Appendix A

A Review of Selected PPPR Act Cases

Introduction

1. This is a review of Family Court (and to a limited extent, High Court) judgments (cases) that directly consider the criteria used to find that a person lacks capacity for the purpose of establishing the Court's jurisdiction to make an order under the Protection of Personal and Property Rights Act 1988 (PPPR Act).[1] It provides an analysis of reported cases dating from 1988, and unreported cases from 2010 to 2015, where jurisdiction was either contested or discussed in the court judgment.[2]

2. The PPPR Act provides no single test for incapacity, which makes it complex legislation to follow and apply.[3] In general terms, the Act says a person lacks capacity if they do not understand the nature or cannot foresee the consequences of decisions, or are unable to communicate them.[4] The extent of incapacity required to appoint a welfare guardian[5] is greater than is needed to make a personal order,[6] a property order,[7] or an administration order.[8] There are separate tests for activating an enduring power of attorney (EPOA), however there is no statutory test for the purpose of making an EPOA.[9]

3. A fundamental principle of the Act is the presumption of competence: a person must be presumed to have capacity unless proved otherwise.[10] Moreover, people are entitled to make imprudent or unwise decisions so long as they have the capacity to do so.[11] The Family Court can only intervene by making an order where a person lacks capacity based on the legal test that is specific to the making of the order.[12] Once jurisdiction has been established, the Court can then determine what intervention, if any, should occur, given the principles of the least restrictive intervention and the need to enable the person to exercise their capacity to the greatest extent possible.[13]

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1 Research assistance for this review was provided by Jessie Lenagh-Glue.

2 Some of the PPPR Act cases have already been mentioned or discussed in Chapters 1 and 5 of this report.

3 Protection of Personal and Property Rights Act 1988, ss 12(5)(b), 18(3), 97A(2) and 98A(2).

4 Protection of Personal and Property Rights Act 1988, s6 (personal – care and welfare orders)

5 Protection of Personal and Property Rights Act 1988, ss 6 and 12.

6 Protection of Personal and Property Rights Act 1988, ss 6 and10.

7 Protection of Personal and Property Rights Act 1988, s 25 (2)(b). A further aspect of property orders is that in determining jurisdiction the Court can take into account the degree to which a person may be subject to undue influence: s 25(4).

8 Protection of Personal and Property Rights Act 1988, s 11.

9 A presumption of donor competence was introduced in the 2007 amendments to the Protection of Personal and Property Rights Act 1988, s 93B.

10 Protection of Personal and Property Rights Act 1988, s 5.

11 Protection of Personal and Property Rights Act 1988, s 8(3).

12 See Chapter 4 Defining Capacity for an analysis of the different legal tests.

13 Where jurisdiction is established, the Court also has the power to make recommendations, rather than a personal order, under s 13. See, for example, *TBH v JIB* FAM-2012-054-378, [2013] NZFC 763 (unrep) at [18], where the Court made a recommendation under s 13 with the proviso that should the matter come back before the Court, orders would be made under s 10. Recommendations are non-binding and this section is rarely used.

4. Despite the multiple tests for incapacity in the Act, in only a few cases has the Court explicitly worked through the legal tests to determine whether, and to what extent, a person lacks capacity with respect to a specific decision or decisions. Even when capacity has been carefully considered, rarely has there been a comparison of the relative difference, if any, between what it means to "partly" and "wholly" lack capacity for the purposes of establishing jurisdiction.

5. These cases can be divided into two groups. Firstly, in the early years of the Act, the Court often considered making protective orders for younger people learning disabilities who were being deinstitutionalised. Families or the social services were looking to the Family Court to make orders to help protect these individuals as they transitioned into living in the community.[14] Secondly, the more recent cases are mainly concerned with older adults with dementia where the opposite social phenomena is occurring, that is, the appointment of a welfare guardian is proposed or, property or personal orders are made to protect assets or to decide the living arrangements of the person concerned away from their family home.[15]

Method

6. The review consists of two parts. Part 1 considers published Family Court and High Court judgments from 1988 through 2015. The keywords "capacity" and "jurisdiction" and "Protection of Personal and Property Rights Act 1988" were entered in the search engines Westlaw NZ and LexisNexis. This yielded 160 results in LexisNexis, and 215 results in Westlaw NZ. Those results were then scanned using the terms "welfare guardian" or "personal order" or "property management" to ascertain which judgments specifically addressed the issue whether jurisdiction was established under the criteria of s 6 of the Act, and also whether the making of an order was the 'least restrictive intervention' as required under s 8. This produced 41 cases of interest for this review.

7. Part 2 considers unreported judgments of the Family Court from 2010 to 2015.[16] The Ministry of Justice keeps a database of unreported judgments, the Judicial Decisions Interface (JDI).[17] The JDI was searched using the keywords "PPPR", "capacity" and "jurisdiction", and was cross-checked using "family jurisdiction" and "PPPR". This search yielded 138 cases. Each case was then scanned to see whether the application was for a personal order;[18] appointing a welfare guardian;[19] an order for property management[20] or property administration;[21] or pertained to the making or revocation of an enduring power of attorney,[22] or a court-ordered will.[23] A total of 94 cases matching these criteria were identified. The cases were

14 *Re E* [1992] 9 FRNZ 393 Judge Inglis; *Re A and Others* [1993] 10 FRNZ 537 Judge Inglis; *Re G (PPPR: Jurisdiction)* [1994] 11 FRNZ 643, Judge Inglis.

15 Examples include: *Hutt Valley DHB v MJP* (2011) FAM-2011-032-623 Judge Moss; *Re CCKS* [2011] NZFLR 603, Judge Hikaka; *Loli v MWY* FAM-2009-004-001877 Judge Adams; *Auckland DHB v Temples* [2014] NZFC 8932, Judge Druce.

16 Cases prior to 2010 have not been digitalised and were not able to be scanned.

17 Personal communication with Zoë Lawton, Research Counsel to the Principal Family Court Judge of New Zealand, 28 October 2015.

18 Protection of Personal and Property Rights Act 1988, s 10.

19 Protection of Personal and Property Rights Act 1988, s 12.

20 Protection of Personal and Property Rights Act 1988, s 31.

21 Protection of Personal and Property Rights Act 1988, s 11.

22 Protection of Personal and Property Rights Act 1988, ss 100 – 106.

23 Protection of Personal and Property Rights Act 1988, s 55.

analysed to identify those in which the issue of capacity was contested and/or subject to a defended hearing.[24] In addition, it was noted whether or not additional expert medical opinion was obtained in relation to capacity.

Limitations

8. This review is not a comprehensive evaluation of PPPR Act judgments since the Act came into force. The limitations of this review are considerable. Many of the judgments are not in any electronic database, and the criteria for determining which judgments will be published are currently under review.[25]

9. Currently, defended hearing judgments are uploaded to the JDI and each week approximately 10 cases across all Family Court jurisdictions are identified as being of either unique interest to the public, or clearly elucidating the law in a particular area for a lay person. These cases are then anonymised for publication. The decision to upload a case to the database may be on the basis of a recommendation from the judge, or by the individuals working on the JDI. There are 600-700 judgments delivered monthly to the Ministry of Justice, with fewer than five percent published. While the process to check and publish cases is becoming more transparent, many cases do not appear on the electronic database. Thus, there are no complete 'hard data' that can be statistically evaluated.

Results

Part 1- reported cases 1988 to 2015

10. Part 1 involved a search of reported cases on the legal databases Westlaw and LexisNexis, which yielded 41 cases from 1988 to 2015, (of which six were High Court decisions), where the issue of jurisdiction for making a court order was explicitly addressed.[26]

Impact of the early decisions

11. Many of these cases were early decisions of Judge Inglis,[27] which were seminal in clarifying how the different tests of capacity in the Act were to be interpreted, and how they interact with one another. In *Re L,*[28] where there was an application for

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24 Cases that had already been identified under Part 1 were not analysed further.

25 Personal communication with Aroha Fletcher (Research Assistant to the Principal Family Court Judge, Ministry of Justice, 1 February 2016).

26 A list of these cases is presented at the back of this Appendix.

27 Twelve cases in total: *Re "Joe"* [1990] NZFLR 260; *Re "Tony"* [1990] 5 NZFLR 609; *Re E* [1992] 9 FRNZ 119; *Re K (A protected person)* (1992) 9 FRNZ 119; *Re Carroll (A protected person)*[1992] 9 FRNZ 126; *Re Z* (1992) 9 FRNZ 397; *Re RMS (PPPR)* (1993) 10 FRNZ 387; *Re A and Others* (1993) 10 FRNZ 537; *Re L (PPPR)* (1993) 11 FRNZ 114; *Re G* (1994) NZFLR 445; *Re V (Personal Order: Birth Procedure)* [1997] NZFLR 718; *Re H & H (PPPR)* (1999) 18 FRNZ 297.

28 *Re L (PPPR)* (1993) 11 FRNZ 114. See also *Re G* (1994) NZFLR 445, where Judge Inglis stated that it is not "necessary to show that the subject is in a vegetable state, completely lacking any power of cognition or rational thought. It is sufficient to show that the subject's capacity to understand the nature and to foresee the consequences of alternatives or options available for choice is so limited by intellectual disability or by mental illness or both that any choice between such alternatives or options which the subject may make cannot responsibly be recognised as effective".

the appointment of joint welfare guardians (L's parents) for a young man with Down Syndrome, Judge Inglis expressed reservations about the wording of the criteria in s 12:[29]

> It is of course clear from the medical evidence that, when the full range of decisions relating to personal care and welfare is considered, L is far from "wholly lacking in capacity". However that is a far wider test than the rather *unhappily worded* s 12(2) requires. What the provision requires is a focus on particular respects in which the person concerned lacks capacity, so that a welfare guardian's appointment is required not to manage the person's whole life but only to make up whatever shortfall in capacity there may be. (emphasis added)

12. Judge Inglis' decisions are still applied today. *Re "Tony"*[30] was referred to in *BAH v JFE*,[31] as holding that capacity for appointing an enduring power of attorney was dependent on whether a person understood the nature and consequence of the decision at the time it was made, and that incapacity in one area did not mean incapacity for all decision-making.

13. *In the Matter of A*[32] (where jurisdiction was not contested) is an influential High Court decision of the full bench, and is still cited today as authority for the Court to treat a person's welfare and best interests as the first and paramount consideration in the decision to make a personal or welfare guardianship order.

Data on jurisdiction cases

14. Of the 41 jurisdiction cases found in this search, approximately half (19) were made prior to 2000, and only one was a High Court decision.[33] Only six of these 19 decisions were defended hearings where capacity was contested.[34] Jurisdiction was established in 13 decisions.[35] Nine cases were applications for the appointment of a welfare guardian under s 12,[36] and in five of these it was determined that the person wholly lacked capacity, as required for jurisdiction to be established.

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29 *Re L (PPPR)* (1993) 11 FRNZ 114 at 115.

30 [1990] 5 NZFLR 609.

31 FAM-2013-091-000549, [2014] NZFC 10178 (unrep) at [24].

32 *In the Matter of A* [1996] NZFLR 359 (HC), North, Ellis, Doogue JJ.

33 *In the Matter of A* [1996] NZFLR 359 (HC).

34 *Re Long* [1988] 5 NZFLR 545; *Re LM (A Protected Person)* (1992) 9 FRNZ 555; *Re E* (1992) 9 FRNZ 119; *Re RMS (PPPR)* (1993) 10 FRNZ 387; *Re G* [1994] NZFLR 445; *Re L (PPPR)* (1994) 11 FRNZ 114.

35 *Re Long* [1988] 5 NZFLR 545; *Re LM (A Protected Person)* (1992) 9 FRNZ 555; *Re S (Shock Treatment)* [1992] NZFLR 208; *Re Barbara (aka R v C)* (1991) 8 FRNZ 169; *Re K (A protected person)* (1992) 9 FRNZ 119; *Re Carroll (A protected person)* (1992) 9 FRNZ 126; *Re A and others* (1993) 10 FRNZ 537; *Re G* [1994] NZFLR 445; *B v DR* [1994] NZFLR 898; *Re L (PPPR)* (1994) 11 FRNZ 114; *In the Matter of A* [1996] NZFLR 359 (HC); *Re V (Personal Order: Birth Procedure)* [1997] NZFLR 718; *RE H & H (PPPR)* (1999) 18 FRNZ 297.

36 *Re "Joe"* [1990] NZFLR 260; *Re "Tony"* [1990] 5 NZFLR 609; *Re LM (A Protected Person)* (1992) 9 FRNZ 555; *Re Z* [1993] 10 FRNZ 387; *Re A and others* [1993] 10 FRNZ 537; *Re G* [1994] NZFLR 445; *In the Matter of M* [1994] NZFLR 164; *Re L (PPPR)* (1993) 11 FRNZ 114; *In the Matter of A* [1996] NZFLR 359 (HC).

15. From 2001 to 2015, there were another 10 reported cases under s 12 where jurisdiction was expressly discussed in the judgment.[37] The Court determined that jurisdiction had not been established in two cases.[38] In *FJR v EMR*,[39] there was medical evidence of partial and complete lack of capacity in several areas. The Court held however, that a welfare guardian order was not the only satisfactory way to ensure appropriate decisions would be made regarding the person's care and living arrangements. Instead, a personal order was made under s 10.

16. The Part 1 review also examined whether the judgment considered s 8 and whether the intervention proposed was the least restrictive given the circumstances. This principle was expressly discussed in 27 of the 41 cases, often in conjunction with discussion of the two-step procedure, first establishing that jurisdiction existed under s 6, and only then determining the degree of intervention, if any, required.[40] In *Re S (Shock Treatment),* the Court held:[41]

> … it is clear that the test to be applied is not a 'welfare' or 'best interests' test. Instead the enquiry must be as follows: (a) what is the degree of Mr M's incapacity; (b) having regard to the degree of his incapacity, what is the least restrictive intervention possible; … (c) what course of action will enable Mr M to exercise such capacity as he has to the greatest extent possible?

Part 2 – unreported cases from 2010 to 2015

17. Part 2 of this review analysed 138 unreported judgments from the Ministry of Justice database, JDI. Of these, 35 cases were deemed not relevant,[42] and nine cases were judgments that had been reported elsewhere and were included in Part

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37 *Y v X (Mental Health: sterilisation)* [2004] 23 FRNZ 493; *X v Y (Mental health: sterilisation*) [2004] 23 FRNZ 475 (HC) (this was an appeal from Judge Fraser's decision to not make a decision concerning capacity in deciding whether to grant a welfare guardian's request that X be sterilised, as her lack of capacity had already been decided by the decision in 2003 to make a s 12 order. Miller J granted X's appeal, stating that the Court cannot utilise s 12 for the purpose of authorising non-routine treatment under s 18(2) unless it is satisfied that the subject person wholly lacks capacity. He opined that: "The question of capacity to make the decision that is the subject of the application is a threshold question that must be considered in every case"; *Dawson v Keesing* [2004] 23 FRNZ 952 (HC); *KBC v JEC* [2005] 25 FRNZ 505; *Re N* (2006) FAM-2005-019-926; *B v W* (2006) FAM-2005-069-305; *M v H* (2006) FAM-2006-063-52; *FJR v EMR* (2006) FAM-2005-085-716; *DW v JPW* (2009) FAM-2009-092-001787; *Re RVR* (2010) FAM-2007-054-000472; *Re CCCKS* [2011] NZFLR 603.

38 *DW v JPW* (2009) FAM-2009-092-001787; *Ellery v Hampton* [2014] NZFC 8225 (in this case, an application to extend proceedings had first been filed in 2012 and a report had been ordered in November 2013 to address whether the person met the criteria under the Act to establish jurisdiction. The person refused to engage with the psychiatrist, and there was no evidence that the situation would change).

39 (2006) FAM-2005-085-716, Judge Mill.

40 See *Re Barbara* [1991] 8 FRNZ 169; *Re V (Personal Order: Birth Procedure)* [1997] NZFLR 718; *Re H & H (PPPR)* [1999] 18 FRNZ 297; *Public Trust v CMS* (HC) [2008] 27 FRNZ 184; *DW v JPW* (2009) FAM-2009-092-001787.

41 *Re S (Shock Treatment)* [1992] NZFLR 208 at 213.

42 Reasons for eliminating cases as not relevant included cases which were final confirmation of interim orders with no detailed reasoning; cases involving legislation other than the PPPR Act; cases where the subject person was deceased and the issue was the propriety of decisions made by attorneys or property managers; or cases where a property manager was requesting guidance from the Court on a specific issue, such as gifting, or an undisputed testamentary disposition.

1. In only one of the remaining 94 cases did the Court make an outright finding that jurisdiction was *not* established.[43]

18. In a further 15 cases the Court either determined that the evidence demonstrated only partial lack of capacity,[44] or the Court directed further evidence was required and ordered a medical report under s 76.[45] In one case, the Court held that although jurisdiction was established, in view of the least restrictive intervention principle, it was not necessary to make a s 11 property administration order.[46]

Participation in the hearing

19. The PPPR Act clearly states that the person about whom the application is made should be present at any hearing.[47] There is a procedure for excusing them under certain circumstances[48] and the subject person is represented by the court-appointed lawyer. In 15 of the 94 cases, the judge expressly excused the person from participating in the hearing. Of the remaining 79 cases, in only 24 was there evidence that the person actively participated in the hearing.[49]

20. There were 25 cases where the person clearly objected to the orders being made, and a further 10 where it was unclear whether there was an objection or not. In the 14 cases where the person objected, they clearly participated in a defended hearing. In a further nine cases the person objected, but did not participate in the hearing. There were a further two cases where older adults were excused from attendance despite their objection to the orders being made in their absence.[50] In only nine cases did the person participate in the hearing when they were not formally objecting to the application.

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43 *LCA v RJG* (2011) FAM-2010-004-00701 (unrep). This was an application for a property management order under s 25. The Court found that the evidence from both a neuropsychologist and a psychogeriatrician contradicted DHB specialist reports that the subject person had a delusional psychosis and that the subject person had a reasonable overall understanding of financial management. The application was dismissed.

44 *RCD & DAD v VED* (2009) FAM-2009-024-000061; *CP v VEH* (2011) FAM-2010-021-000185; *VJW v KLM* (2012) FAM-2010-042-000730, [2012] NZFC 3164; *SPH, TJC v MM, BGC & JC* (2013) FAM-2013-004-001295, [2013] NZFC 7913; *SJW v MJW* (2013) FAM-2011-077-000032; *MTL v MTB* (2014) FAM-2014-070-000437, [2014] NZFC 4306 (all unrep). In these 6 cases, the Judge granted either a personal order under s 10, or an administration order (s 11) or property management order(s 25) instead of a s 12 welfare guardianship order.

45 *KMA v FJR* (2012) FAM-202-019-000851, [2012] NZFC 4358; *JAH v DAP* (2010) FAM-2010-088-000350; *HBP v AGB* FAM-2011-043-000649; *BGM v CPF* (2012) FAM-2012-043-000428, [2012] NZFC 7047; *Public Trust v AVA* (2012) FAM-2005-044-000559, [2012] NZFC 7056; *TJM & EMR v DSP* (2014) FAM-2013-004-001961, [2014] NZFC 2805; *JAH v DAP* (2010) FAM-2010-088-000350; *CMM v RWL* (2014) FAM-2010-043-000891, [2014] NZFC 6520; *TJM & EMR v DSP* (2014) FAM-2013-004-001961 (all unrep).

46 *GH v RMT* (2011) FAM-2003-043-000502 (unrep).

47 Protection of Personal and Property Rights Act 1988, s 74(1).

48 Protection of Personal and Property Rights Act 1988, ss 74(2)-(4).

49 In six judgments it was unclear whether the person participated in the hearing or not.

50 In *AJI v LF* [2012] NZFC 9152 (unrep), a welfare guardian was appointed and a personal order granted that the person reside in a secure dementia unit for six months; in *PKM v HJF* [2013] NZFC 8381 (unrep) a welfare guardian and a property manager was appointed.

Family Court statistics 2006-2007

21. The latest published statistics of Family Court cases cover the period 2006-2007. They show that over 40 percent of the PPPR Act cases were for people over the age of 60, whereas only 17 percent of the general population was in this age bracket.[51] This review of jurisdiction cases reflected the trend of these statistics. Of the 94 cases identified, almost 60 percent (55/94) involved people over 60 years of age. Table A-1 illustrates the types of orders applied for by the age category of the subject person.

Table A-1[52]

	Welfare Guardian (s 12)	Property Mgnt/Admin (ss 25/11)	Personal Order (s 10)	Validity of EPOA	Court ordered Will (ss 54,55)
> 60 years	34	38	11	7	6
< 60 years	25	20	9	0	0
Unknown	1	2	1	0	0

22. The majority of applications were for the appointment of a welfare guardian, often accompanied by an application for a property order.[53] Of the 60 welfare guardian applications, 46 were made, with another two granted on an interim basis. In the vast majority of these decisions, reference was made to medical or specialist reports confirming that the person wholly lacked capacity.

Jurisdiction issues and case examples

23. The key issues which arose regarding jurisdiction in both parts of this review, discussed below, are:

a) whether the presumption of capacity has been displaced by the medical and other evidence;

b) the importance of independent medical evidence where capacity is contested;

c) the meaning of "wholly" lacking capacity, regarding s 12 welfare guardian applications;

d) the meaning of "partly" lacking capacity, regarding s 10 personal orders, and whether a distinction between "wholly" and "partly" lack capacity was made; and

e) whether a donor lacked capacity to enter into, or revoke, an Enduring Power of Attorney (EPOA).

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51 Ministry of Justice *Family Court Statistics in New Zealand in 2006 and 2007* (Ministry of Justice, Wellington, 2009) at 57.

52 The numbers do not reflect the number of judgments, as in many cases there were multiple applications for the same person in a judgment.

53 Protection of Personal and Property Rights Act 1988, s 25.

a) The presumption of capacity not displaced

24. There are few decisions of the Family Court where the person subject to an application directly challenges the Court's jurisdiction to make orders on the basis that they do not meet the incapacity threshold. This review identified 41 cases (30% of the overall total) where the subject person participated in a defended hearing, and another two where the presiding judge spoke with the subject person on an unsworn basis. Of these, there were 19 cases where the subject person objected to the application and gave evidence disputing that the presumption of capacity had been displaced.

25. In *Re RMS*,[54] the question for the court was whether the threshold for making a personal order or a welfare guardian order had been met in the case of an 86-year-old woman suffering from cancer. She was not able to manage her own care and she had been subject to an interim order to live in a rest-home. RMS objected to the order and wanted to return to her own home. Judge Inglis held that RMS was on the "borderline" of jurisdiction, and:[55]

> … in her evidence Mrs Smith demonstrated powers of marshalling argument and presentation of her viewpoint superior to that of many witnesses half her age and in normal health. Mrs Smith is far from the stereotype of an elderly rest-home patient well advanced into senility, and indeed she expressed impatience at being obliged to be in the company of such people at Beechworth.

26. In finding that jurisdiction had not been established, Judge Inglis stressed it was important to remember that:[56]

> Total or partial lack of capacity … is not necessarily indicated merely because those decisions appear to others to be decisions which a person in Mrs Smith's circumstances exercising ordinary prudence would not make.

b) The importance of independent medical evidence where capacity is contested

27. In *VJM v MH,*[57] there was an application for a personal order under s 10 in respect of MH, who had been admitted to hospital following a fall. There were serious medical concerns about her frailty, her poor nutrition, and the failure of previous attempts to support her in her own home. It had been recommended that MH be discharged to a supported care facility. MH was adamantly opposed to the concept and wished to return to her own home. The DHB, in its application, had filed numerous reports from health professionals, occupational therapists and a social worker. During the hearing, a court-appointed psychiatrist, who had examined Mrs H over two days, opined that MH suffered from early stage dementia which affected her reasoning, insight and judgment, leading to significant functional impairment in

54 *Re RMS (PPPR)* (1993) FRNZ 387, Judge Inglis.
55 *Re RMS (PPPR)* (1993) FRNZ 387, 390.
56 *Re RMS (PPPR)* (1993) FRNZ 387, 393.
57 *VJM on behalf of the Hawke's Bay District Health Board v MH* (2011) FAM-2011-041-516, Judge Callinicos (unrep).

matters of personal care.[58] In differentiating between lack of wisdom and lack of competence, the psychiatrist stated:[59]

> The point at which the decision becomes one which lacks competence, rather than simply lacks wisdom, is the point at which the person fails to recognise certain things that are generally regarded as factual, for example the issue of what the caregiver is required to do, the incontinence issues, the real risks that may confront her, the inability to differentiate between the risk of something extremely unlikely, for example a UFO attack, and something that is perfectly plausible in an older person such as a fall and failing to manage at home, and the failure to be able to discuss contingency plans or engage in that discussion at all.

28. Having established jurisdiction, the Court made s 10 interim orders specifying that MH enter a rest home, emphasising this was the least restrictive approach available, having regard to MH's frail state of health. Judge Callinicos emphasised the following matters which had been presented in the medical report: the medical assessor was appointed by the Court and therefore neutral; MH was examined on two separate occasions for the report; the diagnosis was of dementia, and provided a medical cause for the incapacity and the reason for its non-reversibility; MH had impaired executive functioning which reduced her insight into the seriousness of the situation, and impaired her ability to consider the possible consequences of her choices, or consider, even hypothetically, the possibility of a future adverse event; plus MH's frail state of health and the serious risk of further decline if the advice of the multidisciplinary team was not followed. Judge Callinicos concluded that MH's rigid refusal to follow the advice given was "the result of a lack of competence rather than a failure to exercise ordinary prudence" as envisaged by the 'caveat' in s 6(3).

29. In this case, the Court tested the evidence provided in the medical report by suggesting a trial situation with fixed contingency arrangements, and permitted a reasonable adjournment to allow counsel to attempt to obtain MH's agreement with the proposal. Despite this, MH did not shift in her "rigid view" and would not accept assistance that she did not believe she required. The Court was satisfied that MH's inability to make reasoned decisions about the arrangements for her discharge from hospital was a "tipping point", and that the Court had jurisdiction as required by s 6 of the PPPR Act.

c) The legal test of "wholly" lacking capacity

30. In the context of the whole review, there were 82 cases that included an application for the appointment, or the renewal of appointment, of a welfare guardian. Twenty-nine of these cases included a comprehensive discussion of the evidence and whether the person "wholly" lacked capacity, thereby establishing jurisdiction for the Court to make an order.

31. In the early cases, Judge Inglis (and others) examined the issue of how the concept of "wholly" lacking capacity should be interpreted. *Re "Joe",*[60] concerned an elderly gentleman who had been living in a "state of profound self-neglect" and refusing all support services, but was adamant that he wished to be left alone and believed he

58 *VJM v MH,* at [27].
59 *VJM v MH*, at [32].
60 *Re "Joe"* [1990] NZFLR 260.

would be 'hopelessly unhappy' in a rest home. Judge Inglis directed the matter for a hearing on jurisdiction, noting that there was doubt that Joe *wholly* lacked capacity and, when "the person himself positively wants to be left alone, force-fed help may amount to an act of unkindness, no less devastating to the subject because it is well intentioned".[61]

32. *Re Z*[62] involved a woman who had capacity to make and communicate decisions, but wholly lacked the capacity to execute them physically due to the lack of cooperation by her caregiver. Judge Inglis found this lack of capacity was "not a shortfall of the kind recognised by the PPPR [Act]" and any such gap in the Act was a matter for Parliament to address. He declined the daughter's application to be appointed a welfare guardian for her mother.

33. In a more recent case, *BMO v AFM-M and RSO,*[63] the person, R, had suffered a severe head injury in a car accident in 1986, and his previous welfare guardian had died in 2009. Two different parties then applied to be appointed his welfare guardian and property manager. Although R had been subject to a welfare guardian order previously, the Court held that it did not automatically have jurisdiction merely because the incapacity was longstanding and the parties concerned did not dispute the appropriateness of a welfare guardian appointment.[64] Rather, the expert opinions of both a court-appointed neuropsychologist and R's GP, in addition to the "various medical reports provided over the years",[65] confirmed that R continued to lack capacity and there was jurisdiction for the Court to make an order.

34. In *WJH v BTH*,[66] the judge preferred the evidence of the applicant regarding his father's lack of capacity to that of a medical report on file that suggested the subject person (the father) had partial capacity. In this case, the father did not participate in the hearing. After visiting him, the court-appointed lawyer agreed that he "totally" lacked capacity, and there was no suggestion that he objected to the orders being made.[67]

35. Similarly, in *JGB v Guardian Trust*,[68] where the most recent medical opinion suggested that the person's lack of competence to manage his own affairs in relation to property was "partial but substantial". The Court held that there was also jurisdiction for the ongoing appointment of the welfare guardian based on the medical evidence – from the first time that an order had been made in 2007, and again in 2009 and 2010 – and "nothing had changed since then". The lawyer for the applicant stated:[69]

> [He] is able to deal with day-to-day matters but in terms of decisions that are necessary for his welfare and being able to communicate and make major decisions in relation to his ongoing care, he is not in a position to do that without the assistance of his welfare guardian.

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61 *Re "Joe"*, at 261.
62 *Re Z* (1992) 9 FRNZ 397.
63 *BMO v AFM-M and RSO* (2011) FAM-2002-088-000973 (unrep).
64 *BMO v AFM-M and RSO*, at [21].
65 *BMO v AFM-M and RSO*, at [25].
66 *WJH v BTH* (2010) FAM-2010-042-000877, (unrep).
67 *WJH v BTH,* at [4].
68 *JGB v NZ Guardian Trust Co Ltd & PMB and JDI* (2014) FAM-2005-070-000686, [2015] NZFC 189, (unrep).
69 *JGB v NZ Guardian Trust Co Ltd and others,* at [6].

36. As noted, for the appointment of a welfare guardian, it is only necessary that the person wholly lacks capacity in respect of "particular aspect or aspects" of decision-making relating to their care and welfare. In some cases, however, the notion that capacity is decision-specific is undermined where the Court appoints a welfare guardian who is, in effect, a global decision-maker in respect of all decisions in relation to the person's care and welfare. The following two cases are examples of how the concept "wholly" lacking capacity has been very liberally interpreted.

37. In *AK, VT, NT v RJT*,[70] the wife and daughter of a man who had suffered frontal lobe damage in an accident applied to the court to be appointed as joint welfare guardians. The evidence was that when he became upset or angry he was unable to respond in a rational manner and his ability to make sensible and safe decisions disappeared.[71] The Judge concluded that, although in "general terms, [X] does have the capacity to understand the nature and foresee the consequences of his decisions",[72] when he is subject to loss of control he "wholly lacks capacity". Thus, the appointment of joint welfare guardians was considered by the Court to be warranted.

38. In *FL v KEL*,[73] the Court appointed KEL's mother as his welfare guardian. KEL suffered from cerebral palsy, autism and epilepsy. Both his mother (the applicant), and the young man's GP described him as partially lacking capacity to understand the nature and foresee consequences of decisions pertaining to his care and welfare. The proceedings were adjourned to enable a report from a neuropsychologist to report on the man's cognitive capacity and prognosis, however no report ensued as there was "no psycho-neurologist (sic) available locally who could undertake the assessment".[74] The judge spoke with the young man who told him he found decision-making "a bit of a struggle". On the basis of this conversation, the Court held it had jurisdiction to make a welfare guardian order as "the medical evidence establishes that [X] *partly* lacks the capacity to understand the nature and foresee the consequences of decisions in respect of matters relating to his personal care and welfare"[75] regardless of the fact that there was no objection by KEL to the making of the order, it is hard to reconcile this approach with the legal test in the PPPR Act.

d) The legal test of "partly" lacking capacity

39. It is not uncommon for s 10 personal orders to be made under the lower threshold of "partly" lacks capacity, where jurisdiction is not established under the higher threshold of "wholly" lacks capacity for the appointment of a welfare guardian.

40. In this review there were nine cases where the application for appointing a welfare guardian was dismissed. No other orders, for example under s 10, were made. In another four cases, where welfare guardian orders were not made under s 12, there was sufficient evidence to establish that the person partly lacked capacity and a

70 *AK, VT, NT v RJT* (2011) FAM-2009-090-002264 (unrep).
71 *AK, VT, NT v RJT*, at [1].
72 *AK, VT, NT v RJT*, at [2].
73 *FL v KEL* (2015) FAM-2014-044-000395, [2015] NZFC 2792 (unrep).
74 *FL v KEL*, at [4].
75 *FL v KEL*, at [8].

personal order under s 10 could be made. In five cases, the judge adjourned the s 12 application until further medical evidence could be ascertained.

41. In *Dawson v Keesing,*[76] where the applicant sought appointment as a welfare guardian for her mother, aged 86, out of concern that her brother was exerting undue influence and control over their mother. On appeal to the High Court, Heath J upheld the Family Court's decision that the subject person partly lacked capacity to understand the nature and foresee the consequences of decisions about her living arrangements, but did not wholly lack capacity, and therefore could only be subject to a personal order under s 10, not a welfare guardian order.

42. A similar decision was reached in *WK v NK*.[77] This was an application by a mother for appointment as a welfare guardian for her son, NK, aged 23, who had sustained severe head injuries as a young child and had significant intellectual disability with persisting motor impairment, difficulty with his vision, and "display[ed] occasional behavioural concerns".[78] The major concern was about certain financial decisions he had made which benefited a third party to his own detriment. The Court ordered an independent neuropsychological assessment of NK, and heard evidence directly from him. The Court found that the threshold of "wholly" lacking capacity was not reached, however, it had jurisdiction to make an order under s 10.[79]

43. The issue of what constitutes "partly" lacking capacity was discussed in some of these cases, but was only traversed thoroughly in a few cases, including *SJW v MJW*.[80] This was a case where an adoptive father sought a welfare guardian order for his 24 year old son, W, who had been assessed as suffering from foetal alcohol spectrum disorder. The Court had the advantage of an assessment from a psychiatrist and a psychologist, as well as report from a court-appointed clinical psychologist. These reports suggested there was "significant impairment in his overall adaptive functioning",[81] however, W only partially lacked capacity "in relation to matters about financial management, personal safety, relationships, addressing risk issues of substance abuse and offending, and developing realistic future plans".[82] The Court held that while it did not have jurisdiction to make a s 12 welfare guardian order, the threshold was met for personal orders under ss 10 and 11 of the Act. The Judge went on to say:[83]

> It is much easier to make this finding than to decide what steps, if any, should be taken in regard to Mr [W] within the Act. Mr [W]'s disinclination to have his father have any control of his life is strong. At the present time Mr [W] calls upon his mother and father to help him out when the circumstances are very difficult. It is possible that the existence of orders may cause Mr [W] to distance himself. … It is also to be appreciated … that there can be no practical means to enforce personal orders if they are defied: the power in s 23 to appoint a welfare guardian in the event of non-compliance is not on the face of it very effective (putting aside the very real legal question whether non-compliance can result in such an appointment where, as here, the basic test for appointment is not met).

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76 *Dawson v Keesing* (2004) 23 FRNZ 475, PPR2003-092-2669 (HC), Heath J.
77 *WK v NK* (2014) FAM-2012-070-001831, [2014] NZFC 9285 (unrep).
78 *WK v NK*, at [1].
79 *WK v NK*, at [13].
80 *SJW v MJW* (2013) FAM-2011-077-000032, [2013] NZFC 1899 (unrep).
81 *SJW v MJW*, at [10].
82 *SJW v MJW*, at [11(ii)].
83 *SJW v MJW*, at [15].

44. *Hutt Valley DHB v EB*[84] concerned Mrs B, a 79-year-old widow who resided in her own home and had been hospitalised twice in the past year, despite receiving relatively intensive supervision at home. The Court heard evidence from six witnesses as to Mrs B's lack of capacity, which contradicted her own assessment of her ability to care for herself. On the issue of her capacity, the Judge found that:[85]

> The real issue over capacity is to be found in what appears to be her inability therefore to appreciate the fact that she has the problems that she does have and the impact that these problems have on her quality of life. That goes to her understanding of the relevant situation and her appreciation of that, and the flow-on consequences for her.

45. The Court held that it had jurisdiction because Mrs B failed to have "the requisite degree of comprehension" and made an interim personal order requiring her to live in a specified care home.

46. In *TG v FPC,*[86] the application was for a property manager and a personal order for a 31-year-old man who suffered from a treatment resistant schizoaffective disorder. In deciding that the Court did have jurisdiction, the Judge said:[87]

> When particularly unwell it would be difficult to not find that he wholly lacks that capacity, but as such periods when the Clozapine is at therapeutic levels, which it does not appear to be always, he has some partial capacity. Nevertheless I am satisfied that that partial capacity is very limited, and that he still remains subject to delusions and the particular issues of voices, and a disorder of volition that goes with those voices.

47. The Judge held that, even when "somewhat better managed under mental health treatment", Mr C's capacity to understand the nature and foresee the consequences of decisions is "seriously compromised".[88]

e) Capacity and enduring powers of attorney (EPOAs)

48. In 2007, Part 9 of the PPPR Act was amended to strengthen the requirements for activating an EPOA when a person becomes "mentally incapable".[89] The presumption of donor competence was also introduced, in line with the rest of the Act. This presumption can be displaced by a certificate from a relevant health practitioner.[90]

49. As part of this review, information was requested from the JDI regarding the new Part 9 provisions, which give the Court increased ability to monitor and review an attorney's powers and revoke both property and care and welfare EPOAs.[91] A search of published databases only revealed two cases that referred to the

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84 *Hutt Valley District Health Board v EB* (2011) FAM-2011-032-000589 (unrep).
85 *Hutt Valley DHB v EB,* at [22].
86 *TG v FPC* (2011) FAM-2010-004-002888 (unrep).
87 *TG v FPC*, at [4]-[5].
88 *TG v FPC*, at [6].
89 Protection of Personal and Property Rights Act 1988, ss 93A and 94A.
90 Protection of Personal and Property Rights Act 1988, s 93B.
91 Section 102A and widens the scope of people who may make an application to a court for exercise of its jurisdiction under s 102, and gives the Court discretion whether to review any decision of an attorney and make any order it thinks fit.

2007amendments,[92] and no cases were identified by the JDI. This suggests that there has been little uptake of these increased powers.

50. The review identified eight cases where the issue arose of whether an EPOA had been validly executed or activated. In *Waldron v Public Trust,*[93] Potter J held that under s 102(1)(a) of the PPPR Act, the Family Court has jurisdiction to determine whether an instrument is an EPOA, and whether it has been validly executed and entered into, including whether the donor had mental capacity at the time of its execution.

51. In *Re BRH*,[94] the issue was whether a donor, BAH, lacked capacity at the time she executed an EPOA subsequent to her hospitalisation for a stroke. Although BRH was assessed as being "compos mentis" to appoint an attorney at the time, her medical team "continued to have some concerns regarding her cognitive impairment and discharge home".[95] In reviewing all the evidence, the Court held that BRH lacked capacity at the time she signed the EPOA and therefore it was not valid:[96]

> … although there was no evidence specifically focussed upon the date the powers were signed, there is enough evidence relating to the period before and two months later to indicate that she was in a confused state that would not have allowed her to adequately understand the ramifications of the documents she was signing. Furthermore, the various communications, the manner in which the first set of documents was signed and the re-drafting and signing of a second set of documents could only have lead (sic) to more confusion of an elderly woman in a mentally fragile state.

52. In *BAH v JFE*,[97] the question was whether E's execution of his EPOAs, appointing his wife attorney for personal care and welfare and for property in 2010 were valid, given Mr E had earlier granted an EPOA for property to his daughters. There was significant conflict between E's daughters and their stepmother. The Court ordered a report from a psychogeriatrician and there was also evidence from E's GP and the legal executive who witnessed the 2010 EPOAs. The Court held that the 2010 EPOAs were valid and nothing in the Act prevented the appointment of multiple EPOAs for property. However, due to the conflict between Mrs E and Mr E's daughters, the least restrictive intervention was to appoint Mrs E as property manager under s 25 of the Act.[98]

Conclusion

53. This analysis of reported cases dating from 1988, and unreported cases from 2010 to 2015, suggests that extended judicial analysis of whether a person lacks capacity for the purpose of establishing jurisdiction under the PPPR Act has been rare in

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92 *Carrington v Carrington* [2014] NZHC 869; *Waldron v Public Trust* [2010] NZFLR 277, [2010] 28 FRNZ 403.

93 *Waldron v Public Trust*, Potter J.

94 *Re BRH* (2013) FAM-2012-092-000981, [2014] NZFC 10178 (unrep).

95 *OEH v BAIH, BRH*, at [8].

96 *OEH v BAIH, BRH*, at [28].

97 *BAH v JFE* (2014) FAM-2013-091-549, [2014] NZFC 10178, (unrep).

98 Section 100 of the PPPR Act states where a person who has given an EPOA subsequently becomes subject to a personal order or property order, the order shall be binding on the attorney; and, in the event of any conflict arising between the powers and the duties of the attorney and the terms of the order, the order shall prevail.

practice. This is not to suggest that the Court is not considering the medical and other evidence in capacity assessments when establishing jurisdiction. Rather, the Court's reasoning is not routinely reported as part of the judgment. When judges are concerned that there is insufficient evidence to determine jurisdiction, they sometimes order further medical reports, and the outcome of these cases is often unknown. The role of the court-appointed lawyer is relevant in this respect because many cases may be resolved "on the papers", at judicial or settlement conferences.

54. Of concern, however, is that in some cases the strict criteria of s 12(2) requiring a person to *wholly* lack capacity before a welfare guardian can be appointed, are not always followed. Compared to the early decisions, the Act is now most often used for the appointment of a welfare guardian or a property manager for older adults, many of who have dementia. Personal orders under s 10, with a lower threshold of "partly" lacks capacity, are frequently used to make significant decisions in respect of the living arrangements of people subject to the Act, such as a decision to place a person in a secure residential care facility, sometimes over the person's vehement objections.

55. There have been few cases where a person's capacity (and the jurisdiction of the Court) have been contested by way of a defended hearing[99] and even fewer where the person gives evidence and/or participates in the hearing.[100] The requirement that the person subject to an application should attend the hearing (whether contested or not), unless formally excused under s 76, seems not to be rigorously applied.

56. This review is not a comprehensive evaluation of the PPPR Act but a snapshot on how decisions on jurisdiction are made. As there is little case law in this area, there is a corresponding lack of transparency about how the concept of capacity – so central to the operation of the PPPR Act – is tested or applied. There are few fully reasoned decisions in which a person's capacity is contested or that give careful guidance on the legal tests for capacity or the differences between them.

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99 See for example, *Re RMS (PPPR)* (1993) FRNZ387, Judge Inglis; *VJM v MH* (2011) FAM-2011-041-516, Judge Callinicos.

100 Examples of defended hearings on jurisdiction include: *Re H & H (PPPR)* [1999] 18 FRNZ 297 Judge Inglis; *Re CLD* (2010) FAM-2002-044-001729, and *VJM v MH* (2011) FAM-2011-041-516, Judge Callinicos.

Reported Cases in Part 1 Review

1. *Re Long* [1988] 5 NZFLR 545, Judge von Dadelszen.
2. *Re "Joe"* [1990] NZFLR 260, Judge Inglis.
3. *Re "Tony"* [1990] 5 NZFLR 609, Judge Inglis.
4. *Re LM (A Protected Person)* (1992) 9 FRNZ 555, Judge von Dadelszen.
5. *Re S (Shock Treatment)* [1992] NZFLR 208, Judge Twaddle.
6. *Re Barbara* (aka *R v C*) (1991) 8 FRNZ 169, Judge Frater.
7. *Re E* (1992) 9 FRNZ 393, Judge Inglis.
8. *Re K (A Protected Person)* (1992) 9 FRNZ 119, Judge Inglis.
9. *Re Carroll (A Protected Person)* (1992) 9 FRNZ 126, Judge Inglis.
10. *Re Z* (1992) 9 FRNZ 397, Judge Inglis.
11. *Re RMS (PPPR)* (1993) 10 FRNZ 387, Judge Inglis.
12. *Re A and Others* (1993) 10 FRNZ 537, Judge Inglis.
13. *Re G* [1994] NZFLR 445, Judge Inglis.
14. *In the Matter of M* [1994] NZFLR 164, Judge Aubin
15. *B v DR* [1994] NZFLR 898, Judge von Dadelszen.
16. *Re L (PPPR)* (1994) 11 FRNZ 114, Judge Inglis.
17. *In the Matter of A* [1996] NZFLR 359 (HC), North, Ellis, Doogue JJ
18. *Re V (Personal Order: Birth Procedure)* [1997] NZFLR 718, Judge Inglis
19. *Re H & H (PPPR)* (1998) 18 FRNZ 297, Judge Inglis
20. *Y v X (Mental Health: Sterilisation)* (2004) 23 FRNZ 493 (FC), Judge Fraser.
21. *X v Y (Mental Health: Sterilisation)* (2004) 23 FRNZ 475 (HC), Miller J.
22. *Dawson v Keesing* (2004) 23 FRNZ 952, Justice Heath.
23. *KBC v JEC* (2005) 25 FRNZ 505, Judge CP Somerville.
24. *Re N* (2006) FAM-2005-019-926, Judge Twaddle.
25. *B v W* (2006) FAM-2005-069-305, Judge O'Donovan.
26. *M v H* (2006) FAM-2006-063-52, Judge Twaddle.
27. *FJR v EMR* (2006) FAM-2005-085-716, Judge Mill.
28. *Nesbit v S* (2008) FAM-2008-004-2320, Judge Burns.
29. *Public Trust v CMS* (2008) 27 FRNZ 184, Judge Keane.
30. *DW v JPW* (2010) FAM-2009-092-001787, Judge Malosi.
31. *SSDT-E v RWELFARE GUARDIANB* (2009) CIV 2008-485-2808; [2009] NZHC 757 (HC), Young J.
32. *Waldron v Public Trust* (2010) 28 FRNZ 403, Potter J.
33. *Re CLD* (2010) FAM-2002-044-001729, Judge Walker.
34. *Re RVR* (2010) FAM-2007-054-000472, Judge CP Somerville.
35. *CCS Disability Action (Wellington) Branch Inc v JCE* (2011) FAM-2009-032-000592, Judge Grace.
36. *Loli v MWY* (2011) FAM-2009-004-001877, Judge Adams
37. *Re CCKS* [2011] NZFLR 603, Judge Hikaka
38. *VJM on behalf of the Hawkes Bay District Health Board v MH* (2011) FAM-2011-041-516, Judge Callinicos.
39. *Hutt Valley District Health Board v MJP* (2011) FAM-201.1-032-623, Judge Moss.
40. *Ellery v Hampton* (2014) NZFC 8255, Judge Geoghegan
41. *Wilson v Wilson* (2014) NZHC 2766; [2015] NZFLR 104 (HC), Brown J.