

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

**NOTE: PURSUANT TO S 80 OF THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE**

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**IN THE FAMILY COURT  
AT ASHBURTON**

**I TE KŌTI WHĀNAU  
KI HAKATERE**

**FAM-2022-003-000013  
[2023] NZFC 2812**

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

BETWEEN PUBLIC TRUST  
[GB]  
Applicants

AND [AL]  
Person In Respect Of Whom the Application  
Is Made

Hearing: 21 March 2023

Appearances: P Vinnell for the Applicant Public Trust (via telephone)  
No appearance by or for the Applicant [GB]  
R Smyth for the Subject Person

Judgment: 21 March 2023

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**ORAL JUDGMENT OF JUDGE P W SHEARER**

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**Introduction**

[1] Further to the judicial conference and resulting minute of Judge Dravitzki dated 18 November 2022, a 45 minute hearing has been scheduled today to determine

applications under the Protection of Personal and Property Rights Act in respect of [AL], who is the subject person and who I shall hereafter refer to as [AL].

[2] The applications before the Court, are:

- (a) Firstly, an application dated 25 February 2022 by the Public Trust to be appointed as property manager for [AL];
- (b) Secondly, an application dated 21 March 2022 by [AL]'s mother, [JL], for appointment as welfare guardian; and
- (c) Thirdly and most recently, an application yesterday, 20 March 2023, by [GB] to be appointed as property manager, which application was signalled at the last judicial conference and noted by Judge Dravitzki in his minute. [GB] has been [AL]'s support worker for many years, and [AL] is now living with her as of about two weeks ago. I note from one of the reports I have read that [AL] refers to [GB] as his second mother.

[3] Present in court today are [JL] and Ms Smyth, who is the Court-appointed lawyer for [AL]. Ms Smyth advised that [GB] has not been able to attend today due to work commitments. Mr Vinnell from the Public Trust attended by telephone, but left the conference at my invitation after I indicated that I intend to appoint [GB] as property manager. The Public Trust had no objection to [GB] being appointed and understood the practicality, with [AL] now living with [GB]. I advised Mr Vinnell that a copy of this decision will be sent to him for the Public Trust's file.

### **Background**

[4] The background, as set out in the pleadings and the reports that Ms Smyth has filed, is that [AL] suffered a serious head injury in a fatal car accident 20 years ago, in 2003, when [AL] was then [a teenager]. [AL]'s friend who was driving the car was killed in the accident.

[5] [AL] required significant rehabilitation and has been left with ongoing disability. I understand that he is in receipt of ACC support and has been since the accident.

[6] He has lived at home with his parents ever since the accident, but unfortunately [AL]'s father died of cancer at the end of August last year. [JL] has subsequently made what no doubt would have been a difficult decision to sell the family home, and she has just moved into a small one-bedroom retirement unit in [location deleted] about two weeks ago, and that was when [AL] then moved to live with [GB] and her family. Ms Smyth has noted in her report that [AL] has a close relationship with [GB]'s husband, and also her [adult] son.

### **Legal issue**

[7] The legal issue and the reason that a formal hearing has been required, is because the original medical report from [AL]'s general practitioner at [name of medical centre deleted] in Ashburton, [AL's general practitioner], dated 16 December 2021 stated that [AL]'s lack of competence to manage his own property and to understand the nature and foresee the consequences of decisions relating to his personal care and welfare, was partial rather than total.

[8] Partial incapacity is sufficient to appoint a property manager, but as Judge Duggan and Judge Dravitzki have pointed out in previous minutes, s 12(2) prevents the Court from appointing a welfare guardian unless it is satisfied that the subject person wholly lacks the capacity to make or to communicate decisions relating to any particular aspect or aspects of their personal care and welfare.

[9] What [AL's general practitioner] said in his initial report is that [AL] can understand simple concepts, but his understanding is limited to simple concepts.

[10] Ms Smyth in her reports to date, dated 7 June, 15 September, and 17 November 2022 and 20 March 2023, has advocated for the appointment of both a welfare guardian and property manager. She met with [AL] at his parents' home and explained her role to [AL] in simple terms. She said he was able to confirm that he has a relationship of trust with his mother and with his support worker [GB].

[11] Ms Smyth noted that [AL] and his mother have a close and caring relationship, and submitted that [AL] needs support and assistance in managing both his property and his personal care and welfare. She submitted that it would be appropriate for [AL] to have a local property manager who is aware of his needs and the day-to-day dynamics for [AL], to advocate for him, assist with making positive decisions for him and protect him from advantage being taken, and advocating for him with family members where necessary.

[12] Also within Ms Smyth's reports is reference to both [AL] and his mother being physically abused by his older brother, and to [AL]'s sister verbally abusing him and endeavouring to take advantage of him financially. Hence the suggestion that the property manager should be someone outside of the family, as [AL] receives ACC funding of \$30,000 annually, and is reported to have KiwiSaver of some \$60,000 and a personal bank account.

[13] More recently, a further medical report has been obtained from [AL's general practitioner] who has been [AL]'s lifetime GP. On 26 January 2023 [AL's general practitioner] re-examined [AL] and reported that:

In my opinion, the donor is mentally incapable as he lacks the capacity to foresee the consequences of decisions about his assets or to foresee the consequences of any failure to make such decisions as he has demonstrated that he can be easily influenced into making decisions about his possessions by others who do not necessarily have [AL]'s best interests in their consideration. The donor's mental capacity is due to a health condition that is likely to continue indefinitely. The reasons for my opinion are he has had a traumatic brain injury in 2003. A recent incident occurred that he was pressured into relinquishing a lawnmower by his sibling which required the intervention of a third party to reacquire the lawnmower.

[14] Unfortunately, that further medical report only addresses [AL]'s incapacity to manage his property, and does not mention his personal care and welfare.

[15] The Court could reasonably assume that if [AL's general practitioner] is now satisfied that [AL] has no capacity to make decisions about his financial affairs, he would reach the same conclusion in respect of [AL] making important decisions about his care and welfare, but there is still a gap in the evidence in that regard. Accordingly,

Ms Smyth has advised that she will contact [AL's general practitioner] and seek a further opinion and report about that.

[16] Ms Smyth had made a late request, this morning, to adjourn the hearing today for that reason, which adjournment I declined. It seemed to me that I could advance matters today, and then deal with the welfare guardian application on the papers, assuming that [AL's general practitioner] confirms that [AL]'s capacity to make important decisions about his personal care and medical treatment is total, rather than partial.

### **Decision**

[17] In the meantime, I am satisfied that there is jurisdiction and the need to appoint a property manager for [AL], and I am satisfied that the appropriate person to undertake that role is [GB]. I therefore make that order now.

[18] I appoint [GB] as property manager with the powers set out in clauses 1(a), (b), (c), (d), (i), (n), (o), (p), (q), (r), (s), (t), (u), (x), and (y) of the First Schedule.

[19] I direct that order is to be reviewed in three years, and that in the unlikely event of an appeal being filed the order is not to be suspended in whole or in part pending the determination of the appeal.

[20] That leaves the application by [JL] for appointment as [AL]'s welfare guardian. I adjourn that application to a case management review in four weeks, so on Wednesday 19 April, by which time I hope to have received a further brief report from Ms Smyth with a further report/opinion from [AL's general practitioner].

[21] When that is filed it can be referred to me in chambers, and assuming that [AL's general practitioner] confirms that [AL]'s incapacity is total, I will make the order on the papers.

[22] Alternatively, if [AL's general practitioner] is of the view that [AL]'s capacity in relation to his personal care and welfare is partial, I cannot see any alternative but to dismiss the application. Either way, there will not be any need for a further court appearance.

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Judge P W Shearer  
Family Court Judge | Kaiwhakawā o te Kōti Whānau  
Date of authentication | Rā motuhēhēnga: 29/03/2023