

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

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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 1434**

IN THE MATTER OF	THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988
BETWEEN	MARTHA TIERNEY Applicant
AND	HENDRICK GEZINUS DIJKSTRA Respondent
AND	BARBARA JANE DIJKSTRA Other Party
AND	GEZINUS DIJKSTRA Person In Respect Of Whom the Application Is Made

Hearing: 18 February 2019

Appearances: E J Tucker (nee Huntley) for the Applicant
K A McClure for the Enduring Power of Attorney
K D O'Brien for the Subject Person

Judgment: 18 February 2019

ORAL JUDGMENT OF JUDGE T M BLACK

[1] Mr Hendrick Dijkstra, referred to hereafter as Henry, applies, pursuant to s 103 of the Protection of Personal and Property Rights Act 1980 for a determination that a document signed by his father Gezinus, referred to in this judgment as Gez Dijkstra, in August 2017 is an enduring power of attorney. That application is opposed by Ms Tierney who is one of Gez's other children, and by Mr O'Brien who was Gez's Court appointed lawyer.

[2] This is an oral decision at the end of a hearing which was occupied this morning. I am not reading it out. I am not extemporising from notes, I am just extemporising, and for that reason when the decision comes back from typing I reserve the right to myself to alter it, to correct any obvious misstatements, omissions, errors, that sort of thing. But any such amendments will not affect the decision or the reason for it.

[3] The structure of the decision is that I will deal briefly with the background then the positions taken by the parties, the legal principles which are applicable, an analysis of the facts set against those legal principles, and that will lead me to a result.

[4] By way of background, at the time that the document in question was signed Gez was a resident at a Carterton rest home and he was 91 years old. His wife had died a year or so earlier. He had been dividing his time between Wellington where Ms Tierney lives, and where his wife was in care before her death, and Carterton, but had been a resident of the rest home for some time. In 2012 Gez had signed an enduring power of attorney in favour of Henry. That power of attorney was in an uncontroversial form. It required consultation with Gez's spouse and other children before the attorney exercised powers under the enduring power of attorney and it required the provision of information to those same classes of persons. It did not allow any element of self-dealing.

[5] It is apparent that by the middle of 2017 there had been a breakdown in the relationship between Ms Tierney and Henry, and Ms Tierney was asking questions about Henry's conduct of his father's financial affairs. It is apparent that Henry and Barbara, Henry's wife who is the welfare attorney, had discussions with Gez on the basis that if Gez wished them to remain in Carterton and available to Gez in terms of

visiting, taking him home for visits, providing entertainment, that sort of thing, then Gez was going to need to fund that, and the alternative would be that Henry and Barbara would move overseas. They had lived overseas, previously been in business overseas.

[6] The power of attorney in question arises as a result of those discussions.

[7] There are associated proceedings before the Court relating to reviewing and the attorney's decisions, and removing the attorneys, and those are going to be the subject of further hearing this afternoon.

[8] Henry and his wife are not present today for reasons which I have canvassed in my earlier minute. The hearing today has proceeded on the basis of evidence from Mr Slack, who is the lawyer who witnessed Mr Gez's signature, and on the evidence of Dr Herd, who was and is Gez's GP.

[9] I have heard brief submissions from each counsel.

[10] In terms of the legal issues which I have to determine they are these:

- (a) Did Gez have capacity to grant the power of attorney in August 2017.
- (b) Have the requirements of s 94A been met, such that in terms of s 95(1), the power of attorney is an enduring power of attorney.
- (c) I should say, just for the avoidance of any doubt, that there is no dispute that Gez no longer has capacity. So, if the power of attorney is not an enduring power of attorney it is no longer valid, it having been revoked on Gez's subsequent incapacity as a matter of law.
- (d) Section 94A sets out a number of requirements and procedural requirements that are required to be followed in terms of the witnessing of the executing of an enduring power of attorney, and relevantly in this case the witness to the donor's signature, in terms of s 94A(6), must explain the effects and implications of the enduring power of attorney

of the donor and advise him in this case of several specified matters and requires under subs (7) witness to sign a certificate advising that the witness believes that the donor understands the nature of the instrument, understands the potential risks and consequences of the instrument, and is not acting under undue pressure or duress.

[11] In terms of the positions taken by the parties Mr McClure on behalf of Henry, for this purpose, submits that the document is what it is. It is expressed as an enduring power of attorney. Mr Slack has signed the witnesses certificate, albeit some months later, and I accept that that issue is not material, and that I should not have regard to Henry's subsequent behaviours in relation to his father's affairs to import on Mr Slack some obligation to foresee the consequences of the execution of the document in the form that it was executed. I should not view the advice given to Gez through the lens of hindsight, he submits.

[12] Ms Tucker for Ms Tierney submits that what the document did was give Henry an unfettered ability to drain Gez's bank accounts, and that is, in fact, what has occurred. I note in that regard that in associated proceedings Judge Grace made an order freezing the bank accounts last year because of the concerns raised by Mr O'Brien and by Ms Tierney about Henry's operation of the accounts, and that freezing order remains in place notwithstanding a hearing which took place in front of Judge Binns last year.

[13] Ms Tucker submits that the evidence about the advice given to Gez by Mr Slackers does not meet the threshold of an adequate explanation of the effects and implications of the enduring power of attorney. She also submits that there is some question mark in terms of capacity in earlier interactions between Gez and medical professionals in 2015 which raise serious questions about his capacity and Dr Herd acknowledged that had he known of those earlier investigations or interactions in 2017 he may have acted more cautiously or required further testing before he reached the conclusion, which he did, that in August 2017 Gez had capacity to execute an enduring power of attorney.

[14] Mr O'Brien's position is that he supports Ms Tucker's submission that the advice given to Gez was not adequate.

[15] Turning to an analysis I deal with the question of incapacity, or capacity first. I acknowledge that the 2015 interactions give cause for concern, but in the end Dr Herd's certificate and his evidence remains that from his perspective in August 2017 Gez had capacity to grant an interim power of attorney, and I find that he did have capacity. Capacity is variable. Capacity to manage all of one's affairs is a different thing from the capacity, for example, to make a testamentary disposition which is different, for example, again from the capacity required to execute an enduring power of attorney.

[16] I have to observe that this situation is almost the paradigm situation which the amendments made to the Protection of Personal and Property Rights Act in 2008 were designed to mitigate or avoid.

[17] A 91 year old vulnerable person does not contact a lawyer with a view to drafting a new document. The attorney, his son, contacts a lawyer, a new lawyer, not the person who has been Gez's lawyer for the last 30 years, and asks Mr Slack to prepare a document allowing for Henry and his wife to live rent and expense free, or live all expenses paid by Gez for the rest of Gez's life.

[18] Mr Slack said that that was an unusual request, I agree. Mr Slack's evidence was he had never drafted an enduring power of attorney which such a wide self-dealing provision in it previously. But the situation, in my view, should have had alarm bells flashing and ringing, flashing brightly and ringing loudly.

[19] Mr Slack drafted the document and arranged to see Gez. He met him on one occasion only, and as I say, had no previous knowledge of, or relationship with him. His instructions came entirely from Henry.

[20] Mr Slack's evidence was to the effect that Gez understood what the document was trying to achieve, and that was so that Henry could stay. Henry was present

throughout the meeting. I acknowledged that Henry offered to excuse himself, but that Gez indicated he should stay.

[21] The situation is that Mr Slack acknowledges that he did not know anything about the circumstances of Gez's other children because he did not ask. He did not know anything about the state of Gez's financial affairs other than that he had a house and some other funds because he did not ask.

[22] The situation is that Gez has four children, one of whom suffers from a significant disability, and in respect of whom Gez has made particular provision in his will. If that information, for example, had been known to Mr Slack I have no doubt it would have put him on heightened alert of the need for further enquiry.

[23] Mr Slack did not envisage that Henry would utilise his father's funds in the way which has happened, and by way of example Henry has filed in the Court a budget indicating \$8000 a month as being justified living expenses including all new clothing for he and his wife following their successful weight loss programme. But the document which Mr Slack drafted has that effect.

[24] The relevant clauses which are materially identical, one in favour of Henry one in favour of Barbara, "To live in my property at [address deleted], Carterton, and to pay his living expenses out of funds in my bank accounts to enable him to remain in Carterton to be close to me rather than moving overseas to make a living."

[25] The fact that Mr Slack did not appreciate that Henry would view that clause as being open slather is perhaps understandable in the sense that Mr Slack did not perceive Henry to be that sort of person. But it must mean that Mr Slack did not explain the effects and implications of the enduring power of attorney. He could not have reasonably signed a certificate saying that Gez understood the potential risks and consequences of the instrument because the consequence which has occurred is a readily apparent risk of the instrument and the way in which it was drafted. No checks on the ability to pay living expenses, no definition of living expenses, a removal of the obligation to consult and provide information. The instrument did give Henry open

slather, and the evidence does not satisfy me that Mr Slack explained that to Gez, and far less that Gez understood that.

[26] As a result, I am not satisfied that the obligations in s 94A(6) were complied with. The instrument is not an enduring power of attorney.

ADDENDUM:

[27] I will just formally reserve the question of costs.

Judge TM Black
Family Court Judge

Date of authentication: 28/02/2019

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