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**IN THE FAMILY COURT  
AT HAMILTON**

**FAM-2016-019-000683  
[2017] NZFC 3260**

IN THE MATTER OF	THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988
BETWEEN	[H G] Applicant
AND	[J B] Person In Respect Of Whom The Application Is Made
AND	[P B] [D C] Other Parties/Persons

Hearing: 27 April 2017

Appearances: Ms Jensen for the Applicant  
Mr M Earl for the Subject Person  
No appearance by or for the Other Parties/Persons

Judgment: 5 May 2017 at 10:00 am

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**RESERVED JUDGMENT OF JUDGE R H RIDDELL  
[Capacity issue under the Protection of Personal and Property Rights Act]**

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## **Introduction**

[1] On 27 April 2017 following a defended hearing I issued a decision finding that the subject person (“Mr [J B]”) wholly lacked the capacity to make or communicate decisions and therefore the grounds had been met for the appointment of a welfare guardian and property manager under the Protection of Personal and Property Rights Act 1988 (“the Act”).

[2] I indicated that my reasons for coming to that conclusion would be set out in greater detail, which is the subject of this decision.

[3] However I found that there were significant conflicts of interest arising from the applicant daughter’s wish to be appointed for her father. Because of those conflicts, it was agreed that counsel would confer to see if an alternative property manager or welfare guardian could be appointed.

[4] I note that the applicant’s husband was proposed by Mr [J B] as a person suitable to fulfil the role. However because of his work commitments he was reluctant to undertake that task. The most pressing matter is the appointment of a property manager to ensure that Mr [J B] qualifies for a residential subsidy. That matter requires urgent attention.

## **Background**

[5] Mr [J B] is 83 years old. He is a Hungarian-German who moved from Hungary in 1956 to Germany.

[6] Mr [J B] is married and they have two children, Ms [H G] (the applicant) and Ms [D C] who resides in [location deleted].

[7] He has one grandchild who is 18 years old and is the [child] of Ms [H G].

[8] There are long standing concerns about Mr [J B]’s alcohol consumption which have led to [medical condition deleted]. In 2013 Mr [J B] was admitted to hospital

after collapsing from being drunk. He was diagnosed at the time with alcohol induced dementia but still considered competent to make decisions.

[9] After that time in hospital, his daughter deposed that her father remained sober for almost three years as he was unable to obtain any alcohol.

[10] However on 11 January 2016 Mr [J B] purchased a mobility scooter and began using it to drive to the bottle store to buy alcohol.

[11] There have been a number of domestic violence incidents between Mr [J B] and his wife who is [age deleted]. As a result of those concerns, a police safety order was issued on 21 May 2016. Ms [H G] stated:

... my father breached that. He did not appear to understand the meaning of the order, or the seriousness of his behaviour.

My mother then applied for and was granted a temporary protection order and a temporary occupation order. Despite the orders, my mother was not able to return home because my father was still in the house and had no place to go.<sup>1</sup>

[12] Ms [H G] went on to depose that her father did not appear to understand the meaning of the orders made and kept telephoning her demanding that her mother return home. He remained living in the home from [date deleted] May to [date deleted] June.

[13] Ms [H G] found evidence that her father was continuing to consume alcohol and not eating properly. She was also concerned that he was not showering or changing his clothes.

[14] Ms [H G] started looking for retirement home options for her father and contacted him to let him know she would come to fetch him to look at various retirement home options. When she arrived he refused to go. He continued to argue and so Ms [H G] contacted the police.

[15] Ms [H G] was at Ms [P B]'s home when the following occurred:

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<sup>1</sup> Affidavit 8/7/16 [11].

A police constable came and explained to my father that if he did not go with me to the rest home then he would be arresting him for breach of the occupation order. My dad eventually agreed that he would go with me, but that he needed to pack some belongings. I went to the garage to fetch the spare door remote to ensure he could not take it with him.

I was in the garage when I heard the constable yelling at my father. I went back into the house and saw the constable pushing my father out of the house. Once outside, the constable told me that he had caught my father pouring petrol over the lounge carpet and that my father was trying to light it. The constable also told me that when he tried to remove the can of petrol from my father, he (the constable) ended up getting splashed with petrol as well.

More police officers arrived a short while later and they arrested my father. I went to the police station to give a statement.<sup>2</sup>

[16] Mr [J B] was hospitalised for further assessment and the psychiatrist advised Ms [H G] that a scan of Mr [J B]'s brain showed significant shrinking and an assessment resulting in a diagnosis showing lack of capacity.

[17] That led Ms [H G] to make application to the Court for her appointment as welfare guardian and property manager for her father.

[18] Mr [J B] was appointed counsel who advised the Court in his first report that:

- Mr [J B] denied having difficulties with alcohol;
- He was confused as to the circumstances that led to him going to a rest home;
- Mr [J B] also became confused when Mr Earle attempted to discuss the Court documents with him.

[19] In a second report, Mr Earle advised the Court that Mr [J B] had been given an opportunity to read and discuss the documents regarding the present applications but did not want to do so.

[20] Following the altercation with police concerning the petrol, Mr [J B] was charged with attempted arson and assault on police. He has pleaded not guilty and a two day trial has been set for August 2017. Ms [H G] will give evidence at that trial for the police.

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<sup>2</sup> [19 – 21]

## **Medical evidence**

[21] There have been two reports by psychiatrists for Mr [J B] and a further assessment carried out by a social worker.

[22] The first assessment was by Ms Cate Anderson on 27 June 2016 and contained a comprehensive assessment of Mr [J B]'s cognition, his mood and behaviour as well as his ability to care for himself. At that time he was an in-patient at the [care unit]. He was described as being pre-occupied and repetitive about his perceived grievances and believed his family were plotting against him.

[23] The second report by Dr Fussell was dated 5 July 2016. That report concluded that Mr [J B]'s lack of capacity was total, that he was unable to manage his own affairs in relation to property and lacked capacity to understand the nature and foresee the consequences of decisions regarding his personal care and welfare.

[24] The third report was requested in the criminal proceedings under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. The Court sought a report under s 38(1)(a) to determine whether Mr [J B] was unfit to stand trial.

[25] That report was prepared by Dr Majeed who is a consultant forensic psychiatrist. He met Mr [J B] at the [care unit] on 9 November 2016 and described Mr [J B] as being able to discuss his current charges in a fairly broad manner

[26] Mr [J B] told the psychiatrist that he was intending to defend the arson charge and that he disputed the summary of facts read out to him.

[27] The psychiatrist noted that Mr [J B] was being treated for depression. However considered he did not suffer from any delusions, that there was no evidence of any abnormal perceptions and that his cognitive function revealed good orientation to time, place and person.

[28] Dr Majeed concluded that Mr [J B] was able to enter a plea and that he would be able to communicate with legal counsel.

[29] At the hearing the Court heard evidence from Dr Fussell. She has been a consultant psychiatrist since 2009 and has specialised in older people's psychiatry for the past eight years. She has a speciality in the area of dementia.

[30] Dr Fussell confirmed her conclusion that Mr [J B] wholly lacked capacity based on three factors.

[31] First she had carried out a Montreal cognitive assessment. Second Mr [J B] had blood tests and third a CT scan showed that Mr [J B] had had two strokes and displayed marked global atrophy of his brain. In other words his brain had been starved of oxygen over a period of time. She believed that was consistent with his memory problems and his alcohol consumption which had contributed to his memory loss.

[32] Dr Fussell was of the view that Mr [J B] was unlikely to recover his competency.

[33] She has had opportunity to view him on the ward on a number of occasions and noted that he has had difficulty recalling short term information. His cognitive testing results were 15:30 which demonstrates quite a moderate impairment, backed up by the results of the CT scan.

[34] Dr Fussell also noted that when she spoke to him on the day prior to the hearing, he had no recall of having been to Court before, or that he was due to come to Court to give evidence.

[35] She described him as being very warm, a person who chatted openly and had a wonderful manner. In other words he was socially able to converse. However in her view because of that ability to hold a superficial conversation, she believed that he might appear to be quite plausible and mentally stable. That belied his clear short term memory loss.

[36] In Dr Fussell's view Mr [J B] had no ability to weigh up information and to assess or make decisions. The doctor was challenge about Mr [J B]'s entitlement to

make bad decisions. To that, Dr Fussell replied that we are all entitled to make bad decisions but given Mr [J B]'s age, medical condition and his degree of impairment it was important to ensure that he is safe, hence her support for the orders sought.

[37] Dr Fussell was somewhat delicate when asked about the very different findings of Dr Majeed. She noted that Dr Majeed is a forensic psychiatrist and not a psychiatrist specialising in older health. She disputed that Mr [J B] was fit to plead or participate in the criminal trial. She described competency as being a fact specific issue. In her belief when she saw Mr [J B] the previous day he had no recollection of ever having been in Court a number of times. As he said to her "I have never been in Court in my life". His failure to recall the number of times he had attended Court was in her view a clear indication of his lack of competency.

[38] In addition. Dr Fussell noted that Mr [J B] is now frailer than he was in November 2016 when the s 38 report was prepared. When asked how Mr [J B] would manage if the orders were not made on his behalf, she responded that because he has little insight into his situation he would have difficulty managing independently. He had no ability to problem solve. He would not be able to care for himself. He needed prompting in hospital to eat and shower. He would be likely to start drinking again and would place himself and others at risk. In the past his wife had managed the finances and he demonstrated no ability of understanding the need to pay bills or how to do that on a practical level.

[39] Dr Fussell's evidence was compelling.

[40] I am satisfied that Dr Fussell has the necessary medical expertise of aged care and knowledge of Mr [J B] to provide the Court with an accurate assessment of his current medical status.

[41] The Court did not have the opportunity to hear from Dr Majeed. He was not called as a witness. It may be that his conclusion would be different given the passage of time and Mr [J B]'s deteriorating health. I cannot say.

[42] However having had the opportunity to hear from Dr Fussell, I have come to the conclusion that I prefer her evidence over that of Dr Majeed.

## **Discussion**

[43] This hearing proceeded on the basis that Mr [J B] had told his counsel that he did not agree with the making of a property manager or welfare guardian on his behalf.

[44] Mr [J B] wanted to move back into the family home and live independently again. He was quite vocal about denying the charges of attempted arson and assault.

[45] Mr [J B] gave evidence in Court.

[46] It was quite apparent to me from the start that Mr [J B] is extremely frail. While he understood English, the Court provided him with a translator who was only needed from time to time primarily because Mr [J B] could not always hear what was being said in Court.

[47] It became abundantly apparent that Mr [J B] was not able to answer questions in a straight forward manner. Simple questions were put to him to which he was unable to answer. On other occasions he veered away from the question to return to his familiar theme of fraud. He believed that large amounts of money have been stolen by family members and he often mentioned \$230,000.00. He was not able to give a coherent explanation as to where that money had been, whether it was held in a bank account and when it was allegedly stolen.

[48] Even allowing for Mr [J B]'s advancing years, his answers were vague and wandering and they were consistent with a person who is suffering from advanced dementia.

[49] His daughter Ms [H G] also gave evidence. She spoke of the urgency about obtaining a property manager's order as her parent's financial resources were being depleted for rest home fees.



[50] I found her to be a calm and plausible witness who wanted the best for her father. I had no sense of her acting in anything other than a dutiful manner with her father's interests at heart.

[51] She agreed that she has supported her mother during the recent separation and would give evidence against her father in the forthcoming criminal trial. She agreed that would represent a conflict of interest and when asked whether she would support her father against her mother's interests, in any relationship property division, said she could not do so.

### **Decision**

[52] The medical evidence in this case is overwhelming. Based on the report and oral evidence of Dr Fussell, the evidence of his daughter Ms [H G] and my own observation of the parties giving evidence, I have no doubt that Mr [J B] wholly lacks the capacity to make or communicate decisions or to manage his own affairs.

[53] Whatever capacity he had for decision making at the time of Dr Majeed's report of 10 November 2016, has all but disappeared. Mr [J B] is an elderly and frail gentleman whose cognitive functioning has become severely impaired.

[54] Such was the certainty of my view that I conveyed that to counsel at the conclusion of the hearing. This decision has set out the basis for that view.

[55] However that leaves the question as to suitable appointees for the roles of welfare guardian and property manager. I expressed my observation that Ms [H G] was in a conflict situation, particularly as she was intending to give evidence against her father. Moreover if the parents were intending to separate their assets they would need independent advice and it would be difficult, if not impossible for Ms [H G] to support her father during that process when she has acknowledged her alignment with her mother.

[56] Since then I have learned informally through counsel that the parties have reached agreement about the appropriate appointees and a consent memorandum will

be filed to that effect. That document should be referred to me in chambers for consideration and determination.

[57] In the meantime I record that in the circumstances Mr Earl's costs should be met from the public purse. This matter should not have required a defended hearing and I am mindful of the additional costs that have been borne by both [J B and P B] in regard to rest home fees because of the oppositional position taken by Mr [J B].

[58] Finally I direct that a copy of this decision is to be released to the public Defender's Office to consider whether a further s 38 report might be appropriate for Mr [J B].

R H Riddell  
Family Court Judge