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**IN THE FAMILY COURT
AT WELLINGTON**

**I TE KŌTI WHĀNAU
KI TE WHANGANUI-A-TARA**

**FAM-2018-035-000040
[2019] NZFC 1172**

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

BETWEEN MARTHA TIERNEY
Applicant

AND HENDRICK GEZINUS DIJKSTRA
Respondent

BARBARA JANE DIJKSTRA
Other Party/Person

ELIZABETH HALLEY
Other Party/Person

GEZINUS DIJKSTRA
Person in respect of whom the application is
made

Hearing: 18 February 2019

Appearances: E-J Tucker for the Applicant
No appearance by or for the Respondent
No appearance by or for the Other Parties
K O'Brien for the Subject Person

Judgment: 3 March 2019

REASONS FOR JUDGMENT OF JUDGE T M BLACK

[1] On 18 February 2019, I made a decision in relation to, relevantly, three applications: firstly, requiring Mr Dijkstra to refund a sum of approximately \$137,000 to his father's estate; secondly, removing him as property attorney and his wife as welfare attorney; thirdly, appointing Public Trust as property manager. That was a results decision with an indication that reasons would be given later. These are those reasons.

[2] By way of background, in 2012, the subject person, Mr Gezinus (referred to as "Gez") Dijkstra appointed his son, Hendrick Dijkstra (referred to as "Henry") and his daughter-in-law, Barbara Dijkstra-Morey (referred to as "Barbara"), property and welfare attorneys, respectively. In each case, those powers of attorney were, and are, enduring powers of attorney created pursuant to the Protection of Personal and Property Rights Act 1988 ("the Act").

[3] By 2015, Gez's wife and Henry's mother was living in care in Tawa. Gez was dividing his time between his daughter Martha Tierney's home in Tawa and his home in Carterton, where Henry and Barbara were also living. Gez's wife died in 2016 and not long after that, he went into care at a rest home in Carterton.

[4] In August 2017, following enquiries by Mrs Tierney as to Henry's expenditure, Henry arranged for Gez to execute a new power of attorney in his favour containing an unfettered self-dealing provision. In a judgment on 18 February 2019, I determined that that document was not an enduring power of attorney for the purposes of the Act, for the reasons set out in that decision.

[5] In early 2018, Mrs Tierney commenced applications for review under s 103 and then made, in January of this year, an application to revoke Henry and Barbara's appointments and for the appointment of Public Trust as property manager and herself as welfare guardian.

[6] In terms of the hearing, that was scheduled by me to occur on 30 November 2018. Henry and Barbara did not attend. I declined Henry's application for an adjournment. Three bundles of evidence were produced as evidence. There is affidavit evidence from a number of persons, but most relevantly from Mrs Tierney and Henry.

[7] In effect, in relation to the first issue of refund, Mrs Tierney submits that Henry was not entitled to benefit himself from Gez's resources, because of the rule against self-dealing. The allegation is that Henry has used the power of attorney to make payments for his own benefit and the benefit of his wife. Such payments are generally in the nature of living expenses.

[8] In response to that allegation, Henry's position is generally that the payments were made either by his father, or expressly authorised by him while he still had capacity.

[9] In relation to the removal of Henry and Barbara as attorneys, Mrs Tierney says that they have shown themselves inappropriate to be holding that power. Henry has unlawfully used the power of attorney to benefit himself. Barbara has made decisions which have not been in Gez's interests and, on two occasions now, her decisions have been overruled by the Court.

[10] Mrs Tierney says that Public Trust, as an independent party, is an appropriate property manager. Public Trust has consented to the appointment.

[11] The power of review of an attorney's decision is set out in s 103 of the Act, and "The Court may, if it thinks it reasonable to do so ... review the decision and make any order it thinks fit." The power to revoke a power of attorney is set out in s 105(1) "if it is satisfied" – relevantly, in this case – "that the attorney (a) is not acting, or proposes not to act, in the best interests of the donor."

[12] A power also exists under s 105(2) that if the court finds that the attorney is unsuitable to be the donor's attorney, it shall revoke the appointment.

[13] Mr O'Brien, as lawyer for the subject person, supports Mrs Tierney's applications.

[14] It is clear to me, when assessing this case, that I need to have some regard to the issues of capacity. In that regard, I note that Henry obtained a letter from Gez's GP in 2015 stating that the enduring power of attorneys should be invoked. The doctor has since clarified that he did not conduct an assessment of Gez at the time, and Henry relied on that comment and other material to support his contention that Gez had capacity to make a new power of attorney in 2017. However, the evidence does establish that Gez was suffering from significant cognitive difficulties; there is material from late 2015 clearly setting that out.

[15] There is some irony in Henry representing to others that his father had lost capacity back in 2016 but now saying that his father only lost capacity in 2018.

[16] I am unable to accept Henry's assertion that the various transactions complained of were authorised by Gez. Of course, Henry's evidence was not able to be tested, because he did not attend the hearing, and, to the extent that his evidence is contradicted by other evidence, I must put it to one side.

[17] Mrs Tucker has undertaken an analysis of the various transactions; that is at paragraph 20 of her submissions of 18 February 2019 and the supporting spreadsheets handed up in Court. I accept those calculations.

[18] I turn to the application to remove attorneys. I have accepted that Henry has made unauthorised transactions. It follows that Henry has acted other than in the donor's interests. And given his presentation to the Court, I find that there is a reasonable prospect that he will continue to not act in Gez's best interests, and his appointment should be revoked.

[19] I accept the submission that Barbara has been a party to Henry's transactions and has benefited personally from them. And, of course, I am the Judge who made the decisions overruling two of her decisions late last year. I find that there is a prospect that Barbara will continue to not act in Gez's best interests.

[20] Having made that finding, it is not, strictly speaking, necessary to go on to consider whether either person is a proper person to hold appointment. If I had been required to make a finding about that, I would have found that neither is. They have consistently put their own interests ahead of Gez's interests, and it is not appropriate that they continue in those roles.

[21] For that reason, the appointments are revoked.

[22] Gez needs a manager that needs to be an independent person. The Public Trust has consented. It is appropriate that the Public Trust is appointed in that role, and there will be an order accordingly.

Judge TM Black
Family Court Judge

Date of authentication: 03/03/2019

In an electronic form, authenticated pursuant to Rule 206A Family Court Rules 2002.