Supreme Court

New South Wales

Case Name:	CJ v AKJ
Medium Neutral Citation:	[2015] NSWSC 498
Hearing Date(s):	-
Date of Orders:	1 May 2015
Decision Date:	1 May 2015
Jurisdiction:	Equity Division - Protective List
Before:	Lindsay J in Chambers
Decision:	(1) Order, without prejudice to any future application for relief in the exercise of the Court's protective jurisdiction (of whatever character), that the plaintiff's application for a declaration that the defendant is incapable of managing his affairs, and consequential orders for management of a protected estate, be dismissed. (2) Order that all funds standing to the credit of the defendant in court (in relation to the District Court proceedings), including interest, be paid out to the defendant (being the defendant in these current, Supreme Court proceedings) personally or as he may in writing direct.
Catchwords:	GUARDIANSHIP – Guardians, committees, administrators, managers and receivers – Appointment – Application for appointment of a protected estate manager – Capacity for self-management – Meaning – Governed by nature and purpose of protective jurisdiction PRACTICE – NSW Trustee and Guardian Act – Capacity for self-management - Person incapable of managing his or her affairs – Meaning – Utility and limitations of practice "tests" for assessing incapacity –

	Concept governed by nature and purpose of protective jurisdiction
Legislation Cited:	NSW Trustee and Guardian Act 2009 NSW Civil Procedure Act 2005 NSW Uniform Civil Procedure Rules 2005 NSW Part 7
Cases Cited:	A (by his tutor Brett Collins) v Mental Health Review Tribunal (No. 4) [2014] NSWSC 31 Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB [2014] NSWSC 245 EB and Ors v Guardianship Tribunal and Ors [2011) NSWSC 767 GAU v GAV [2014] QCA 308 Gibbons v Wright (1954) 91 CLR 423 at 434-438. In the Matter of Case (1915) 214 NY 199 P v NSW Trustee and Guardian [2015] NSWSC 000 PB v BB [2013] NSW SC 1223 PY v RJS [1982] 2 NSWLR 700 Re an alleged incapable person (1959) 76 WN (NSW) 477 Re D [2012] NSWSC 1006 at [46]-[67] Re Eve [1986] 2 SCR 388 at 410; (1986) 31 DLR (4th) Re R [2014] NSWSC 1810 Secretary, Department of Health and Community Services v JWB and SMB (Marion's case) (1992) 175 CLR 218 at 258-259 Wellesley v Duke of Beaufort (1827) 2 Russ 1 at 20; 38 ER 236 Wellesley v Wellesley (1828) 2 BLI. NS124; 4ER 1078
Category:	Principal judgment
Parties:	Plaintiff: CJ (father of defendant) Defendant: AKJ (person in need of protection)
Representation:	Solicitors: Slater & Gordon
File Number(s):	2015/00048686

JUDGMENT

INTRODUCTION

1 These proceedings invite consideration of the meaning of the expression "a person … incapable of managing his or her affairs" (in section 41(1) of the

NSW Trustee and Guardian Act 2009 NSW) in the context of a young adult male whose capacity for self-management is dependent on the availability of active support from his parents.

2 Section 41(1) is in the following terms (with emphasis added):

> "**41 Orders by Supreme Court for management of affairs**
>
> (1) *If the Supreme Court is satisfied that a person is incapable of managing his or her affairs*, the Court may:
>
> (a) *declare that the person is incapable of managing his or her affairs* and order that the estate of the person be subject to management under this Act, and
>
> (b) by order appoint a suitable person as manager of the estate of the person or commit the management of the estate of the person to the NSW Trustee."

3 The plaintiff (the father of the defendant) applies to the Court for:

- (a) a declaration, pursuant to section 41(1)(a) of the *NSW Trustee and Guardian Act*, that the defendant is incapable of managing his affairs;
- (b) an order, under section 41(1)(a) of that Act, that the estate of the defendant be subject to management under the Act;
- (c) an order, under section 41(1)(b) of the Act, that the plaintiff be appointed manager of the defendant's estate; and
- (d) an order, under section 77(4) of the *Civil Procedure Act* 2005 NSW, that compensation money paid into court on the account of the defendant (in separate proceedings in the District Court of NSW instituted, and conducted to finality, by the defendant against the State of NSW without the intervention of a tutor) be paid out to the plaintiff, as manager of the defendant's estate.

Factual Matrix

4 The defendant (as I will call him throughout this judgment even though, in the District Court proceedings, he was the plaintiff) was born in 1993 and is presently aged 21 years. He has a mild autistic disorder, coupled with cone dystrophy. He lives at home, in country NSW, with his parents (both aged in their 50s) and a twin brother. The twins share a common disability. A sister, currently aged in her late 20s, lives independently of the rest of the family.

5 An application for a protected estate manager has been made because, during the course of the District Court proceedings, a respected psychiatrist of established reputation expressed opinions that call into question the defendant's capacity to manage his own affairs and, although the proceedings

were settled without the appointment of a tutor (under the *Uniform Civil Procedure Rules* 2005 NSW, Part 7), the Court (in approving the parties' settlement under section 76 of the *Civil Procedure Act*) ordered, *inter alia*, that the settlement sum be paid into court, on the account of the defendant, "pending appointment of a manager".

6 The District Court entered a judgment for the defendant, against the State, in the sum of $150,000 plus costs, subject to deductions for adjustments (if any) due to Medicare Australia and Centrelink.

7 On 28 April 2015 the State paid $142,737.99 ($150,000, net of a deduction in favour of Centrelink) into court to abide orders of this Court in exercise of its protective jurisdiction under the *NSW Trustee and Guardian Act*, section 41 and the *Civil Procedure Act*, section 77 (4).

8 During the course of the District Court proceedings the psychiatrist initially expressed an opinion that the defendant did not have capacity to provide instructions for the conduct of the proceedings. Nevertheless, after discussion with the defendant his father, the present plaintiff, and the legal representatives (including counsel) responsible for the conduct of the District Court proceedings were satisfied that the defendant did, in fact, have sufficient capacity to provide instructions for the conduct of the proceedings.

9 When the psychiatrist was subsequently requested to provide an updated opinion he (taking into account intervening developments) expressed an opinion that the defendant *did* have capacity to provide instructions, but *not* to manage settlement funds.

10 The opinion of the plaintiff, the defendant and (I infer from the evidence) other family members is that, with due respect to the contrary opinion of the defendant's psychiatrist, the defendant *is* able to manage his own affairs (including the compensation awarded to him in the District Court proceedings), without the intervention of a protected estate manager, *while ever he remains on good terms with, and in the supervisory care of, his parents*.

11 The consensus of the parties, and other family members, appears to be that, although the defendant suffers disabilities which, if he were not within the

loving care of his parents, would expose him to a risk of exploitation, he is able, with the assistance of his parents, to manage well enough.

12 The defendant has control over income he receives by way of a disability support pension and paid employment. He has a bank account for day-to-day expenses, as well as a savings account on which his mother is a co-signatory. He discusses plans for expenditure with her before incurring a liability for, or making, significant expenditure.

13 The defendant's parents are renovating a nearby residence for the defendant and his brother to move into. He is independent in his care and daily activities.

The Legal Framework for Decision

14 **Capacity for Self-Management.** The expression "a person … incapable of managing his or her affairs", central to the operation of section 41(1) of the *Trustee and Guardian Act* and associated provisions, is undefined by the Act.

15 An illustration of one of the provisions associated with section 41(1) is its procedural converse, section 86 of the Act. It provides a procedure for revocation of an order made under section 41. The Court's inherent jurisdiction extends to revocation of a management order independently of section 86: *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [87]-[89].

16 Section 86(1), with emphasis added, provides as follows:

> "**86 Revocation of orders by Supreme Court**
>
> (1) The Supreme Court, on application by a protected person and *if the Court is satisfied that the protected person is capable of managing his or her affairs*, may:
>
> (a) *revoke any declaration made that the person is incapable of managing his or her affairs*, and
>
> (b) revoke the order that the estate of the person be subject to management under this Act, and
>
> (c) make any orders that appear to it to be necessary to give effect to the revocation of the order, including the release of the estate of the person from the control of the Court or the manager and the discharge of any manager."

17 The proper construction, and operation, of chapter 4 of the *NSW Trustee and Guardian Act* (in which both section 41 and section 86 are located) is informed by:

(a) the nature and purpose of the Court's inherent, *parens patriae* (protective) jurisdiction (explained in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218 at 258-259), upon which chapter 4 is modelled; and

(b) the "general principles" enunciated in section 39 of the *NSW Trustee and Guardian Act*.

18 Chapter 4 (sections 38-100) is entitled "Management functions relating to persons incapable of managing their affairs".

19 Section 38 defines the expression "protected person" as including, *inter alia*, a person in respect of whom an order is in force under section 41(1) that the whole or any part of the person's estate be subject to management under the Act. Section 38 also defines the concept of an "estate" of a person as meaning, so far as presently material, "the property and affairs of a person".

20 So far as material, section 39 of the Act is in the following terms:

> "**39 General principles applicable to Chapter**
>
> It is the duty of everyone exercising functions under this Chapter with respect to protected persons … to observe the following principles:
>
> (a) the welfare and interests of such persons should be given paramount consideration,
>
> (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
>
> (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
>
> (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
>
> (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
>
> (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
>
> (g) such persons should be protected from neglect, abuse and exploitation."

21 This section is in substantially the same terms as section 4 of the *Guardianship Act* 1987 NSW, which informs the performance by the Guardianship Division of the Civil and Administrative Tribunal of NSW ("NCAT"), under Part 3A (particularly sections 25E-25H) of the *Guardianship Act* 1987 NSW, of functions similar to those conferred on the Supreme Court by reference to

section 41(1) of the *NSW Trustee and Guardian Act*: *W v H* [2014] NSWSC 1696 at [54]-[60].

22 The practice of the Court, over many years, has been to view the expression "a person … incapable of managing his or her affairs" through the prism of observations made by Powell J in *PY v RJS* [1982] 2 NSWLR 700 at 702B-E.

23 However, as explained by White J in *Re D* [2012] NSWSC 1006 at [46]-[67] and *Re R* [2014] NSWSC 1810 at [84]-[94], Powell J's formulation of his test (sometimes described as an "objective" test) of capacity for self-management by reference to "the ordinary affairs of man" has been the subject of criticism as: (a) a gloss on the legislation; and (b) not in unison with a perceived need, according to the terms of the legislation, to take subjective considerations into account on a determination of a particular person's capacity for self-management.

24 In light of White J's analysis (with which, in general, I agree), the Court should be mindful of a need to give effect to the text of the legislation without any elaborative gloss.

25 Insight into the meaning of the expression "a person … incapable of managing his or her affairs", as used in chapter 4 of the *NSW Trustee and Guardian Act*, can be had by study of broadly comparable provisions in Part 3A of the *Guardianship Act.*

26 However, although the expression is undefined in both statutes, the character of NCAT as a statutory tribunal carries with it a greater legislative prescription of the Tribunal's procedures leading to the making of a Financial Management Order (under sections 25E-25H of the *Guardianship Act*) than can be found in conferral on the Supreme Court of jurisdiction (under section 41 of the *NSW Trustee and Guardian Act*) to make an equivalent form of management order. This is entirely consistent with the character of the Court as a superior court and preservation of its inherent, *parens patriae* jurisdiction.

27 In the absence of an express legislative definition, the expression "(in)capable of managing his or her affairs" should be accorded its ordinary meaning, able

to be understood by the broad community (lay and professional) it serves, remembering that:

(a) the concept of incapacity for self-management is an integral part of the protective jurisdiction which, historically, arose from an obligation of the Crown (now more readily described as the State) to protect each person unable to take care of him or her self: *Marion's Case* (1992) 175 CLR 218 at 258, citing *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243.

(b) of central significance is the functionality of management capacity of the person said to be incapable of managing his or her affairs, not: (i) his or her status as a person who may, or may not, lack "mental capacity" or be "mentally ill"; or (ii) particular reasons for an incapacity for self-management: *PB v BB* [2013] NSWSC 1223 at [5]-[9] and [50].

(c) the focus for attention, upon an exercise by the Court of its protective jurisdiction (whether inherent or statutory), is upon protection of a particular person, not the benefit, detriment or convenience of the State or others: *Re Eve* [1986] 2 SCR 388 at 409-411, 414, 425-428, 429-430, 431-432 and 434; (1986) 31 DLR (4th) 1 at 16-17, 19, 28-30, 31, 32 and 34; *JPT v DST* [2014] NSWSC 1735 at [49]; *Re RB, a protected estate family settlement* [2015] NSWSC 70 at [54].

(d) the "affairs" the subject of an enquiry about "management" are the affairs of the person whose need for protection is under scrutiny, not some hypothetical construct: *Re R* [2014] NSWSC 1810 at [94]; *PB v BB* [2013] NSWSC 1223 at [6].

(e) an inquiry into whether a person is or is not capable of managing his or her affairs focuses not merely upon the day of decision, but also the reasonably foreseeable future: *McD v McD* [1983] 3 NSWLR 81 at 86C-D; *EB & Ors v Guardianship Tribunal & Ors* [2011] NSWSC 767 at [136].

(f) the operative effect given to the concept of capacity for self-management, upon an exercise of protective jurisdiction by the Court (whether inherent or statutory), is informed, *inter alia*, by a hierarchy of principles, proceeding from a high to a lower level of abstraction; namely:

    (i) an exercise of protective jurisdiction is governed by the purpose served by the jurisdiction (protection of those not able to take care of themselves): *Marion's Case* (1992) 175 CLR 218 at 258.

    (ii) upon an exercise of protective jurisdiction, the welfare and interests of the person in need of protection are the (or, at least, a) paramount consideration (the "welfare principle"): *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238B-C and 241A-B and F-G; *A (by his*

tutor Brett Collins) v Mental Health Review Tribunal (No 4) [2014] NSWSC 31 at [146]-[147].

(iii) the jurisdiction is parental and protective. It exists for the benefit of the person in need of protection, but it takes a large and liberal view of what that benefit is, and will do on behalf of a protected person not only what may directly benefit him or her, but what, if he or she were able to manage his or her own affairs, he or she would, as a right minded and honourable person, desire to do: H.S. Theobald, *The Law Relating to Lunacy* (London, 1924), pages 362-363, 380 and 462: *Protective Commissioner v D* (2004) 60 NSWLR 513 at 522 [55] and 540 [150].

(iv) whatever is to be done, or not done, upon an exercise of protective jurisdiction is generally measured against what is in the interests, and for the benefit, of the person in need of protection: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2014] QCA 308 at [48].

28 The Court's inherent jurisdiction has never been limited by definition. Its limits (and scope) have not, and cannot, be defined: *Marion's Case* (1992) 175 CLR 218 at 258, citing *Re Eve* [1986] 2 SCR 388 at 410; (1986) 31 DLR (4th) 1 at 16; *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243; and *Wellesley v Wellesley* (1828) 2 Bli. NS 124 at 142; 4 ER 1078 at 1085.

29 The jurisdiction, although theoretically unlimited, must be exercised in accordance with its informing principles, governed by the purpose served by it.

30 Although the concept of "a person… incapable of managing his or her affairs" is foundational to the Court's protective jurisdiction in all its manifestations (inherent and statutory), the purposive character of the jurisdiction is liable, ultimately, to confront, and prevail over, any attempt at an exhaustive elaboration of the concept in practice decisions.

31 From time to time one reads in judgments different formulations of the, or a, "test" of what it is to be "a person (in)capable of managing his or her affairs". Convenience and utility may attach to such "tests", but only if everybody remembers that they provide no substitute for a direct engagement with the question whether the particular person under scrutiny is, or is not, "(in)capable of managing his or her affairs", informed by "the protective purpose of the

jurisdiction" being exercised, and the "welfare principle" derived from that purpose.

32 The general law does not prescribe a fixed standard of "capacity" required for the transaction of business. The level of capacity required of a person is relative to the particular business to be transacted by him or her, and the purpose of the law served by an inquiry into the person's capacity: *Gibbons v Wright* (1954) 91 CLR 423 at 434-438.

33 The same is true of "capacity" for self-management, upon an exercise of protective jurisdiction, governed by the protective purpose of the jurisdiction, viewed in the context of particular facts relating to a particular person in, or perceived to be in, need of protection.

34 Once this is accepted, there is scope for appreciation of different insights available into the meaning, and proper application, of the concept that a person is "(in)capable of managing his or her affairs".

35 Four different formulations of the concept may serve as an illustration of this.

36 First: Without any gloss associated with "the ordinary affairs of man" Powell J's formulation, in *PY v RJS* [1982] 2 NSWLR 700 at 702B-E, of what it is to be "a person incapable of managing his or her affairs" might usefully be recast as follows:

> "… a person is not shown to be incapable of managing his or her own affairs unless, at least, it appears:
>
> > (a) that he or she appears incapable of dealing, in a reasonably competent fashion, with [his or her affairs]; and
> >
> > (b) that, by reason of that lack of competence there is shown to be a real risk that either:
> >
> > > (i) he or she may be disadvantaged in the conduct of such affairs; or
> > >
> > > (ii) that such moneys or property which he or she may possess may be dissipated or lost (see *Re an alleged incapable person* (1959) 76 WN (NSW) 477); it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner: See *In the Matter of Case* (1915) 214 NY 199, at page 203, per Cardozo J… [emphasis supplied] ".

37 Secondly: An alternative formulation, found in *EB and Ors v Guardianship Tribunal and Ors* [2011) NSWSC 767 at [134] per Hallen AsJ, is to the effect that a person can be characterised as "incapable of managing his or her affairs" if his or her financial affairs are of such a nature that action is required to be taken, or a decision is required to be made, which action or decision the person is unable to undertake personally, and which will not otherwise be able to be made unless another person is given the authority to take the action or make the decision.

38 Thirdly: An approach which commends itself to me, in this case, is to record that, in considering whether a person is or is not capable of managing his or her affairs:

> (a) a focus for attention is whether the person is able to deal with (making and implementing decisions about) his or her own affairs (person and property, capital and income) in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation; and
>
> (b) in considering whether a person is "able" in this sense, attention may be given to: (i) past and present experience as a predictor of the future course of events; (ii) support systems available to the person; and (iii) the extent to which the person, placed as he or she is, can be relied upon to make sound judgments about his or her welfare and interests.

39 Fourthly: Drawing upon the legislation that governs the Guardianship Division of NCAT in determining whether or not to make a financial management order (*Guardianship Act*, Part 3A, particularly sections 25E and 25G, read with sections 3(2) and (4)), it might be said that, in common experience, whether a person is or is not "capable of managing his or her own affairs" might be determined by reference to the following questions:

> (a) whether the person is "disabled" within the meaning of sections 3(2) (a)-(d). That is, whether the person is: intellectually, physically, psychologically or sensorily disabled; of advanced age; a mentally ill person; or otherwise disabled;
>
> (b) whether, by virtue of such a disability, the person is (within the meaning of section 3(2)) "restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation"; and

(c) whether, despite any need he or she has for “supervision or social habilitation” (section 3(2)):

(i) he or she is reasonably able to determine what is in his or her best interests, and to protect his or her own welfare and interests, in a normal, self-reliant way without the intervention of a protected estate manager (sections 4 (a)-(c), 4(f), 25G (b) and 25G (c)).

(ii) he or she is in need of protection from neglect, abuse or exploitation (sections 4(a), 4(g), 25G(b) and 25G(c)).

40 The utility of each of these formulations depends on whether (and, if so, to what extent) it is, in the particular case, revealing of reasoning justifying a finding that a person is or is not (as the case may be) capable of managing his or her affairs, having regard to the protective purpose of the jurisdiction being exercised and the welfare principle.

41 In each case care needs to be taken not to allow generalised statements of the law or fact-sensitive illustrations to be substituted for the text of any legislation governing the particular decision to be made and, in its particular legislative context, the foundational concept of capacity for self-management.

42 Whatever form of words may be used in elaboration of that concept, it needs to be understood as subordinate to, and of utility only insofar as it serves, the purpose for which the protective jurisdiction exists.

43 Likewise, ultimately, whatever is done or not done on an exercise of protective jurisdiction must be measured against whether it is in the interests, and for the benefit, of the particular person in need of protection: *GAU v GAV* [2014] QCA 308 at [48]. That touchstone flows from the core concern of the Court’s inherent jurisdiction with the welfare of the individual, and it finds particular expression in the *NSW Trustee and Guardian Act*, section 39(a).

44 In *Re D* [2012] NSWSC 1006 at [65] White J expressed a tentative view that (although the “general principles” set out in section 39 are relevant to an exercise of the discretion of the Court under section 41 as to whether to order that the estate of a person be subject to management under the Act if and when the Court is satisfied that the person is incapable of managing his or her affairs) they are not relevant to a determination of whether or not the Court should be so satisfied.

45 I do not embrace that view, save to the extent that I agree that a finding of incapacity for self management under section 41 is not, in terms, dependent on the operation of section 39. The operation of section 41 might be informed by section 39, but the concept of incapacity for self-management referred to in section 41 is capable of standing alone, without reference to section 39.

46 I view the statutory statement of "general principles" in section 39 as a legislative elaboration of the welfare principle at the heart of the Court's *parens patriae* jurisdiction (*PB v BB* [2013] NSW SC 1223 at [57]-[60]; *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245 at [60]-[63]; *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [83]-[84]; A (by his tutor Brett Collins) v *Mental Health Review Tribunal* (No. 4) [2014] NSWSC 31 at [161]-[162]; *JPT v DST* [2014] NSWSC 1735 at [42]). Nevertheless, it is not an exhaustive statement of the principles that govern an exercise of protective jurisdiction by the Court: *RL v NSW Trustee and Guardian* (2012) 84 NSWLR 263 at 285 [96].

47 I construe the words "with respect to" protected persons in section 39 as sufficient to require a finding of incapacity for self-management under section 41(1) of the Act to be informed by the "general principles".

48 In my opinion, in construction of the Act as a whole, section 39 forms part of the context in which the expression "incapable of managing his or her affairs" in section 41 is to be construed *and* given operative effect.

49 Whether or not I am correct in this, the purposive character of the Court's protective jurisdiction (of which section 41 forms part) subsumes the identified differing perspectives of the introductory words of section 39.

50 **Discretionary jurisdiction**. A formal finding that a person is incapable of managing his or her affairs may be a procedurally important, formal statement that the affairs of the particular person have been brought under the control of the Court upon an exercise of protective jurisdiction; but, upon an exercise of the Court's inherent jurisdiction and subject to any governing legislation, it is not a necessary pre-condition for an exercise of protective jurisdiction. An order for the appointment of a protected estate receiver (such as in *JMK v RDC* and *PTO v WDO* [2013] NSWSC 1362 at [55]-[56] and [68](5)) is nonetheless an

exercise of protective jurisdiction for want of a formal finding that the person whose estate is placed under receivership is incapable of managing his or her affairs.

51 Even if a person *is* found to be incapable of managing his or her affairs the Court might decide, in its discretion, not to appoint a protected estate manager or, if a manager has been appointed, to revoke the appointment (having regard to what is in the best interests, and for the benefit, of the person in need of protection): *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [55] *et seq*; *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286 at [42]; *AC v OC (a minor)* [2014] NSWSC 53 at [36]-[54]; *Tomlinson, Broadhurst, Ex parte* (1812) 1 Ves & Bea 57; 35 ER 22.

52 Absent an abuse of the processes of the Court, a decision that a manager not be appointed to the estate of a person in need of protection does not preclude subsequent consideration of whether to appoint a protected estate manager.

53 In each case the Court must exercise its independent judgement, taking into account the views of the person whose affairs are under consideration, and those of his or her family and carers who may be well placed to inform the Court of his or her particular circumstances. The jurisdiction is not a "consent jurisdiction" in the sense that a particular order can be had, or withheld, merely because somebody seeks or consents to a particular course of action: *M v M* [2013] NSWSC 1495 at [50].

ANALYSIS

54 Given that consideration of the question whether the defendant is, or is not, a person incapable of managing his affairs depends upon an assessment of his subjective circumstances, including the support available to him from his family and the extent to which he, placed as he is within a benign domestic environment, can be relied upon to make sound judgments about his or her welfare and interests, the appropriate finding to make, on the facts of this case, is that the defendant *is* capable of managing his affairs. Within the community of his family, and with their ongoing support, he is able to take care of himself, his property and his finances.

55 In reaching this view, I take into account the relatively modest size of the defendant's estate, his prudential behaviour in dealing with money and his habit of regular consultation with his family about expenditure plans.

56 Were I of the view that the defendant lacks capacity for self-management, I would have determined that, notwithstanding his incapacity, an application of the welfare principle (measuring what is to be done, or not done, by reference to what is in the interests, and for the benefit, of the defendant) requires that the plaintiff's application for a protected estate manager be dismissed. The defendant's support network is sufficient unto the day.

57 If, in the future, the defendant's circumstances change for the worse, the orders made in these proceedings will not, of themselves, stand in the way of a fresh consideration of what, if any, orders should be made upon an exercise of protective jurisdiction relating to him or his affairs.

58 For the moment, it is enough to say that I accept the assessment of the defendant, and those closest to him, that, for the foreseeable future, he should be left to manage his own affairs, including the compensation moneys he recovered in the District Court proceedings.

ORDERS

59 Accordingly, omitting reference to formal notations and orders, I propose to make orders and a notation to the following effect:

(1) ORDER, without prejudice to any future application for relief in the exercise of the Court's protective jurisdiction (of whatever character), that the plaintiff's application for a declaration that the defendant is incapable of managing his affairs, and consequential orders for management of a protected estate, be dismissed.

(2) ORDER that all funds standing to the credit of the defendant in court (in relation to the District Court proceedings), including interest, be paid out to the defendant (being the defendant in these current, Supreme Court proceedings) personally or as he may in writing direct.

(3) NOTE that the Court makes no orders as to the costs of the proceedings, noting that the solicitor for the plaintiff records that her firm will not seek payment of any legal costs in respect to the proceedings, but will itself pay counsel's fees and the Court's filing fee referable to the application.

60 I commend the solicitor for the plaintiff and her firm for their attitude to the costs of the proceedings, consequent upon the course of the District Court proceedings, necessitating institution of the current proceedings.

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