public Trust* (supra) at [37].

remedy had [DP] tried to enforce the gift. As the Court of Appeal confirmed in *Scott v Wise*:[51]

> "… Voluntary transactions will be avoided at the instance of the donor or his representative once lack of capacity is established unless there is some equitable defence."

[190] I therefore find that the gift was a decision made by [DP] acting as [JR]'s attorney, albeit acting in clear breach of his duties.

**Is it Reasonable to Review the Decision?**

[191] Is it reasonable in all the circumstances for me to review the decision?[52] As Judge Turner noted in *W J T v P J T*:[53]

> "The Act is prophylactic legislation for the benefit of those who are unable to manage their personal or property affairs. Section 103 is a supervisory jurisdiction which provides a remedy in circumstances where the Court considers that the attorney's actions cannot be justified in terms of the power given to him/her. Through this means the integrity of the legislation can be maintained."

[192] The Family Court in *Treneary* summarised the obligations of an attorney:[54]

> "A person appointed under a power of attorney acts as an agent of the donor. A fiduciary relationship is created between the attorney and the donor. Generally, the donor is entitled to repose trust and confidence in the attorney who has a responsibility in common law to:
>
> (a) Act with absolute openness and fairness to the donor;
>
> (b) Exercise reasonable care in all the circumstances'
>
> (c) Keep the donor's property separate and be able to account for it;
>
> (d) Avoid any position where the agent's interest conflict with his duties."

[193] The Family Court in *Re ACT* concluded that applying "*Wednesbury*" concepts of unreasonableness, and the broad discretion available to the Court under s 103, it is reasonable for a Court to review a decision of an attorney and make an order:[55]

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[51] *Scott v Wise* [1986] 2 NZLR 484 (CA) per Summers J.
[52] Section 103(4).
[53] *W J T v P J T* [2012] NZFLR 855 at [13].
[54] *Treneary v Treneary* (2008) 27 FRNZ 78 at [55].
[55] *CT* [2013] NZFC 17790 at [42].

> "If there is evidence any of the following factors apply:
>
> (1) The decision undermines the purpose of the Act;
>
> (2) The decision results in a breach of the attorney's statutory or common law duties;
>
> (3) The decision is irrational, failed to take in to account relevant matters or took into account irrelevant matters;
>
> (4) It is in the overall interests of justice to do so."

[194] I find it is reasonable that I review the decision to make the gift which resulted in a breach of [DP]'s duty not to self-benefit.

**[Location 2] – Remedy**

[195] I take account of the fact that under [JR]'s Will as it stands, [DP] would nonetheless receive the property at [location 2] in the event that [JR] died while she still owned it. Following its disposal, the proceeds would have fallen into the residue of [JR]'s estate and under clause 8 of her Will of 15 May 2014 the residue is payable to the Trustees of the [Family Trust]. If I am to set the gift aside and direct that [DP] repays the gift to [JR]'s estate, it will not only deprive him of the immediate use of the funds but will also mean that he may not receive the gift that is recorded in the May 2014 Will.

[196] I bear that in mind in making my decision for an appropriate remedy. However, [DP] cannot be permitted to retain funds that he received as a result of a fundamental breach of his obligations to [JR]. It is appropriate that he be ordered to repay those funds to [JR]'s estate along with interest under the Interest on Money Claims Act from the date of receipt of the gift. That is to his detriment as a result of the current terms of [JR]'s Will, but that detriment is a direct result of the significant breaches of fiduciary duty by [DP].

**Transaction 2: The Gift of $81,774.12**

[197] The only evidence that this gift was ever made by [JR] comes from the evidence of [DP] and the document that he prepared himself, which he says [JR] signed on 15 December 2015. It is [DP]'s evidence that the gift was a result of an

initiative by [JR]. She received the settlement statement from Hesketh Henry after [location 2] was sold, she read the settlement statement, noted that $81,774.12 had been paid to the BNZ as the mortgage repayment and told [DP] she was not happy that her and [TP]'s "*gambling debts*" had been deducted and that [DP] had been "*short changed*". The settlement statement was addressed by email to [DP]'s email address. [DP] accepted in cross examination that it was sent to him.

[198] In August of that year [JR] had completed her MoCA with a score of only 18/30 with Dr Casey observing a significant impairment in memory, concentration, arithmetical ability and executive function. For example, [JR] was unable to complete a Serial 7 subtraction from 100 beyond the number 93. She was unable to draw a clock face displaying the time of 10 past 11 and she was unable to repeat a list of five single digit numbers which were read to her. It is unlikely that [JR] was able to read and comprehend the settlement statement in December 2015.

[199] [JR] did not have $81,774.12 to gift to [DP] at the date she allegedly signed the document. The total funds to her in all of her bank statements were around $30,000 at December 2015. [DP] as her attorney must have known that. The first time that anyone other than [DP] (and allegedly [JR]) was aware of the existence of the "*Power of Attorney Instructions*" – which [DP] admits he has typed – was when it appeared as Exhibit K to the affidavit that [DP] swore on 23 December 2020. The Police Document Examiner concluded that the signature to this document should not be relied on as a document genuinely signed by [JR]. When cross examined [DP] was adamant that it had been signed by [JR], "*… I can categorically say she signed that and whether she signed it in the morning when she was, I don't know whether she was*". [DP] emphatically denied that he had signed the document.

[200] The clarity and confidence with which that signature is written is in contrast to the shaky frailty of [JR]'s signature in sample documents from the years prior to December 2015. That document can only have been signed by [JR] or [DP] and I find on balance of probabilities that it was not signed by [JR]. It follows that the document was both created (typed) and signed by [DP]. I do not know when that occurred, the document was not seen by anyone else, [DP] has not retained the original, that he says

that he has disposed of the computer on which it was prepared so the date it was prepared cannot be verified.

[201] I do not accept [DP]'s evidence that [JR] "*noticed*" some time after the sale of [location 2] that [DP] had not received the full proceeds of sale and offered to make it up. In any event, accepting the "*gift*" in these circumstances without [JR] having any opportunity for independent legal advice was a clear breach of [DP]'s fiduciary duty to [JR]. The gifting of such a significant sum of money – which [JR] did not have available to pay – was clearly contrary to her welfare and best interests. [DP] has also failed in his duty to keep adequate records by failing to retain the original of this document or any evidence of the date of its creation.

[202] I find [DP]'s evidence there was an agreement to reduce the "*debt*" of $81,774.12 that [JR] owed [DP] by small incremental payments is untrue. [DP] produced a number of receipts that he says he issued. These receipts were not given to [JR] nor anyone else. They are handwritten. While some of them record "*payment made for gardening put towards debt*" or "*payment to [DP] for Noel Leeming purchase offset against debt owed*" or the like, many of them are simply noted as payments to [DP] or for his benefit, for example, "*payment of [DP]'s rates*".

[203] Exhibit M to [DP]'s affidavit of 23 December 2023, a typed list headed "*Payments made to offset debt owed to [JR] from [location 2] proceeds – amount owed $81,774.12*" was created after these proceedings were issued and after [DP] was ordered to give discovery. I do not accept his evidence that it was created from a handwritten document that he had maintained but which he destroyed after the discovery order was made. When he first exhibited this document, he did not say that it was a transcription from a handwritten original, he simply said "*also attached is Exhibit M as a copy of the spreadsheet listing the payments which I made from [JR]'s account*".

[204] Again, on [DP]'s evidence [JR] was not given a copy of his spreadsheet nor any records of the money that [DP] was applying for his benefit to offset the alleged debt. That is a breach of [DP]'s obligation to maintain adequate records. I do not accept his evidence that "*I believe that, all in all, the arrangement which [JR] and I*

*arrived at for the payment of the extra $81,774.12 debt worked reasonably well. The debt was slowly paid down and the gradual payments did not place any undue stress on [JR]'s account*." Contrary to what [DP] says, "*the arrangement*" was entirely contrary to [JR]'s interests. Agreeing to immediately gift [DP] money she had no way of immediately paying him was anathematic to her financial security.

[205] [DP]'s evidence was that by about 13 December 2018 the money that he had taken from [JR]'s account by way of "*repayment*" had reached the total of $81,774.12. He said, "*however, at about this time and shortly afterwards, I made more payments without realising I had gone over the limit*." He said that when he discovered this, he told [JR] immediately and said that he would repay but she told him not to bother. He said that throughout 2019 he made a number of payments from [JR]'s account which he treated as loans from her to me "… *and all of which I have subsequently repaid*".

[206] If [DP] had been maintaining a contemporaneous handwritten spreadsheet, if it had been his intention to only accept the $81,774.12 from [JR]'s account, I do not accept that he would have "*accidentally*" overpaid himself by such a significant amount.

[207] I find the reality of what [DP] was doing up until 11 December 2018 is that he was simply taking money from [JR] that he was not entitled to. I make that finding on the balance of probabilities and I consider there is strong evidence supporting that finding.

[208] The first deduction of $1,828.50 was made on 18 February 2016. $21,622.86 was drawn on 9 May 2016. From then through until 11 December 2018 the amounts drawn varied between $11,396.66 drawn on 8 March 2017 and $1,100 drawn on 18 December 2017. [DP] has included a column labelled "*Description*". Five of the payments he recorded as "*to [DP]*". The remainder have entries such as "*R & M*", "*insurance*", "*DNA electrical*" or "*tax*" or "*rates*". They are not however payments that were made for [JR]'s benefit, it was not [JR]'s rates that were being paid, it was [DP]'s.

[209] The payments that [DP] received according to his Exhibit M total $106,925.77. The payments listed after 11 December 2018 are headed "*payment contributions made as per [JR]'s instructions*". They total $23,038.53 which is included in the $106,325.77 paid up to 10 December 2019.

[210] In that same document under a heading "*payments made by EPOA*" are a series of "*reimbursements*" which [DP] says he made to [JR] after 8 April 2020 in various ways such as payment of legal bills which he says were her liability. The payment dates run from 8 April 2020 through to 30 November 2020. In the entries which are shown as debits, presumably [DP] is purporting to have repaid money to [JR] – for example $4,579 described as "*legal reimbursement (ATM)*" on 22 June 2020. The net "*repayments*" made to [JR] were $25,277.50 and the spreadsheet closes with a balance of $1,482.41 which is described as "*[DP] in credit*".

[211] I am compelled by the strong evidence to conclude that [DP] acted dishonestly and that the $81,774.12 alleged gift was not a decision made by [JR] at all. However, even if I were wrong about that, I am satisfied that this remarkable transaction could only otherwise be the result of the undue influence that [DP] exercised over [JR]. His explanations for this "*gift*" were lacking in credibility. [JR]'s capacity was considerably reduced at the time of this transaction. Her reliance on him was significant and [JR] was given no opportunity to receive independent legal advice.

**Remedy for Gift of $81,774.12**

[212] In terms of an appropriate remedy, I find that [DP] should repay the sum of $81,774.12. He should also account to [JR] for interest at the prescribed statutory rate under the Interest on Money Claims Act. Because of the complexities arising from various dates of payment the interests of justice will be served if the total that [DP] has taken from [JR] is calculated at six monthly rests commencing from the first deduction made 18 February 2016 with interest to run from those dates. For example, interest should run from 18 August 2016 on sums [DP] had drawn to that date of $26,295.76 at the rate prescribed in the Interest on Money Act through until the date of payment.

**Transaction 3: ATM Withdrawals Totalling $90,150**

[213] As part of the report that she prepared [JR]'s property manager [KS] analysed ATM withdrawals from [JR]'s accounts between 9 February 2015 and 28 April 2020. None of those withdrawals were made by [JR] personally. [DP] accepts that he made all of those withdrawals, although he claimed he made them either at her request or with her knowledge.

[214] $4,700 was withdrawn between 19 February 2015 and 21 October 2015. $13,600 was withdrawn in 2016. In 2017 a total of $29,650 was withdrawn. In 2018, $20,400 was withdrawn. In 2019, $17,500 was withdrawn and between 9 January 2020 and 28 April 2020, $4,300 was withdrawn, making up the total of $90,150. In 2018 and 2019 in most months, $2,000 per month was being withdrawn.

[215] Some of the entries noted in the schedule Ms [KS] prepared were also included in Exhibit M to [DP]'s affidavit of 23 December 2020 as part of payments that he said he was taking to offset the "*debt*" of $81,774.12. It appears those amounts are noted in the schedule [KS] prepared as "*cheque/brand teller transaction*" instead of "*cheque/ATM*".[56]

[216] [KS] found no cash at [JR]'s property when it was cleared out.

[217] [JR]'s daily support workers were paid for out of Government funds. [JR] received Meals on Wheels. [JR]'s utilities and regular bills were paid by [DP] electronically – not in cash.

[218] [DP] said that [JR] and her sister [TP] "*had a long history of taking out cash from their bank accounts. They preferred to have cash on hand for purchases, gifts, donations, food and almost anything else*." [DP] suggests in his evidence that the withdrawals that he was making from [JR]'s bank account from February 2015 onwards were in line with the pattern of spending that occurred while [TP] was alive, evidenced by withdrawals from their joint account.[57]

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[56] Withdrawal of $1,100 on 28 September 2017 and $1,000 on 24 November 2017 fall into this category.

[57] He prepared a schedule which he exhibited as Exhibit O showing the joint account withdrawals and referred to Schedule P showing the withdrawals from [JR]'s cheque account.

[219] There were no significant cash withdrawals between December 2013 and August 2014 noted in the schedule that [DP] prepared. [DP] said that "*on no occasion did I ever withdraw cash from [JR]'s account without a specific request from her. I never did so on my own initiative. On most occasions, I withdrew the cash when [JR] was with me. I did not at any time withdraw cash for my own use*."[58] He said that from early 2017 he kept [JR]'s EFTPOS card with him to make it easier but before then when he ran errands for [JR], he would go to her place first, pick up the EFTPOS card and then go and complete the shopping.

[220] [JR]'s neighbour, [RS], deposed that [JR] did not do electronic banking and usually paid in cash. [RS] recalled [JR] spending "*a small fortune*" at a health shop when [RS] went with her and she said she knew that [JR] liked to spend in various local shops such as the lingerie shop where she was well known. [RS] does not say when that spending occurred, but it is likely that would have been some time prior to 10 February 2014 when an occupational therapist, Helen Wilkinson, noted that the medical team had recommended that [JR] stop driving and that [JR] was mobilising with a walking stick and showering and dressing with lower limb assistance. There is no evidence that [JR] was able to travel independently for shopping or the like after that date.

[221] In cross examination [DP] suggested [JR] might have spent around $500 per week on groceries and cash "*for other items*". He suggested, for example, that [JR] might have paid her home help workers (who were remunerated by the DHB) in cash for cleaning work. He said however, that he could not recall what [JR] would give them.

[222] Mr Atmore suggested in an affidavit that he swore that [JR] might have continued to spend money on gambling. There was no evidential basis for that speculation by Mr Atmore. [DP] in cross examination accepted that was unlikely given that she could not drive, use the internet and did not visit Sky City. [DP] also suggested the "*possibility*" that "*she would use the cash as presents to give, you know to family members …*". He noted that she gave him cash for his sons for birthday

[58] Para 122 affidavit 23 December 2020.

presents "*and things like that*" but he believed it was probably just him that was visiting his aunt, so thought it was unlikely she gave cash to anyone else in her family.[59]

[223] It was the opinion of Ms [KS] that an amount of $150 per week cash would have been sufficient for any additional groceries that [JR] required or for sundry personal items. [DP] felt that was conservative. He said he did not think it was nearly enough referring again to the gifts that she gave and his belief that she always wanted to have "*cash on hand*". [DP] said he did not know where [JR] kept the cash nor what she did with it, if in fact she received any or all of it. He said, "*I just gave her the cash, I would put the cash in, a lot of the cash, in one of her purses beside her bed because that was the place that she, she knew where to get it*".

[224] [DP] accepted that he had no receipts from [JR] and no way of establishing that she in fact received any of the money that he had withdrawn.

[225] [DP] does not accept that he was acting pursuant to the EPOA when he used [JR]'s EFTPOS card and made these cash withdrawals. His position is that he was just doing what [JR] wanted but that [JR] retained capacity.

[226] I only have jurisdiction under s 103 to review decisions that [DP] has made under the EPOA. In March 2014 [JR]'s ACE–R score was 72/100 – significantly below the level indicating dementia. At the same time, as a result of the ACLS test on 18 March 2014 of 4.2 it was noted "*money management might require complete or close supervision*". Clearly [JR] was partly unable to manage her own financial affairs from that time onwards.

[227] I accept that a decision to allow [DP] to withdraw money using her EFTPOS card would not require a high level of understanding or financial competence. However, the only evidence that [JR] knew about these withdrawals or authorised them comes from [DP]. The ATM withdrawal on 19 February 2015 was the first such

[59] [DP]'s evidence that [JR] gave him cash gifts from time to time was in contrast to his affidavit evidence that none of the ATM withdrawals were for his benefit.

withdrawal since 2013. There is no satisfactory explanation for a sudden and increased need for cash on [JR]'s behalf from February 2015 onwards.

[228] [DP] had an obligation to maintain adequate financial records. There ought at least to have been receipts from [JR] or other cogent evidence that she received the money that was withdrawn. He has failed to maintain adequate records in breach of his duty under s 99C of the Act. [DP] was present in March 2014 when the assessment was made that [JR] might require complete or close supervision of money management matters. I do not accept his claims that he believed that [JR] was fully competent to manage her own affairs. [DP] was present during many of the key medical appointments and knew the concerns that were being raised.

[229] I therefore find that the withdrawals that [DP] made from [JR]'s account using her EFTPOS card were decisions made by him at a time when [JR] was mentally incapable of approving them, when she was partly incompetent, and that I have jurisdiction to review those decisions – [DP] was acting as her attorney under the EPOA, albeit acting in breach of his duties, including his duty to preserve [JR]'s assets for [JR]'s benefit and to maintain proper records.

**Remedy for ATM Withdrawals**

[230] From February 2015 to 20 April 2020 there are approximately 268 weeks. Spending at the $150 per week Ms [KS] suggested would be reasonable would amount to $40,200. The funds listed in Ms [KS]'s schedule of ATM withdrawals – excluding the two amounts that [DP] says were credits against the $81,774.12 "*loan*" – total $88,050.

[231] A total of $4,700 was withdrawn in 2015. I note [DP]'s view that the $150 per week amount that Ms [KS] would allow was too low. The only plausible argument that [DP] puts forward for [JR]'s spending was that she might have been giving some cash to her home helpers for cleaning work around the house. Her house was consistently described as cluttered but not necessarily as dirty. Any allowance I make can only be approximate, and ultimately I find it would be reasonable to allow $200 per week which would include any reasonable additional cash [JR] might have given

to a caregiver for the limited cleaning that may have been undertaken. Against the $4,700 spent in the months between 19 February 2015 and the end of that year there would be no reimbursement required from [DP].

[232] $13,600 was withdrawn in 2016 between January and December in amounts varying between $500 and $2,000. Allowing $200 per week for that year, [DP] would be required to account for $3,200, being the difference between the total of $13,600 withdrawn and $10,400 for the year at $200 per week.

[233] In 2017 a total of $27,550 was withdrawn.[60] [DP] would be required to account for $17,150. In 2018, $20,400 was withdrawn and [DP] would be required to account for $10,000. In 2019, $17,500 was withdrawn and [DP] would be required to account for $7,100. In the four months between 9 January 2020 and 28 April 2020, [DP] withdrew $4,300 from [JR]'s account. With an allowance of $200 per week [DP] would be required to account for roughly $1,000.

[234] The total is $38,450. It is reasonable that [DP] be required to account for that money. He failed to retain adequate records, but he has failed to act to protect his aunt in any way. I do not find his explanations for the expenditure – principally that she gave the money to other people – to be credible. To the extent that he received gifts for himself or for his sons he was acting in breach of his obligations as her attorney not to self-benefit. I have insufficient evidence to confidently conclude on balance of probabilities, bearing in mind with the need for strong evidence to support grave allegations, that he actually took the missing money for his own benefit. That is not an issue that was put directly to him in cross examination. It is however, the most credible explanation to what has occurred here.

[235] Regardless, the fact that he says he allowed his aunt to be in possession of significant sums of cash without any inquiry as to how they were being spent or protected, represents a significant dereliction of his duties as her attorney to promote and protect her welfare and best interests. That issue combined with his failure to keep adequate accounts leaves me in a position where I consider it is reasonable in all the circumstances to review the decisions that [DP] made in this regard.

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[60] Excluding the funds [DP] says were credits against the $81,774.12.

[236] The appropriate remedy is that he be required to repay the sum of $38,450 with interest under the Interest on Money Claims Act to be payable on the excess amounts withdrawn over the $200 per week allowance from the end of each relevant year until the date of payment.

**Transaction 4: Transfers from [JR]'s Account to [DP]'s Account of $153,289.12**

[237] As part of her investigation Ms [KS] prepared a Schedule of Payments taken from [JR]'s BNZ Savings Account, Home Loan Account and Cheque Account and paid to the account number [details deleted] in the name of [DP] and his wife [BF], between 9 May 2016 and 8 April 2020. She identified 47 transactions totalling $153,289.12. The transactions were referenced by the depositor as either "*td*" or "*savings*" or the like. It was [DP] who withdrew all of those funds and deposited them into his account.

[238] Some of those transfers coincide with payments that [DP] listed in the spreadsheet labelled "*Payments made to offset debt owed by [JR]* …" which was Exhibit M to his affidavit of 23 December 2020. I have already directed that [DP] reimburse the $81,774.12 taken as part of the "*gift*". [DP] should not have to account for the same funds twice where the payments listed in Exhibit M coincide with the payments in the Schedule of Payments that [KS] has prepared. The payments that coincide are a payment of $21,622.86 on 9 May 2015, a payment of $1,000 on 14 September 2016, a payment of $11,396.66 on 8 March 2017, a payment of $2,000 on 4 December 2017, and a payment of $4,000 on 11 December 2018. They total $40,019.52. The balance of the transfers between 6 May 2016 and 8 April 2020 is $113,269.60.

[239] [DP] says that he agreed with [JR], on or after March 2016, that he could draw these funds as loans to assist him with legal costs. He accepted that to that extent that he had not already repaid any part of this "*loan*", he must repay it.[61] In his affidavit evidence [DP] had said that he did not make any payments without [JR]'s instructions. He went so far as to say that she was "*fully aware*" of the relevant transfers when cross

[61] NOE 2, p 42.

examined.[62] However, when a specific transaction was put to him – $20,000 paid on 6 March 2019 described as "*td*" in the bank statements – and he was asked whether [JR] instructed him to transfer that money to him, he said, "*Specifically, probably no* …".[63] He confirmed that he made payments without reference to [JR] after March 2019 and did not discuss the amounts spent with her but rather kept a tally.[64] That tally was never shown to [JR]. She did not have access to it.[65] Despite saying that he "*issued receipts*" for all of these payments it is quite clear that he did not "*issue*" the receipts – if in fact they were prepared at the time the money was taken. He kept them.

[240] [DP] acknowledged that the information he caused to be entered in [JR]'s bank statements in relation to the withdrawals was confusing and misleading.[66] He acknowledged that by drawing those funds from [JR]'s accounts he was depriving her of the interest that she would otherwise would have received. He himself did not pay any interest to [JR]. He confirmed that he would account for interest to [JR] if required.[67]

[241] It should be noted that [DP] repaid $133,000 of the funds that he drew in October and November 2020, albeit without accounting for any interest.

[242] The funds withdrawn from [JR]'s account in 2019 totalled $98,769.60. Between 10 January 2020 and 8 April 2020 $9,500 was withdrawn.

[243] [DP] had acknowledged that after the date of Dr Sizich's report dated 6 October 2018 and "*beyond that in 2019*", [JR] was "*probably*" not of sufficient capacity to give him instructions.

[244] The legal costs that he was incurring did not appear to relate to [JR]'s interests. In March 2019 the only litigation on foot was litigation concerning [a different Trust], a matter in which [JR] had no interest.

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[62] NOE 2, p 43.
[63] NOE 2, p 51
[64] NOE 2, p 252–253.
[65] NOE 2, p 253 and V2A/375–376, Exhibit M.
[66] NOE 2, p 258.
[67] NOE 2, p 252.

[245] It is clear that all of those payments were made at a time when [JR] was partly lacking capacity to manage her property. I therefore have jurisdiction to consider [DP]'s decisions to advance the monies from [JR]'s account.

[246] I do not accept [DP]'s evidence that he was authorised by [JR] to take this money as truthful. Even on his account, that [JR] was unable to instruct him after August 2018. The decision to operate [JR]'s account and transfer the money to his own account is a decision that he made as [JR]'s attorney and entirely in his own interests. It is not a decision that [JR] made independently.

[247] [DP] has clearly failed to keep adequate accounts. In particular, he failed to provide [JR] with receipts or any form of accounting for the money that he was taking. The records that he did retain were inadequate and inaccurate. They did not record the purpose of the payments.

[248] The payments were for his benefit and [JR]'s detriment. He breached the prohibition on self-benefit, in particular, by receiving interest free monies.

[249] I find that it is reasonable for the Court to review the decision [DP] made to take or borrow these monies from [JR].

[250] As for the appropriate remedy, it may be that in fact [DP]'s repayments will "*put him in credit*" given the fact that $40,019.52 of the monies that are listed in the property manager's Schedule of funds withdrawn from [JR]'s accounts are payments that also form part of the $81,774.12 "*gift*" that I have already directed [DP] must repay to [JR].[68] However, it is clearly reasonable, indeed essential that [DP] account to [JR] for interest on the money that he transferred. The interests of justice will be served if a calculation is carried out at six-monthly rests on the balance outstanding with interest payable under the Interest on Money Claims Act from then on any balance due until the debt is paid in full. If there is to be a net balance still due to [JR] it must be repaid as well.

[68] V1/434 Table of Funds withdrawn from [JR]'s account, and V2/372 Exhibit M, payments made to offset debt owed by [JR].

**Transaction 5: Payment of Legal Fees – $43,957.02**

[251] The legal fees at issue relate to instructions that were given by [DP] to Mr Atmore and counsel allegedly on [JR]'s behalf or for [JR]'s benefit between 2016 and 2020. Part of the $43,957.02 relates to $31,941.84 for invoices dated from 17 December 2016 to 30 April 2018. These were costs incurred in relation to the Law Society complaint against Rico Horsley arising out of the transfer of [location 2] to [NP] and the preparation of proceedings in relation to that transfer – proceedings which were not filed. The $12,015.20 invoiced from 16 June 2020 to 25 September 2020 appear to relate to responses to questions and issues that were raised about [DP]'s actions and decisions as [JR]'s attorney.

[252] It is clear that all of the instructions came directly from [DP] and not from [JR]. Certainly, by June 2020 [JR] was incapable of giving coherent instructions and it is clear that she was not the one who was seeking advice.

[253] I do not accept [DP]'s evidence that [JR] instructed him to pursue the complaint against Mr Horsley.

[254] [DP] did not tell [JR] that he was filing the Law Society complaint. He said he was acting because [JR] has asked him "*to try to return the title back to what it was*". It was submitted that the complaint to the Law Society was unnecessary. [DP] accepted in cross examination that the complaint would not have resulted in the return of the title to [JR].[69]

[255] With the benefit of hindsight, both the complaint to the Law Society and the drafting of the proceedings which were not filed have proven to be unnecessary and not to be for [JR]'s benefit. However, given the state of [JR]'s mental decline by the date that [NP] procured the transfer of [location 1], it was reasonable for [DP], acting as [JR]'s attorney, to take reasonable steps on her behalf to set the transaction aside or recover compensation. The steps that he took were not effective. However, in contrast to the other concerns raised by [DP]'s actions this is not a situation where [DP] appears to have been acting with his own self benefit to the fore.

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[69] NOE 2, p 146, line 96.

[256] The costs incurred were not an effective use of [JR]'s money. Had [JR] had the benefit of truly independent legal advice she (or [DP] as her attorney) might well have decided not to incur that expense.[70] However, even absent that advice I find that [DP]'s decision to incur $31,941.82 in legal expenses was neither irrational nor so unreasonable as to justify an order for reimbursement or compensation against [DP]. The position for Mr Atmore, who has received payments from [JR] while in a conflict of interest may be different, but I have no jurisdiction in that regard.

[257] The situation with the remaining legal fees of $12,015.20 is quite different. These were accounts incurred from 16 June 2020 to 25 September 2020. There can be no argument that [JR] was aware of or authorised this expenditure in any way. The expenditure was for [DP]'s benefit. It was incurred in advice relating to the concerns that had been raised in relation to his actions and decisions as an attorney. The advice [DP] was receiving from Mr Atmore and Mr Wain at this time included advice that a request for information about [JR]'s assets should be "stonewalled".[71] It is reasonable that I review the decision and it is appropriate that [DP] be ordered to repay the sum of $12,015.20 in full together with interest under the Interest on Money Claims Act from the date each invoice was paid.

**Transaction 6: Vehicles and Vehicle Expenses**

[258] [JR] owned an Audi car, she inherited [TP]'s Peugeot. She was unable to drive from 2014.[72] [DP] alleges that [JR] gifted the Peugeot to him, or rather to his sons, so that they would have a vehicle in which they could learn to drive and subsequently use. He said this happened in around 2016.[73] This was not evidence that appeared in his affidavits.

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[70] Mr Atmore was blind to his own conflict and remained solicitor on the record for [DP] despite the provisions of Rules 13.5.1 and 13.5.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which prohibit a lawyer from acting in a proceeding where they may be required to give evidence of a contentious nature and require a lawyer to immediately cease acting if it becomes apparent that the lawyer is likely to need to give evidence of a contentious nature.

[71] NOE, pp 131 to 144.

[72] NOE 2, p 153.

[73] NOE 2, p 158.

[259] [DP] had the use of [JR]'s Audi from 2014. He appears to have used only that vehicle to travel between [his home] and [JR]'s home in [location 2].

[260] It was [DP]'s evidence that [JR] instructed him to charge the costs associated with using the Audi to her. This included all petrol, all servicing costs, warrants, registrations and repairs.

[261] All costs associated with the maintenance, repair and running of the Peugeot were also paid from [JR]'s accounts. For example, in August 2019, $968.40 was paid to Continental Cars for service in relation to the Peugeot despite the fact that vehicle had been registered in [DP]'s name since 2016.[74] [DP] acknowledged that he did not get [JR]'s instructions to meet costs every time he incurred them.[75] He did not keep receipts for all of the costs paid.[76] He had no records of [JR]'s authority to pay these costs. The "*authority*" from [JR] seemed to arise from "*just a general conversation*".[77]

[262] On the other hand, [DP] was visiting [JR] up to twice a week. It is clear that he was carrying out some errands for her benefit. It might have been reasonable for him to receive some reimbursement for mileage had there been a suitably neutral property manager or attorney to authorise such reimbursement.

[263] It may well be that some of the expenses in relation to the Audi were incurred with [JR]'s knowledge and consent at a time when she was able to competently consent between 2014 and 2015. [DP] has failed to keep accurate records. I do not know how much of the expense charged relates to that period and I do not know how much of the expense charged relates to other driving which was not for [JR]'s benefit.

[264] [KS] has not sought to recover the Peugeot, nor to claim for any loss in value on the Audi as a result of depreciation during the time [DP] was using it. She suggests that this represents adequate compromise in terms of any benefit [JR] may have received from [DP] using the vehicle for her property management purposes.

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[74] NOE 2, p 166.
[75] NOE 2, p 167.
[76] NOE 2, p 159.
[77] NOE 2, p 160.

[265] I am satisfied that the use of the cars and the decision to charge the costs to [JR] were decisions that [DP] made as [JR]'s attorney for his own benefit. They were made at a time when she was partially incapable of managing her property affairs. From the tenor of [DP]'s evidence, it seems clear that the vast majority of those expenses and deductions were never discussed with [JR] or authorised by her in any way whatsoever.

[266] Once again, this is an example of [DP] benefitting himself at [JR]'s expense, in breach of the prohibition against self-benefit by her attorney. Once again, [DP] has failed to keep adequate records in breach of his obligations. It is reasonable that I review his decision to take these expenses.

[267] I do not have any evidence as to the value that should be ascribed to the use of the Peugeot and Audi cars. I have no evidence as to their market value at the date that [DP] started to use them, nor as to the depreciation incurred or their current value. Any direction that I make for compensation will necessarily be approximate. In all the circumstances I consider it reasonable to require [DP] to account for $20,000. I believe the Audi has been returned to [JR]'s estate. He or his sons will retain the ownership and use of the Peugeot.

[268] Interest should be paid on the sum of $20,000 under the Interest on Money Claims Act from the date [JR] was declared to be wholly lacking capacity on 5 May 2020 until payment is made.[78]

**Transaction 7: The Fridge Purchase and the EFTPOS Purchases**

[269] The $949 that was applied from [JR]'s bank account towards the purchase of a fridge for [DP] was "*credited*" against the debt [DP] said [JR] owed him. It is not necessary to award additional compensation given that [DP] has been directed to repay the debt in its entirety.

[78] I have selected that date for pragmatic purposes. The use of that date is not intended to indicate that [DP] had any right to take or keep the money prior to that date.

[270] [DP] has not explained the $1,354 that was spent on six occasions on hardware between September 2017 and February 2020. He accepted that he had not kept records and receipts. He alleged that they "… *would have been used to touch up things around … the house (so …) for [JR]*"[79] or for "*general repairs and maintenance*".[80]

[271] [DP] failed to keep adequate receipts which is a clear breach of his obligation to maintain records. On the other hand, [DP] was frequently attending to [JR]'s needs and requirements. It is likely some of this expenditure was for her benefit. Ultimately it is reasonable he be required to account for half of the expenditure, that is the total sum of $677 and I see no need to order that interest be added to that sum as part of this judgment.

**Council Rates and Penalties**

[272] [DP] was receiving all of [JR]'s relevant mail and attending to all payments on her behalf throughout the relevant period. He should not have allowed rates penalties to be incurred. It is reasonable that he be required to pay the sum of $2,055.15. Again though, I do not consider it necessary to order that he pay interest on that sum as part of this judgment.

**Puka Park**

[273] Clearly the $544.15 that was invoiced on 27 February 2017 for this resort at Pauanui was not for [JR]'s benefit. There is no evidence that she travelled anywhere. [DP] should be required to repay the sum of $544.15. Given that it is likely that the expenditure was for his benefit it is reasonable that he pay interest under the Interest on Money Claims Act from the date of payment.

**[JR]'s Jewellery**

[274] [NP] submits that the Court should order [DP] to compensate [JR]'s estate for the value of missing jewellery in the sum of $61,840. That is the combined

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[79] NOE 2, p 151.
[80] NOE 2, p 151.

replacement value for some of [JR]'s jewellery which was the subject of insurance valuations dating from 1993 to 2011. The jewellery cannot now be found. [NP] believes that [DP] retained all of [JR]'s jewellery.

[275] [DP] accepted in cross examination that he took the majority of [JR]'s jewellery from her home in March 2014 to his home for safe keeping. [DP] accepted that he did not store the jewellery in a safe or otherwise secure it.[81] It was [DP]'s evidence that the decision to take [JR]'s jewellery to his home was made because [JR] had noticed that a number of items had gone missing. Unfortunately, he did not create an inventory or take photographs of the jewellery that he uplifted. [NP] submits that he was in a fiduciary relationship in relation to the jewellery from the point in time when he uplifted it. That may be, but I am not in a position to review his decision to uplift the jewellery nor his failure to create an inventory at that time because the jewellery was uplifted before the EPOA was executed.

[276] I accept that after the execution of the EPOA and from the point in time when [JR] became partly incapable of managing her own affairs, I would have jurisdiction. However, I have no evidence that [DP] actually took the items that are now known to be missing. I have no evidence that he has lost them or that he has taken them for his own benefit. The missing items may have been items that were left in her home, but they may have been "*lost*" before [DP] uplifted the remaining jewellery.

[277] I have concerns about [DP]'s failure to keep adequate records of the jewellery. I also have concerns that [DP] appears not to have inquired further when [JR] complained about jewellery going missing and that he did not consider making an insurance claim. His explanation was essentially that he was not certain what [JR] was telling him was correct. That evidence sits uncomfortably with his general position that he did what [JR] wanted or what [JR] told him to do and that he believed [JR] was competent.

[278] However, I am not satisfied that it would be reasonable or appropriate for me to order compensation since I have no evidence that [DP] was responsible for the alleged losses

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[81] He said it was stored in boxes – NOE 2, p 243, 19-20.

## Summary and Directions

[279] A summary of the orders that I am making under s 103(4) is as follows:

(a) [DP] is to repay the sum of $1,334,442.86 being the proceeds of [location 2] and he is to pay interest calculated under the Interest on Money Claims Act from 30 November 2015 until the date of payment.

(b) [DP] is to repay the sum of $81,774.12 with interest to be paid on the balance taken as calculated at six monthly intervals from 15 December 2015. Interest is to be paid until the date of payment.

(c) [DP] is to repay the sum of $38,450 of the EFTPOS withdrawals. He is to pay interest on $3,200 from 31 December 2016 until the date of payment, interest on $17,150 from 31 December 2017 until the date of payment, interest on $10,000 from 31 December 2018, interest on $7,100 from 31 December 2019, and interest on $1,000 from 28 April 2020.

(d) [DP] is to pay interest on the outstanding balances transferred from [JR]'s account to his account, calculated every six months from 9 May 2016 until the date of payment. I direct that Ms [KS] is to prepare a schedule containing a calculation of the balances and interest consequently payable by 31 May 2023 to be referred to me in Chambers.

(e) [DP] is to pay the sum of $12,015.20 for the legal fees paid between 16 June 2020 and 25 September 2020, together with interest calculated from the date each invoice was paid until the date of payment.

(f) [DP] is to pay the sum of $20,000 in relation to the motor vehicle expenses and he is to pay interest on that sum from 5 May 2020 until payment is made in full.

(g) [DP] is to pay $677 in relation to the hardware expenses.

(h) [DP] is to pay $2,055.15 in relation to the Council rates penalties.

(i) [DP] is to pay $544.15 for the Puka Park expense, together with interest on that sum from 27 February 2017 until the date of payment.

[280] Ms [KS] is to prepare a schedule of the relevant interest calculations and it is to be submitted to me in Chambers for approval. That schedule is to be filed by 31 May 2023.

[281] Ms Surgenor as [JR]'s lawyer is to prepare a draft order for sealing.

[282] Any party who seeks costs is to file a memorandum addressing the costs sought by 31 May 2023. Memoranda are to be limited to 10 pages plus any applicable schedule or appendices containing scale calculations or legal fee invoices or the like. Any party who wishes to be heard in reply to any application for costs is to file memorandum in response by 21 June 2023, again to be limited to 10 pages plus schedules and appendices.

Signed at Auckland this 9th day of April 2023 at 11.50 am

Kevin Muir
Family Court Judge