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

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**IN THE FAMILY COURT**
**AT TAURANGA**

**I TE KŌTI WHĀNAU**
**KI TAURANGA MOANA**

**FAM-2021-070-000152**
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**[2024] NZFC 13891**

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| IN THE MATTER OF | THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988 |
| BETWEEN | [RT]<br>[TT]<br>[MN]<br><br>Applicants |
| AND | [MT]<br>[AT]<br>Persons In Respect Of Whom the Application Is Made |

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| Hearing: | 15 October 2024 |
| Appearances: | Applicant [RT] appears in Person<br>No appearance by or for the Applicants [TT] and [MN]<br>M McCarty for the Subject Person |
| Judgment: | 15 October 2024 |

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**ORAL JUDGMENT OF JUDGE S J COYLE**

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[1] [RT], [TT] and [MN] are the property managers for their parents, [MT] and [AT]. Their appointment as property managers was made on 25 May 2021. [RT] is also the welfare guardian for both of his parents.

[2] Applications for review of those orders have been filed and what is sought today is the reappointment of [RT] and [MN] only as property managers for [AT and MT] and for the reappointment of [RT] as welfare guardian. Their reappointment is supported by Ms McCarty, the Court appointed counsel for [AT and MT].

[3] What has complicated this matter is the entering into a reverse mortgage by the property managers and whether there was or was not a power for them to do so. That issue has been set down for a hearing and it has eventually proceeded today on a submissions only basis.

[4] [RT] has provided a substantial and very helpful affidavit in which he sets out the background and his view on why the property managers were acting lawfully.

[5] What has also been provided is a copy of the loan agreement with Heartland Bank and it is clear that the three property managers signed that agreement in their capacity as property managers for [AT and MT].

[6] [AT and MT] owned a property at [address A]. Its ownership was transferred into the [T] Family Trust and they were trustees of that trust as discretionary beneficiaries with their children being the final beneficiaries.

[7] However, upon their declining mental health and following legal advice they were removed as trustees of the trust and [RT], [TT] and [MN] are now the trustees of the [T] Family Trust. Thus, ownership of the [address A] property now vests in the trust and is held by the three siblings in their capacity as trustees of the [T] Family Trust.

[8] In order to obtain a reverse mortgage the borrowers have to be over 60 years of age. At the time the loan agreement was entered into none of the siblings were over 60, although [RT] tells me he was two months shy of his sixtieth birthday.

[9] The reverse mortgage loan agreement records that [AT and MT] are the nominated borrowers, together with the trustees of the [T] Family Trust. The reality, however, is that without [AT and MT] the trust would not have been able to enter into a reverse mortgage.

[10] The intention of entering into the reverse mortgage was to free up some of [AT and MT]'s capital (technically the trust's capital, but vested in them as discretionary beneficiaries) for their benefit and in particular to pay a number of outstanding debts that they had and in relation to which they had no income or assets from which to satisfy those debts. The intention therefore of the property managers in entering into this arrangement was entirely understandable and was only motivated by ensuring the best outcome for their parents. There is absolutely no evidence that any of the siblings were motivated by self-interest and in fact the evidence shows that their only interests were those of their parents. Indeed, [RT] has rearranged his life so that he is now the primary caregiver for his father in particular, who is quite unwell and quite frail.

[11] Ms McCarty therefore has queried whether there is jurisdiction for the property managers to have entered into the loan agreement with Heartland Finance. There has been discussion today around the various sections and powers in the Act and those that may or may not apply.

[12] It is accepted by Ms McCarty and [AT] that s 53 of the Protection of Personal and Property Rights Act 1988 does not apply. That requires pursuant subs (3) leave being granted by the Court to a subject person and the consent of the subject person who must have "adequate understanding of its [transfer, lease, mortgage or other disposition] nature."

[13] Factually, that is not the situation here and certainly there is no doubt in my mind that [AT and MT], because of their cognitive functioning, would not have adequate understanding of what was involved.

[14] A property manager appointed pursuant to the PPPR Act is required to exercise only those powers set out in Schedule 1 to the Act. Section 1(g) of the First Schedule provides for the extension or variation of an existing mortgage on such terms as a

property manager thinks fit. Again, that does not apply as the loan agreement with Heartland Finance is an entirely new mortgage arrangement and is not an extension or variation of an existing mortgage.

[15] [AT] has pointed me to s 1(b) of the First Schedule which provides that the property manager can:

> Apply and expend in the manager's discretion … any money borrowed … by the manager for any 1 or more of the following purposes.

[16] The purposes are then though specified in (i) to (ix) of subs (b).

[17] [AT]'s argument is that pursuant to (i) the monies borrowed by the property managers were to be used towards the maintenance or benefit of [AT and MT]. Additionally, pursuant to paragraph (v) the monies were used towards the payment of debts owed by [AT and MT].

[18] The wording of subs (b) refers to money borrowed by the manager. But in the context of the totality of the PPPR Act, that borrowing by the manager must be in his or her capacity as the property manager on behalf of the subject person. Support for that can be found in, for example, paragraph (i) where the monies borrowed can be used towards the maintenance or benefit of "the person", which must be a reference to the subject person. Thus, any borrowings pursuant to paragraph (b) are not by the manager in his or her personal capacity but are by the manager as property manager on behalf of the subject person.

[19] On the face of it therefore s 1(b) of the First Schedule provides a power for the property manager to borrow money provided the monies are used for one of the purposes set out in paras (i) to (ix) inclusive. I can see no reason why that borrowing could not include entering into a mortgage arrangement. For example, it would be quite conceivable that a young person subject to a severe cognitive disability as a consequence of an unforeseen accident may have monies available to him or her, and because of the extent of those monies, sufficient income through investment to sustain a mortgage. Paragraph (iii) provides for the acquisition of a home for the subject person and that could conceivably include a property manager entering into a

mortgage on behalf of the subject person which is able to be sustained out of that subject person's investment income. Similarly, it must include a power to enter into a reverse mortgage such as occurred on this occasion.

[20] On the face of it therefore the property managers had a power to enter into a reverse mortgage on behalf of [AT and MT] provided the purpose of that mortgage meets one of the purposes in paragraphs (i) to (ix) inclusive.

[21] Normally, a reverse mortgage would be entered into by a couple secured pursuant to the reverse mortgage agreement against a property owned by that individual or couple.

[22] In this case the matter is complicated because the loan agreement is to be entered into by [AT and MT] in relation to property in which they do not own. Yet the agreement records them all as co-borrowers. But in order for the trustees to have been borrowers, as I have set out above, there needed to be someone living in the home who was over 60 years of age and that can only have been [AT and MT].

[23] With the greatest of respect to Heartland Finance, the loan agreement seems to be poorly drafted, and I suggest what should have occurred is that [AT and MT] should have entered into the loan with the trustees being a party to that loan as guarantors. That would then enable the mortgage to be registered and secured against the [address A] property owned by the Trust.

[24] Who in fact the monies were advanced to is further complicated by what subsequently transpired with the mortgage advance. For it appears that it was paid into a bank account in the name of the three property managers but what their status was is unclear. That is, was it a bank account administered by them as trustees of the [T] Family Trust or was it a bank account owned by their parents and administered by them as property managers for their parents?

[25] It seems on the face of it to have been the former, for as Ms McCarty has pointed out the trustees subsequently passed a trustee resolution advancing monies to [AT and MT].

[26] On the face if it therefore the trustees have entered into a reverse mortgage for the benefit of the trust. The trustees have then passed resolutions to benefit [AT and MT] as discretionary beneficiaries. That was not the intention of the property managers but seems to me to be the only logical conclusion when the paper trail is traced.

[27] Thus, despite the intention of the property managers, what has in fact occurred is an advance of monies to the [T] Family Trust "using" [AT and MT]'s age as a vehicle to access those funds, but then with the trustees exercising their discretion to then advance those monies, at least in part, to [AT and MT] for what is arguably the purpose set out in paragraph (i) of the First Schedule.

[28] Additionally, the trustees have utilised some of those monies to pay [AT and MT]'s personal debts, but also it seems to me they have utilised the money to pay a trust debt; i.e. the legal fees arising out of the application to replace [AT and MT] as trustees with the three siblings as new trustees. In short, there has been a blurring of the boundaries.

[29] I accept without reservation the intention was to borrow monies in the name of [AT and MT] and what should have occurred, and what should occur if there are any future borrowings, is that any monies advanced should be paid into [AT and MT]'s bank account and any debts that [AT and MT] have are paid out of that bank account.

[30] It is always very difficult in a situation such as this for parties wearing two hats, namely as trustees of the trust and as property managers for their parents. In this case [RT] and his siblings sought legal advice. I would urge those who provide legal advice in these situations to similarly not blur the boundaries and to ensure that the trustees are only acting within their lawful powers and similarly property managers are also lawfully acting within their powers, which are clearly defined and circumscribed in Schedule 1 of the PPPR Act.

[31] What should have occurred in my view is that [AT and MT] could have entered into a reverse mortgage guaranteed by the trustees of the trust. Monies that were then advanced by Heartland Finance should have been paid into their bank account,

administered by their property managers on their behalf. Those comments are made of course with the benefit of hindsight, and I agree with Ms McCarty that it now clearly sets an expectation as to the way forward.

[32] On an ongoing basis [RT] and [MN] will need to be aware of their separate and disjoint roles as property managers for their parents and as trustees, together with [TT], for their parents' trust and will need to ensure that there is no blurring of boundaries.

[33] Having set out what has occurred, my view that there was nothing untoward in the intentions of the property managers, and I have set out a clear pathway forward should there be any further borrowings required. Therefore I now need to consider the substantive applications.

[34] There clearly is jurisdiction to make the orders sought in terms of the legislation. There is clearly jurisdiction to excuse [AT and MT]'s attendance today as they would not be able to fully understand the proceedings and it would be unnecessarily distressing to them.

[35] I am also entirely satisfied that [RT] and [MN] continue to be fit and proper people to be appointed as property managers and that [RT] is an appropriate person to be appointed as welfare guardian for his parents.

[36] Against that background therefore I now make the following orders and directions:

(a) I make an order appointing [RT] and [MN] as property managers for [MT] and [AT]. For the sake of clarity, they are jointly appointed but pursuant to separate orders for each of their parents. The powers of the property manager are to be those set out in the existing order.

(b) I make an order appointing [RT] as welfare guardian, again mirroring the terms of the existing order and in relation to both of his parents.

(c) A review of these orders, given that this is a review hearing, is to occur within five years; that is, before 15 October 2029.

(d) In the event of an appeal being filed, neither of these orders shall be suspended, either in whole or in part.

(e) Ms McCarty's costs as counsel for [AT and MT] are to be met from the consolidated fund.

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Judge SJ Coyle
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 22/10/2024