

NOTE: ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOV.T.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS](http://www.justice.govt.nz/courts/family-court/legislation/restrictions-on-publications).

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2011-404-3775
[2014] NZHC 869**

IN THE MATTER OF the Declaratory Judgments Act 1908,
 declarations at common law and orders
 under the inherent jurisdiction of the High
 Court that are analagous to orders under
 the Protection of Personal and Property
 Rights Act 1988.

BETWEEN YVONNE CARRINGTON
 Applicant

AND BRIAN CARRINGTON
 Respondent

Hearing: 31 March 2014, 1 April 2014

Counsel; J G Miles QC and S Grant for Applicant
 H Waalkens QC, F Monteiro and R M Gale for Respondent
 K Davenport QC for Interested Party A
 R B Stewart QC and B Tompkins for Interested Parties B and C
 M Sandelin for Respondent's Property Manager

Judgment: 30 April 2014

JUDGMENT OF KATZ J

This judgment was delivered by me on 30 April 2014 at 4:30 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Harmos Horton Lusk, Auckland
 Wilson Harle, Auckland
 Gilbert Walker, Auckland
 Minter Ellison Rudd Watts, Auckland
Counsel: J G Miles QC, Auckland
 H Waalkens QC, Auckland
 R B Stewart QC, Auckland
 K Davenport QC, Auckland
 S A Grant, Auckland

Table of Contents

Introduction	1
Background and overview of issues	3
The High Court’s parens patriae jurisdiction	10
Historical origins and current status of the jurisdiction - England	10
The parens patriae jurisdiction in New Zealand	15
The scope of the jurisdiction	18
The Declaratory Judgments Act 1908	20
The Family Court’s jurisdiction under the PPPRA	22
Overview of the PPPRA	22
Provisions relating to wills	25
Enduring powers of attorney	28
The interface between the jurisdiction of the High Court and Family Court	30
The key issue	30
The relationship between the Declaratory Judgments Act and the PPPRA	31
Can the Declaratory Judgments Act jurisdiction be invoked where there are significant factual disputes?	39
The relationship between the parens patriae jurisdiction and the PPPRA jurisdiction	45
Orders and declarations sought in relation to enduring powers of attorney .	62
Orders and declarations sought regarding Mr Carrington’s will	72
Does the Declaratory Judgments Act provide jurisdiction to determine the validity of the will of a living will-maker?	76
Can the High Court determine the validity of the will of a living will-maker in its parens patriae jurisdiction?	90
Order sought in relation to evidence in potential future proceedings regarding Mr Carrington’s will	93
Declarations sought in relation to whether Mr Carrington had capacity in 2011 to bring proceedings in the Family Court	96
Confidentiality and suppression orders	101
Summary and conclusion	102
Result	107

Introduction

[1] Mrs Carrington claims in these proceedings that her estranged husband, Mr Carrington,¹ was unduly influenced to change his will and enduring powers of attorney in May 2011, at a time when he lacked mental capacity to do so. She seeks orders and declarations that Mr Carrington’s new will and powers of attorney are invalid, together with a declaration that he lacked mental capacity to file proceedings in the Family Court in 2011 seeking dissolution of marriage and a division of relationship property.

¹ I have used pseudonyms to protect the identities of the parties.

[2] Mr Carrington has applied to strike out Mrs Carrington's proceedings.² He says that this Court has no jurisdiction to make the various orders and declarations sought and, further, that the proceedings are an abuse of process. In particular, counsel for Mr Carrington submitted that bringing proceedings in this Court was a "cynical attempt" to circumvent the jurisdiction of the Family Court under the Protection of Property and Personal Rights Act 1988 ("PPRA"). To the extent that these proceedings raise issues that are justiciable at all, Mr Carrington says that the proper forum for them is the Family Court.

Background and overview of issues

[3] Mr and Mrs Carrington married in 1988 and have been separated since 2006. In addition to the two children of their marriage, they both have adult children from prior marriages. Mr Carrington appointed Mrs Carrington as his power of attorney in relation to property in 1992 and also executed a will in her favour in 2004. Their subsequent separation in 2006 appears to have been largely amicable. Indeed, in 2009, Mr Carrington appointed Mrs Carrington his enduring power of attorney in relation to personal care and welfare.

[4] In 2011, however, things changed. Mr Carrington revoked the powers of attorney he had granted in favour of Mrs Carrington and appointed new attorneys. He executed a new will. He also applied to the Family Court for dissolution of marriage and a division of relationship property.

[5] Mrs Carrington claims that Mr Carrington, who is elderly, lacked the necessary mental capacity to undertake these actions. She says that they were undertaken as a consequence of Mr Carrington being subjected to undue influence by one of his adult children. As a result, Mrs Carrington filed an originating application in this Court in June 2011. The second amended originating application seeks declarations under "the Declaratory Judgments Act 1908, declarations at common law, and orders under the inherent jurisdiction of the High Court that are *analogous* to orders under the [PPRA]" (emphasis added).

² His strike out application is supported by interested parties B and C.

[6] The orders and declarations sought by Mrs Carrington would have the effect of “undoing” the various steps taken by Mr Carrington in 2011. They would confirm Mr Carrington’s 2004 will as his valid final will and prevent him from making any further wills. His new powers of attorney would be ruled invalid and the previous powers of attorney, in favour of Mrs Carrington, would be reinstated. Finally, a declaration would be made that Mr Carrington did not have the necessary mental capacity to file proceedings in the Family Court for dissolution of marriage or a division of relationship property.

[7] Mr Carrington has applied to strike out these proceedings on the basis that the originating application does not disclose a reasonably arguable cause of action, as this Court has no jurisdiction to make the declarations and orders sought. He also says that the proceedings are an abuse of process. Mrs Carrington opposes the strike out application.³

[8] Determining whether this Court has jurisdiction to make the orders and declarations sought raises a number of difficult legal issues. For example, what is the scope of the High Court’s inherent “*parens patriae*” jurisdiction, given the Family Court’s extensive jurisdiction under the PPPRA? Are the two jurisdictions intended to operate in parallel, or does the *parens patriae* jurisdiction operate as a safety net, to provide a remedy where the PPPRA does not? Further, can the High Court, in its inherent jurisdiction, determine that a person’s will is invalid due to lack of testamentary capacity, while the will-maker is still living? Or can that issue only be determined, in the High Court’s probate jurisdiction, after the death of the will-maker?

[9] I will address these and other issues raised by Mr Carrington’s strike out application in the following order. First, I will outline, in turn, the scope of this Court’s jurisdiction (both inherent and under the Declaratory Judgments Act 1908) in relation to mentally incompetent adults and the Family Court’s statutory jurisdiction under the PPPRA. I will then consider the interrelationship of the respective jurisdictions including, in particular, whether they are concurrent or complementary. Taking into account my conclusions as to the nature and scope of this Court’s

³ Her opposition is supported by interested party A.

jurisdiction, I will then consider the specific orders and declarations sought by Mrs Carrington. Finally, I will summarise my findings.

The High Court's parens patriae jurisdiction

Historical origins and current status of the jurisdiction - England

[10] Parens patriae means “parent of the nation”. The origins of the parens patriae jurisdiction are said to be “lost in the mists of antiquity”.⁴ The jurisdiction is thought to date back to at least the time of Edward I (1272-1307), when the English Crown asserted both a right and a duty, as parens patriae, to make decisions affecting the welfare of children or persons of unsound mind who were brought under the Crown’s protection. The precursor to the parens patriae jurisdiction appears to have been the jurisdiction exercised by feudal lords to take possession of the land of a tenant unable to perform his feudal duties.⁵

[11] The first recorded reference to the parens patriae jurisdiction is found in the Statute Prerogativa Regis in 1324, during the reign of Edward II.⁶ The powers were transferred from the King’s governors to the Court of Wards and Liveries (a Court established by Henry VIII) in 1540. When that Court was abolished in 1660, the jurisdiction was transferred to the Lord Chancellor and specific Chancery Judges who were appointed under the Sign-manual. The practice of conferring royal authority by Sign-manual was abandoned in the United Kingdom in 1959, however, with the introduction of the Mental Health Act 1959 (UK).

[12] In *Re F (Mental Patient: Sterilisation)*⁷ the House of Lords held that the High Court’s parens patriae jurisdiction over persons with an intellectual disability had been extinguished by the Mental Health Act 1959. This resulted in a lacuna in the law. In a remarkable demonstration of the resilience and pragmatism of the common law (which Lord Donaldson MR described in *Re F* as “common sense under a wig”)

⁴ *Re Eve* [1986] 2 SCR 388 at [32], citing Henry Theobald *The Law Relating to Lunacy* (Stevens & Sons, London, 1924).

⁵ *Re Eve*.

⁶ H Bell *An Introduction to the History and Records of the Courts of Wards and Liveries* (Cambridge University Press, Cambridge, 1953) at 128 citing William Stanford *An Exposition of the Kinges Prerogative* (Tottel, London, 1577), cited in *Re Eve*, above n 4.

⁷ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (HL) at 51, 54, 57-58, 70, 79.

the House of Lords met this challenge by “rediscovering” an inherent declaratory jurisdiction in relation to incompetent adults, founded on the principles of necessity. This inherent declaratory jurisdiction was then developed by subsequent courts into what Munby J later described (in 2005) as a “jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established *parens patriae* or wardship jurisdiction in relation to children”.⁸

[13] The Mental Health Act 1959 was subsequently replaced by the Mental Capacity Act 2005 (UK). In *DL v A Local Authority*,⁹ the English Court of Appeal held that, even though the Mental Capacity Act had put in place statutory mechanisms to protect adults lacking capacity, it had not taken away the High Court’s inherent jurisdiction to intervene to protect vulnerable adults when necessary, particularly where their capacity had been impaired by coercion or undue influence (a situation not covered by the Mental Capacity Act). Lord Justice McFarlane stated that:¹⁰

...In the absence of any express provision, the clear implication is that if there are matters outside the statutory scheme to which the inherent jurisdiction applies then that jurisdiction continues to be available to continue to act as the “great safety net” described by Lord Donaldson [in *Re F*]...

[14] Accordingly, in the United Kingdom, the High Court’s inherent jurisdiction to protect vulnerable adults continues in force, although it is clear from the case law that that jurisdiction is complementary to the Mental Capacity Act, rather than operating in parallel with it. The inherent jurisdiction operates as a safety net, to fill the gaps in the statutory regime.

The parens patriae jurisdiction in New Zealand

[15] The New Zealand High Court has inherent jurisdiction as a superior court of general jurisdiction. Section 16 of the Judicature Act 1908 confers on the High Court all of the jurisdiction it had on the coming into operation of the Act, and all judicial jurisdiction which may be necessary to administer the laws of

⁸ *E v Channel Four Television Corporation* [2005] EWHC 1144 (Fam), [2005] 2 FLR 913 at [55].

⁹ *DL v A Local Authority* [2012] EWCA Civ 253, [2012] 3 WLR 1439.

¹⁰ At [61].

New Zealand. Virtually from its first establishment in 1841, the High Court had conferred on it all the legal (or common law), equitable, and probate jurisdiction that the superior courts had in England as at that date.¹¹

[16] The *parens patriae* jurisdiction was expressly conferred on the High Court by the Supreme Court Ordinances of 1841 and 1844. The relevant provisions were carried over into section 17 of the Judicature Act 1908, which provides:

17 Jurisdiction as to mentally disordered persons, etc.

The Court shall also have within New Zealand all the jurisdiction and control over the persons and estates of idiots, mentally disordered persons, and persons of unsound mind, and over the managers of such persons and estates respectively, as the Lord Chancellor of England, or any Judge or Judges of Her Majesty's High Court of Justice or of Her Majesty's Court of Appeal, so far as the same may be applicable to the circumstances of New Zealand, has or have in England under the Sign-manual of Her Majesty or otherwise.

[17] Unlike in the United Kingdom, that jurisdiction has not been extinguished by statute in New Zealand. The High Court continues to have the inherent *parens patriae* jurisdiction which the appointed English judges had prior to the passage of the Mental Health Act 1959.¹²

The scope of the jurisdiction

[18] The scope of the *parens patriae* jurisdiction was described by the Supreme Court of Canada in *Re Eve* as follows:¹³

The *parens patriae* jurisdiction for the care of the mentally incompetent is vested in the provincial superior courts. Its exercise is founded on necessity - the need to act for the protection of those who cannot care for themselves. The jurisdiction is broad. Its scope cannot be defined. It applies to many and varied situations, and a court can act not only if injury has occurred but also if it is apprehended. The jurisdiction is carefully guarded and the courts will not assume that it has been removed by legislation.

While the scope of the *parens patriae* jurisdiction is unlimited, the jurisdiction must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not for the benefit of others. It must at all times be exercised with great caution, a caution that

¹¹ *Laws NZ* Jurisdiction of the High Court para 133.

¹² *Re R* [1974] 1 NZLR 399 (CA) at 401.

¹³ *Re Eve*, above n 4 at 389-390.

must increase with the seriousness of the matter. This is particularly so in cases where a court might be tempted to act because failure to act would risk imposing an obviously heavy burden on another person.

[19] Those comments are equally apt in the New Zealand context. The jurisdiction conferred on this Court by s 17 of the Judicature Act is a broad one, aimed at protection of the vulnerable.¹⁴ It extends beyond property matters to health and related matters¹⁵ and even matters pertaining to the status of marriage.¹⁶

The Declaratory Judgments Act 1908

[20] The Declaratory Judgments Act 1908 provides the High Court with jurisdiction to determine questions of construction or the validity of legislation or a legal instrument or agreement, regardless of whether any coercive or substantive relief (for example an injunction or damages) could be obtained. In particular, s 3 of that Act provides:

Declaratory orders on originating summons

Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation...or any bylaw...or any deed, will, or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or

Where any person claims to have acquired any right under any such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof,—

such person may apply to the High Court by originating summons for a declaratory order determining any question as to the construction or validity of such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or of any part thereof.

[21] Proceedings under the Declaratory Judgments Act require the Court to first determine whether the matter in respect of which a declaration is sought falls within the scope of the Declaratory Judgments Act (the jurisdiction issue) and, secondly,

¹⁴ *P v Department of Social Welfare* [1983] NZLR 266 (CA) at 272. See also *M v M* [1983] NZLR 502 at 506, (1983) 2 NZFLR 270 (CA).

¹⁵ For example, in *Re X* [1991] 2 NZLR 365, [1991] NZFLR 49 (HC) Hillyer J relied on the *parens patriae* jurisdiction to authorise a hysterectomy on a severely mentally retarded fifteen year old girl who lacked the capacity to understand, and therefore consent to, the procedure.

¹⁶ *Re W* [1994] 3 NZLR 600, (1994) 12 FRNZ (HC).

whether the case is an appropriate one for the exercise of the Court's discretion to make a declaration.

The Family Court's jurisdiction under the PPPRA

Overview of the PPPRA

[22] The PPPRA provides the Family Court with jurisdiction to make wide ranging orders to protect mentally incompetent adults. It can order that a particular person is unable to manage their own affairs, appoint a welfare guardian to look after their personal care and welfare¹⁷ or appoint property managers to manage their financial affairs.¹⁸

[23] The principles underpinning the Act include the presumption of competence,¹⁹ the principle of least restrictive intervention,²⁰ and the principle of empowerment.²¹ The PPPRA is structured so as to promote the autonomy of subject persons, ensure their right to be heard, and enable and encourage them to act in accordance with whatever capacity they may still have.

[24] Jurisdiction under the PPPRA is vested in the Family Court in the first instance.²² Section 83 provides for a right of appeal to the High Court. Further, s 14 of the Family Courts Act 1980 provides for the transfer of Family Court proceedings to the High Court in certain circumstances.

Provisions relating to wills

[25] A property order does not extinguish testamentary capacity. The Family Court can, however, direct that a person subject to such an order can only make a will with leave of the Court.²³ The Family Court also has power, in effect, to validate a will that has previously been made.²⁴ If it appears to the Court that a prior

¹⁷ Parts 1 and 2.

¹⁸ Part 3.

¹⁹ Sections 5 and 6(3).

²⁰ Section 8(a).

²¹ Section 8(b).

²² In s 2 "court" is defined as the Family Court. See also *W v Public Trust* [2010] NZFLR 277, (2010) 28 FRNZ (HC) and *Re Morahan* [1993] NZFLR 531, (1993) FRNZ 229 (HC).

²³ Section 54(2).

²⁴ Section 54(3) and (4).

will was made when a person was unable to manage his or her own affairs, the Court may cause inquiries to be made as to whether that will accurately expresses the present desires and intention of the subject person.²⁵

[26] Where the Court has directed that a will can only be made with leave of the Court, or the Court is satisfied that the subject person lacks testamentary capacity, the Court may authorise the person's property manager to execute a will for and on behalf of that person, in such terms as the Court directs.²⁶ In such circumstances the Court may cause the present desires and intention of the person to be ascertained (to the extent possible) and may authorise the manager to execute a new will reflecting such intentions.²⁷ If it is not possible to ascertain the person's present desires and intentions, the Family Court will endeavour to "give effect to what the testator with all his or her traits and foibles would have seen fit to do, if now able to do it".²⁸

[27] The Court must first settle the proposed terms of the testamentary provision on a preliminary basis. Any person with a proper interest is entitled to be heard at that stage, before the final terms of the will are settled.²⁹

Enduring powers of attorney

[28] Enduring powers of attorney are entirely creatures of statute, created by the PPPRA. There is no equivalent common law instrument. At common law, a power of attorney was automatically revoked when the donor became mentally incompetent. One of the most innovative aspects of the PPPRA was therefore the introduction, in Part 9 (which was added at Select Committee stage), of enduring powers of attorney. These continue in effect after the donor loses capacity.

[29] With ordinary powers of attorney, the donor will be mentally capable and therefore able to "supervise" the actions of their attorney. This does not apply to enduring powers of attorney. The PPPRA accordingly confers extensive supervisory jurisdiction on the Family Court in relation to such instruments. Indeed, following a

²⁵ Section 54(5).

²⁶ Section 55(1).

²⁷ Section 54(6).

²⁸ *Kirwan v Public Trustee* [1995] 2 NZLR 498 at 505, [1995] NZFLR 249 (HC).

²⁹ Section 55(2).

review of enduring powers of attorney by the Law Commission in 2000³⁰ the safeguards in the PPPRA in relation to enduring powers of attorney were further strengthened in 2007.³¹

The interface between the jurisdiction of the High Court and Family Court

The key issue

[30] It was common ground between the parties that the High Court can exercise its parens patriae jurisdiction to protect vulnerable adults in circumstances not falling within the scope of the PPPRA. The parties differed, however, as to whether the High Court can exercise such jurisdiction in relation to matters falling *within* the scope of the PPPRA. Does the High Court’s jurisdiction operate in parallel to the statutory jurisdiction of the Family Court under the PPPRA? Or is the High Court’s jurisdiction complementary, aimed at “filling the gaps” in the PPPRA?

The relationship between the Declaratory Judgments Act and the PPPRA

[31] The PPPRA does not expressly exclude the High Court’s jurisdiction under the Declaratory Judgments Act. The High Court’s jurisdiction to make declarations in relation to a particular subject matter may, however, be impliedly excluded by statute.

[32] In cases where a specific procedure or process is provided for by the relevant legislation, it is generally presumed that the prescribed process should be followed. This is sometimes referred to as the duty to exhaust specialised statutory remedies. The learned authors of *Zamir and Woolf: The Declaratory Judgment*, observe as follows:³²

In cases in which a specific remedy is provided by legislation, it will usually be presumed that even though the Legislature has not expressly excluded the power of the High Court to grant declaratory relief, it intends that normally

³⁰ Law Commission Preliminary Paper 40 *Misuse of Enduring Powers of Attorney: A discussion Paper* (Wellington, Law Commission, 2000).

³¹ Protection of Personal and Property Rights Amendment Act 2007.

³² Jeremy Woolf *Zamir and Woolf: The Declaratory Judgment* (4th ed, Sweet & Maxwell, United Kingdom, 2011) at 220. See also *Barracough v Brown* [1987] AC 615 (HL) (when statute creates a right and summary remedy for enforcing it, superior courts have no original jurisdiction to enforce the right); *Red Hill v Papakura District Council* (2000) 6 ELRNZ (HC); *Graham v Auckland Council* [2013] NZHC 833, (2013) 17 ELRNZ 299.

the prescribed remedy and no other should be pursued. Naturally the courts will attach importance to this indication given by Parliament. This is particularly so where the issue is assigned to a tribunal rather than the High Court. Where a particular tribunal is set up to deal with the disputes in question, there are likely to be obvious advantages in encouraging litigants to use that tribunal to resolve disputes: it is likely to have greater expertise on the particular subject and its procedures should be designed to deal effectively with the issues raised. The composition of its members, as in the case of employment tribunals, may mean that it possesses firsthand experience which is not available to the ordinary courts, and although disputes may ultimately go from the tribunal to the courts on appeal, it is clearly valuable that there should be some expert input before the appeal is considered by the courts.

(Footnotes omitted).

[33] In my view such observations are applicable in this case, particularly given the specialised role of the Family Court within the New Zealand legal hierarchy.

[34] In addition, there is a related principle that when specific rights are *created* by statute (in contrast to a statute simply providing a remedy in relation to pre-existing matters) the Courts will generally require parties to use the special statutory procedures provided in relation to those rights. In *Barraclough v Brown* the Court held that a claim could not be made under a statute, while at the same time the process laid down by the statute for facilitating that claim is ignored.³³

...it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court, he can come first to the High Court to have his right to recovery – the very matter relegated to the inferior court – determined. Such a proposition was not supported by authority, and is, I think, unsound in principle.

[35] Courts will accordingly discourage attempts to bypass the procedures set out in a statute creating a particular right.³⁴ This principle is particularly apt in relation to the relief sought in relation to Mr Carrington's enduring powers of attorney, given that such instruments are entirely creatures of statute. As noted above, they were created by the PPPRA and did not exist at common law. The PPPRA includes comprehensive provisions in relation to them, with exclusive supervisory jurisdiction conferred on the Family Court.

³³ *Barraclough v Brown* [1897] AC 615 at 620.

³⁴ See for example *Argosam Finance Co Ltd v Oxby (Inspector of Taxes)* [1965] Ch 390, [1964] 3 All ER 561.

[36] In relation to matters falling within the scope of the PPPRA, Parliament clearly intended that original jurisdiction reside in the Family Court. The High Court's role is an appellate one. That is made clear by Part 7 of the PPPRA and, in particular, s 83 which provides for appeals from the Family Court to the High Court and, in special cases, further appeals to the Court of Appeal on questions of law.

[37] In accordance with the principles I have outlined, and the relevant statutory context, the High Court's jurisdiction under the Declaratory Judgments Act in relation to matters falling within the scope of the PPPRA is, in my view, residual in nature. If a matter falls squarely within the scope of the PPPRA then the statutory remedies and procedures under that Act must first be exhausted, before a declaratory judgment can be sought in the High Court.

[38] On the particular facts of this case, little turns on whether this is seen as a jurisdictional issue (as Mr Waalkens QC submitted) or as a matter going to the exercise of the Court's discretion (as Mr Miles QC submitted). In enacting the PPPRA and conferring on the Family Court original jurisdiction under that Act, Parliament impliedly excluded the right of litigants to seek declaratory judgments from the High Court in relation to matters falling squarely within the scope of the PPPRA. Even if that conclusion is incorrect, it would be inappropriate in my view to exercise any such jurisdiction in this case, to the extent that the relevant issues fall squarely within the scope of the PPPRA, for the reasons I have outlined above.

Can the Declaratory Judgments Act jurisdiction be invoked where there are significant factual disputes?

[39] A further ground advanced by Mr Waalkens for challenging the existence of jurisdiction under the Declaratory Judgments Act was that these proceedings involve very significant factual disputes and large amounts of highly contentious evidence.

[40] In *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd*³⁵ the Court of Appeal stated that the Declaratory Judgments Act is fundamentally designed to provide a quick and inexpensive means of obtaining a judicial interpretation where the matter in dispute cannot be conveniently determined in its ordinary jurisdiction

³⁵ *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) at 85.

and where a “declaratory judgment would be appropriate relief”.³⁶ Litigation with difficult questions of mixed fact and law were said to be unsuitable for the declaratory judgment procedure.³⁷

[41] Ms Davenport QC submitted that recent case law indicates a relaxation of this position, at least at High Court level.³⁸ I note, however, that in *Mandic v Cornwall Park Trust Board (Inc)*³⁹ the Chief Justice recently observed that “application for declaratory orders is inappropriate when there are questions of fact to be determined (as is implicit in the terms of s 3)”.

[42] This case has been set down for an eight week hearing. Over 170 affidavits have been filed (albeit some of them on interlocutory issues) by 85 witnesses. Notices to cross-examine have been served in relation to 67 witnesses. Allowing this case to proceed under the Declaratory Judgments Act would not simply involve a minor erosion of the principle that determination of factual issues is inappropriate in declaratory judgment proceedings. Rather, total abandonment of the principle would be required. In the absence of a clear indication from an appellate court that *New Zealand Insurance Co Ltd* is no longer good law, I have grave reservations as to the appropriateness of such a course.

[43] I accept Ms Davenport’s submission, however, that the existence of factual disputes is a matter that strictly goes to discretion, rather than jurisdiction per se. Further, there may be room for greater latitude for consideration of factual issues when the issue before the Court is the *validity* of a document as opposed to its construction. I accordingly have some doubts as to whether this ground alone is sufficient to justify striking out the proceedings, to the extent that they rely on the Declaratory Judgments Act. In addition, I note that counsel raised the possibility (but did not fully develop it) that “declarations at common law” could be made as an alternative to declarations under the Declaratory Judgments Act, and that the

³⁶ At 85.

³⁷ At 93.

³⁸ For example *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) and *Ambrose v Attorney-General* [2012] NZAR 23 (HC).

³⁹ *Mandic v The Cornwall Park Trust Board (Inc)* [2011] NZSC 135, [2012] 2 NZLR 194 at [5].

existence of factual disputes would not be an impediment to such declarations being made.

[44] Accordingly, to the extent that any declarations sought in the originating application may not fall within the scope of the PPPRA I will consider, on its merits, the issue of whether the Declaratory Judgments Act provides jurisdiction for making such declarations.⁴⁰

The relationship between the parens patriae jurisdiction and the PPPRA jurisdiction

[45] I have held that there is a duty to exhaust statutory remedies under the PPPRA before invoking this Court's jurisdiction under the Declaratory Judgments Act. The same principle applies, in my view, to this Court's parens patriae jurisdiction. It operates in a manner that is complementary to the Family Court's statutory jurisdiction, rather than in parallel with it.

[46] The inherent jurisdiction is able to be invoked when justice requires it.⁴¹ Justice does not, however, require the inherent jurisdiction be invoked in circumstances where there is an adequate statutory remedy available. Further, as the Supreme Court of Canada observed in *Re Eve*, the exercise of the court's inherent jurisdiction in this area is founded on the principle of *necessity* – the need to act for the protection of those who cannot care for themselves. It will not be necessary to invoke the Court's inherent jurisdiction, however, where a remedy under the PPPRA is readily available.

[47] Although jurisdictional issues at the interface of the PPPRA and the parens patriae jurisdiction have arisen relatively rarely, the existing case law generally supports the conclusion I have reached. Firstly, in *Re Morahan Williams J* expressed the view that following the enactment of the PPPRA the High Court “now has a purely appellate role except in exceptional cases where it might exercise its inherent jurisdiction”.⁴²

⁴⁰ From [76] onwards.

⁴¹ *R v Moke and Lawrence* [1996] 1 NZLR 263 (CA).

⁴² Above n 22 at 533.

[48] *Re W* is also consistent with the characterisation of the inherent jurisdiction as supplementary to the statutory jurisdiction. It involved an application to dissolve a marriage entered into by the subject person, a matter not permitted by the PPPRA (s 18(1)(a)). Neazor J noted that the preservation of the High Court's inherent jurisdiction by s 114 of the PPPRA may have been designed to complement the exclusion of a welfare guardian's ability to deal with the matters at hand.⁴³ The inherent jurisdiction accordingly remains available in situations not specifically provided for by statute or where the statute does not provide the remedy sought.

[49] In *Dawson v Keesing* Heath J held that:⁴⁴

Subject to a Family Court's ability to transfer any proceedings before it to the High Court (under s 14 of the Family Courts Act 1980) all originating jurisdiction under the Act is vested in a Family Court.

[50] His Honour expressed the view that once a proceeding had been transferred to the High Court, the High Court had greater powers than the Family Court because of the preservation of the Court's inherent jurisdiction by s 114 of the PPPRA. In that case, however, the proceeding had been properly commenced in the Family Court under the PPPRA and then transferred by a Family Court Judge to the High Court.

[51] In both *Re JSB*⁴⁵ and *Chief Executive, Ministry of Social Development v S*⁴⁶ Heath J expressed the view that the High Court's inherent *parens patriae* jurisdiction was available when there was no statutory jurisdiction or "specific legal rules" enabling the Court to make the orders sought. He held in *Re JSB* that the jurisdiction could be exercised only in circumstances that fell within its proper scope and where there is no conflict with statutory or regulatory provisions:⁴⁷

The first port of call must be the statute... the statutory scheme remains relevant in identifying the limits of any residual jurisdiction.

⁴³ Above n 16 at 605.

⁴⁴ *Dawson v Keesing* HC Auckland PPR2003-092-2669, 25 May 2004 at [7].

⁴⁵ *Re JSB* [2010] 2 NZLR 236 (HC).

⁴⁶ *Chief Executive, Ministry of Social Development v S* (2009) 28 FRNZ 236 at 238.

⁴⁷ *Re JSB*, above n 45 at [52].

[52] Heath J further observed that where a child is under the guardianship of the Family Court it would be necessary to transfer the proceeding to this Court, under s 30(4) of the 2004 Act, for relief to be sought under the inherent jurisdiction.

[53] In *JMG v CCS Disability Action (Wellington Branch) Inc* Miller J held that there was jurisdiction to add the name of a subject person to a tenancy agreement under s 10(4) of the PPPRA, but also accepted:⁴⁸

...that this Court's *parens patriae* jurisdiction would allow this Court on appeal to order that a protected person be made a tenant, *if there was no jurisdiction to do so under s 10(4)*. If necessary I would invoke that jurisdiction. I prefer the view, however, that s 10(4) does extend to the order made in this case...

(Emphasis added)

[54] I have not overlooked the cases relied on by Mr Miles and Ms Davenport, in support of their respective submissions that the High Court has parallel jurisdiction to the Family Court in relation to PPPRA issues. In particular, they referred to *Jew v Jew*,⁴⁹ *Yeoman v Public Trust Ltd*⁵⁰ and *Kerridge v Kerridge*.⁵¹ I note, however, that those cases all arose in the context of relationship property proceedings, where the interrelationship between the jurisdiction of the Family Court and High Court is necessarily somewhat more complex. They are therefore of rather less assistance than the cases I have referred to above, which arose specifically in the PPPRA context. Further, the observations of the Court of Appeal in *Kerridge v Kerridge* are not necessarily inconsistent with the views I have reached in the PPPRA context. For example, the Court observed that:⁵²

While the [Property Relationships Act 1976] is a code in respect of transactions between spouses in respect of property, it is not a code in respect of all available remedies between spouses for all possible legal disputes that may arise between them.

[55] Similarly, the PPPRA is not a “code” in relation to all legal issues that may arise in respect of mentally incompetent adults. As is apparent from previous case law, issues will arise from time to time that fall outside the scope of the PPPRA. In

⁴⁸ *JMG v CCS Disability Action (Wellington Branch) Inc* [2012] NZFLR 369 (HC) at [41].

⁴⁹ *Jew v Jew* [2003] 1 NZLR 708 (HC).

⁵⁰ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC).

⁵¹ *Kerridge v Kerridge* [2009] NZCA 14.

⁵² At [52].

such circumstances the High Court will be able to exercise its inherent jurisdiction (or possibly its declaratory judgments jurisdiction) in order to “fill the gap”.

[56] The view that the High Court’s jurisdiction is complementary rather than parallel to the Family Court’s jurisdiction under the PPPRA is also consistent with the legal position in England. Lord Donaldson in *Re F* referred to the inherent jurisdiction as a “great safety net”. It operates in England to fill any gaps in the statutory scheme and protect vulnerable adults whose circumstances do not fall within the scope of the Mental Capacity Act. The inherent jurisdiction does not operate to usurp the statutory role of the Court of Protection (which has original jurisdiction under the Mental Capacity Act) but to complement it. For example, in *DL v A Local Authority* Davis LJ held that where cases fell within the scope of the Mental Capacity Act and were capable of being dealt with under its provisions, the invocation of the inherent jurisdiction would be inappropriate. However:⁵³

...in the case of an adult who lacks capacity within the meaning of the 2005 Act, it appears that the inherent jurisdiction remains available to cover situations not precisely within the reach of the statute.

[57] Mr Miles relied heavily on the savings provision in s 114 of the PPPRA, which provides that “nothing in this Act shall limit the general jurisdiction of the High Court under section 17 of the Judicature Act 1908 or otherwise”. Section 17, however, preserves the *parens patriae* jurisdiction “so far as the same may be applicable to the circumstances of New Zealand”. The circumstances of New Zealand must necessarily include the extent to which Parliament has enacted laws, such as the PPPRA, for the protection of mentally incompetent adults. Thus, where a statutory jurisdiction operates to vest additional functions in the Family Court, it will trigger a corresponding attenuation of the High Court’s inherent jurisdiction.

[58] Section 114 makes it clear that the PPPRA is not a code in relation to incompetent adults. This avoids the difficulties that arose in the United Kingdom when the *parens patriae* jurisdiction in relation to incompetent adults was extinguished by the Mental Health Act 1959. As outlined at [12] above, that resulted

⁵³ Above n 9 at [70].

in a lacuna in the law that the House of Lords had to remedy in *Re F* in 1980 by “rediscovering” an inherent declaratory jurisdiction that effectively paralleled the *parens patriae* jurisdiction. Section 114 avoids similar difficulties arising in New Zealand.

[59] The alternative interpretation of s 114, advanced on behalf Mrs Carrington, was that the High Court retains a broad s 17 jurisdiction which operates in parallel with the PPPRA. Such an interpretation would, however, render meaningless the various statutory provisions which confer original jurisdiction under the PPPRA on the Family Court, with the High Court having a solely appellate role, unless the Family Court elects to transfer proceedings to it under the Family Courts Act.

[60] The first port of call in relation to mentally incompetent adults must therefore be the Family Court, in its PPPRA jurisdiction. To the extent that issues may arise which fall outside the scope of the PPPRA, the High Court will be able to intervene to protect the vulnerable, utilising its inherent *parens patriae* jurisdiction.

[61] I now turn to consider the three categories of declarations and orders sought by Mrs Carrington, focussing in particular on whether the particular issues raised in each category fall within the scope of the Family Court’s PPPRA jurisdiction. It is only to the extent that they do not, that such issues will be justiciable in this Court in the first instance.

Orders and declarations sought in relation to enduring powers of attorney

[62] Mrs Carrington seeks a declaration that Mr Carrington’s 2011 powers of attorney (in relation to both property and personal care and welfare) are invalid, on the grounds of lack of capacity and undue influence. She seeks orders reinstating the powers of attorney in her favour. In the alternative, Mrs Carrington seeks that new attorneys be appointed by the Court.

[63] The first observation I make is that the Family Court has recently appointed a temporary property manager for Mr Carrington. Such an order prevails over either the 2004 or 2011 enduring powers of attorney in relation to property. I note, however, that Mrs Carrington has foreshadowed her intention to challenge, in the

Family Court, the appointment of a temporary property manager. Accordingly, although the issues raised in relation to the property power of attorney are currently moot, they may not remain so.

[64] Whether the Family Court has jurisdiction to determine if a person has capacity to grant an enduring power of attorney was considered by Potter J in *W v Public Trust*. Her Honour found that pursuant to s 11 of the Family Courts Act 1980 (which creates the Family Court and provides its jurisdiction) the Family Court had exclusive jurisdiction in all matters under the PPPRA.⁵⁴ She noted that the Family Court's jurisdiction in respect of an enduring power of attorney is provided by s 102 of the PPPRA, which relevantly provides:

102 Court's jurisdiction in respect of an enduring power of attorney

(1) A Court shall have jurisdiction to determine —

(a) Whether or not any instrument is an enduring power of attorney;
or

(b) Whether or not the donor of an enduring power of attorney is mentally incapable.

...

[65] Counsel for Ms W submitted to Potter J that s 102(1)(b) could not be used to retrospectively determine the capacity of a donor at the time they signed the enduring power of attorney, due to the use of the present tense ("is"). The Family Court accordingly did not have the necessary jurisdiction. Potter J disagreed. She stated that:⁵⁵

Given the extent and breadth of the jurisdiction vested in the Family Court in situations where the donor has become mentally incapable and given that the Family Court has jurisdiction to determine when that situation arises, I agree with Mr Gilchrist's submission that it makes no logical sense that Parliament would have intended another and different court should have the jurisdiction to determine whether the enduring power of attorney was validly executed and entered into, including whether the donor had mental capacity at the time of execution. Such an inefficient and illogical outcome would hardly be consistent with the purpose of the Act to protect and promote the rights of persons who are not fully able to manage their own affairs.

⁵⁴ Above n 22 at [23].
⁵⁵ At [37].

[66] Her Honour concluded that the resolution of the issue lies in s 102(1)(a).⁵⁶ In determining whether a particular instrument is, or is not, an enduring power of attorney, the Family Court would be entitled to consider whether the document was validly executed and entered into. Her Honour cited *Re Tony*⁵⁷ in support of the proposition that if there is no capacity to grant a power of attorney the grant will be ineffective.

[67] I find Potter J's analysis compelling, and I agree with her conclusion. I note that there was also a second issue before Potter J, which was:⁵⁸

If [the Family Court does not have jurisdiction] which Court has jurisdiction:
District Court or High Court?

[68] Her Honour stated that it was not necessary for her to determine this issue, given that she had concluded that the Family Court did have jurisdiction to determine the capacity of the donor of an enduring power of attorney. She went on to state, however, that:⁵⁹

...I simply observe that while the High Court would have inherent jurisdiction to determine such a matter, it seems the District Court would not have jurisdiction.

[69] Mr Miles submitted that, in making this statement, her Honour was recognising that the Family Court and High Court had parallel jurisdiction in relation to enduring powers of attorney. In my view, however, that is not the correct interpretation of her Honour's comment. Earlier in her judgment, Potter J clearly recognised that the Family Court has exclusive jurisdiction in all matters under the PPPRA and set out the reasons for her view. Her Honour's observation regarding the High Court's inherent jurisdiction was simply in response to a hypothetical question – if the Family Court does not have jurisdiction, which of the High Court or District Court would have the necessary jurisdiction? Viewed in that context, I entirely agree with her conclusion. If the Family Court did not have jurisdiction, then the High Court would be able to exercise its inherent jurisdiction.

⁵⁶ At [38].

⁵⁷ *Re "Tony"* (1990) 5 NZFLR 609 (FC) at 621.

⁵⁸ At [2].

⁵⁹ At [49].

[70] I have accordingly concluded that the Family Court has the necessary jurisdiction under the PPPRA to determine whether Mr Carrington had capacity, in March 2011, to revoke his existing powers of attorney and appoint new attorneys. The situation is even more clear-cut in relation to the allegations of undue influence. Under s 102(2)(h) of the PPPRA the Family Court has jurisdiction to “determine whether the donor of the power was induced by undue influence or fraud to create the power”.

[71] There is accordingly no need for this Court to determine whether Mr Carrington’s 2011 power of attorney is valid. That issue is within the scope of the Family Court’s jurisdiction under the PPPRA. It follows that this aspect of the originating application should be struck out.

Orders and declarations sought regarding Mr Carrington’s will

[72] Mrs Carrington seeks the following orders and declarations in relation to Mr Carrington’s will(s):

- (a) [A declaration that] Mr Carrington’s new will, executed on 4 May 2011, was executed at a time when he lacked testamentary capacity, and for any consequential orders.
- (b) [A declaration that] the new will is invalid and of no effect.
- (c) To the extent that it may be necessary [an order] by analogy with s 55(1) of the PPPRA authorising a manager to execute a will on behalf of Mr Carrington in terms of the will he executed in 2004.
- (d) [A declaration that] Mr Carrington lacks testamentary capacity to make further wills.
- (e) [Orders that] the evidence taken in this case be perpetuated for any subsequent hearing on the validity of the new will and any subsequent will of Mr Carrington.

[73] The net effect of such orders and declarations, if made, would be to “freeze” the position as it existed in 2004, prior to the parties’ separation. The 2004 will would be confirmed as Mr Carrington’s final valid will, while associated orders and declarations would ensure that neither Mr Carrington, nor his property manager on his behalf (under the supervision of the Family Court) could execute a new will which differed in terms from his 2004 will.

[74] I have outlined above the powers of the Family Court under the PPPRA in relation to wills. They are extensive. If the Family Court concluded that Mr Carrington lacked testamentary capacity, or was subject to undue influence, when he made his 2011 will, it has the necessary powers to remedy the situation. The PPPRA provisions are directed, however, to the recognition or creation of a will that accords with the *present* desires and intention of the subject person. That is not, however, what Mrs Carrington seeks. She seeks a ruling that the 2004 will (which pre-dates the parties’ separation) is Mr Carrington’s final valid will.

[75] It is possible that Mrs Carrington could obtain that outcome under the PPPRA, but only if the Family Court was satisfied that the 2004 will properly reflects Mr Carrington’s present intentions and desires. It is therefore at least arguable that the specific “relief” sought by Mrs Carrington in this part of her originating application is not available to her under the PPPRA. I will therefore consider whether this Court has jurisdiction, either under the Declaratory Judgments Act, or in its inherent jurisdiction, to make the declarations and orders she seeks.

Does the Declaratory Judgments Act provide jurisdiction to determine the validity of the will of a living will-maker?

[76] The relevant parts of s 3 of the Declaratory Judgments Act, for present purposes, are as follows:

Declaratory orders on originating summons

Where any person claims to have acquired any right under any.....will...or to be in any other manner interested in the construction or validity thereof...such person may apply to the High Court by originating summons for a declaratory order determining any question as to the construction or validity of such...will... or of any part thereof.

[77] Mr Miles and Ms Davenport both submitted that this section provides the High Court with jurisdiction to determine the validity of a will while the will-maker is still alive. Mr Miles relied, by analogy, on *Gillett v Holt*.⁶⁰ That case is not, however, an example of a court allowing a will to be contested during the will-maker's lifetime. Rather, that case was decided on the basis of proprietary estoppel. Nor do I find the line of cases that hold that a contract not to revoke a will is binding to be of assistance. Those cases involve the simple application of the law of contract to circumstances in which consideration by one side has been agreed to be provided by testamentary disposition. If the fulfilment of the will-maker's part of the bargain is made impossible by the disposition, prior to death, of the particular property in question, then an action for breach of contract will lie. Such circumstances are far removed from this case.

[78] In the absence of any previous New Zealand or English authority directly on point, Mr Waalkens referred to a Texas case, *Cowan v Cowan*,⁶¹ which bears a number of similarities to the present case. In that case two of the will-maker's three children brought declaratory judgment proceedings seeking to have their mother's purported will declared invalid, while she was still alive. They alleged undue influence by a third sibling, as well as lack of testamentary capacity. As in New Zealand, Texas probate legislation did not permit the probate of the will of a living person. The Court noted that "since Mrs. Cowan is not dead, there are no heirs and there is no will".⁶²

[79] The plaintiffs relied on the Texas Uniform Declaratory Judgments Act ("Texas DJA"), which provides (in similar terms to New Zealand's Declaratory Judgments Act) that "any person interested under a deed, will, or written contract may have determined any question of validity arising under the instrument".⁶³ The Texas Civil Appeals Court held, however, that it did not have jurisdiction under that provision to determine whether a will was valid while the will-maker was still alive.⁶⁴ The Texas DJA did not create new substantive rights, but was remedial in

⁶⁰ *Gillett v Holt* [2000] EWCA Civ 66.

⁶¹ *Cowan v Cowan* 254 S W 2d 862 (Tex Civ App 1952).

⁶² At 865.

⁶³ At 862.

⁶⁴ At 865.

nature, providing a new method of exercising existing jurisdiction. There was no pre-existing jurisdiction, however, to determine the validity of the will of a living will-maker.

[80] The Court noted that a will is ambulatory in nature and “those named as beneficiaries are devisees only in the embryo”.⁶⁵ The Texas DJA did not contemplate declarations upon matters where the interest of the plaintiff was contingent upon the occurrence of some future event.⁶⁶ The Court accordingly concluded that it had no jurisdiction to grant the declarations sought.

[81] Almost 50 years later, the Court of Appeals of Tennessee in *Wynns v Cummings*⁶⁷ also concluded that no jurisdiction exists to declare the validity or invalidity of a will before the testator’s death.⁶⁸

[82] Other than *Cowan v Cowan*, the only case counsel were able to locate that touched on the issue of the Court’s jurisdiction in relation to the will of a living person was the 1789 Court of King’s Bench case of *Allen v Dundas*.⁶⁹ Buller J observed in that case that:⁷⁰

The first question to be considered is, What is the effect of a probate? It has been contended by the plaintiff’s counsel, first, that it is not a judicial act; and secondly, that it is not conclusive. But I am most clearly of the opinion that it is a judicial act; for the Ecclesiastical Court may hear and examine the parties on the different sides, whether a will be or be not properly made; that is the only Court which can pronounce whether or not the will be good. And the Courts of Common Law have no jurisdiction over the subject. Secondly, The probate is conclusive till it be repealed: and no Court of Common Law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person; but in such a case the Ecclesiastical Courts have no jurisdiction, and the probate can have no effect: their jurisdiction is only to grant probates of the wills of dead persons. The

⁶⁵ At 865.

⁶⁶ At 865.

⁶⁷ *Wynns v Cummings* WL 1683757 (Term Ct App 2001). See also the decision of the Missouri Court of Appeal in *Estate of Rogers v Battista* 125 S W 3d 334 (Mo Ct App 2004) to similar effect and *Pond v Faust* 90 Wash 117 155 776 (1916).

⁶⁸ It is interesting to note that several US states (Ohio, Arkansas, and North Dakota) have enacted legislation specifically providing for validation of a will while the will-maker is still alive. These are known as “ante-mortem probate” statutes. They enable a living will-maker to seek a judicial finding as to the validity of their will, including confirmation that they had testamentary capacity and were free from undue influence. The will-maker remains able, however, to make a new will or revoke the validated will.

⁶⁹ *Allen v Dundas* (1779) 3 Term Rep 125, [1775 - 1802] All ER Rep 398.

⁷⁰ At 129-130.

distinction in this respect is this; if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity.

[83] To put those comments in historical context, in England and Wales, prior to 1857, the ecclesiastical courts probated wills, granted letters of administration and heard cases related to disputed wills. Probate was transferred to civil courts by the Court Probate Act 1857.

[84] Obviously, this Court is not bound to follow US case law. I find the reasoning in *Cowan*, however, to be compelling. The normal practice in New Zealand (as in Texas) is for the validity of a will to be determined after the will-maker's death, by the obtaining of probate. The death of a will-maker is a condition precedent for the exercise of High Court's probate jurisdiction.⁷¹ Prior to then a "will" is simply a document that appears to set out the will-maker's testamentary intentions, as at the date the document was signed. There may be several such documents. None of them can have legal effect as a will, however, until the will-maker has died and one of the relevant documents has been recognised as a valid will and admitted to probate.

[85] Prospective beneficiaries have no right or interest in the will-maker's property until such time as he or she dies.⁷² Prior to that time any interest they may have under the will is in the nature of an expectancy, which may or may not come to fruition. Such an expectancy may be frustrated by a range of factors, including the making of a new will, the disposal of the will-maker's property to third parties while he or she is still living, or the prospective beneficiary predeceasing the will-maker.

[86] There are sound policy and legal reasons why a will can only be recognised as valid and admitted to probate after a will-maker's death. In particular, by its very nature a will is ambulatory, or changeable, until death. Even a person with dementia may have lucid moments, in which they may have testamentary capacity. There is also always the prospect of new or improved drug treatments becoming available which can impact on mental capacity. In addition, even where a person entirely

⁷¹ See, for example, the definition of "administration in s 2 of the Administration Act 1969 – "administration means probate of the will of a deceased person".

⁷² *Wills and Succession* (online looseleaf ed, LexisNexis) at 2.2.

lacks the necessary mental capacity to make a will, the Family Court has jurisdiction under the PPPRA to direct and supervise the making of a statutory will.

[87] Given the ambulatory nature of a will during the will-maker's lifetime, the age old method for disputing the validity of a will is a "will contest" after the will-maker's death. At that time the High Court is able, in its probate jurisdiction, to determine issues of testamentary capacity, undue influence and the technical validity of a will. What Mrs Carrington, in effect, seeks to achieve in these proceedings is to accelerate that "will contest" to the present time, while Mr Carrington is still living. She seeks a determination from this Court as to whether the 2004 or 2011 will is Mr Carrington's final valid will. Such a course would, however, cut across this Court's probate jurisdiction, as well as the Family Court's PPPRA jurisdiction, which includes comprehensive provisions in relation to the wills of mentally incompetent persons.

[88] What then is the scope of s 3 of the Declaratory Judgments Act in relation to wills? The case law provides some guidance. The most common situation where a declaratory judgment is sought in respect of a will appears to be where there is an issue regarding the construction or validity of a particular clause in a will that has been admitted to probate.⁷³ Another situation in which it might be necessary (or possible) to invoke the Declaratory Judgments Act jurisdiction would be where the validity of a will is disputed but the executor refuses to propound the will. In such circumstances it has been held that anyone opposed to the will may bring proceedings to declare the will invalid.⁷⁴

[89] The Declaratory Judgments Act does not, however, confer jurisdiction on this Court to determine the validity of the purported will of a living will-maker, nor to declare that that person does not have or will never have capacity to make a will in the future. Given the ambulatory nature of a will, and the role of the Family Court in relation to wills under the PPPRA, a prospective beneficiary does not have a sufficiently crystallised "right" or "interest" under a purported will during the will-maker's lifetime to found a declaratory judgment. The only available

⁷³ For example *In re Raven* [1915] 1 Ch 673, *In Re Wynn* [1952] Ch 271, *Tuck's Settlement Trusts* [1976] Ch 99 and *Tuck's Settlement Trusts* [1978] Ch 49.

⁷⁴ *Murphy v Lawler* [1918] NZLR 605, [1918] GLR 412 (NZSC).

jurisdiction for addressing issues in relation to the wills of mentally incompetent persons, while they are still alive, is that found in the PPPRA.

Can the High Court determine the validity of the will of a living will-maker in its parens patriae jurisdiction?

[90] Mrs Carrington relied on this Court's parens patriae jurisdiction as an alternative basis for the orders and declarations sought in relation to Mr Carrington's will. It is not appropriate to invoke the parens patriae jurisdiction in this context, however, for a number of reasons, including those I have outlined above as to why the Declaratory Judgments Act does not provide jurisdiction to determine the validity of a will during the will-maker's lifetime. I further note that the inherent jurisdiction pays no regards to the interests or expectations of those who come after, and "it is the duty of the court not to ... interfere with any rights of succession".⁷⁵ The inherent jurisdiction confers no ability to contest a will inter vivos.⁷⁶

[91] As I have noted above, the parens patriae jurisdiction operates as a "safety net" which can be exercised to protect the vulnerable, when statute law does not. The PPPRA, however, provides appropriate mechanisms for addressing any concerns as to whether Mr Carrington has been subjected to undue influence or lacked testamentary capacity. That legislation includes comprehensive provisions aimed at ensuring that Mr Carrington's needs and interests are appropriately protected at all times. It is therefore unnecessary to invoke this Court's parens patriae jurisdiction to address such issues. In this context I note the observations of the Supreme Court in *Re Eve*, as set out at [18] above, that the parens patriae jurisdiction must be exercised for the benefit of the person in need of protection and not for the benefit of others. The provisions in the PPPRA relating to wills achieve that goal, by focussing on Mr Carrington's present needs and desires. The orders and declaration sought in the originating application however, are primarily focused on the interests of competing beneficiaries under the 2004 and 2011 wills.

⁷⁵ *Attorney-General v Marquis of Ailesbury* (1887) 12 App Cas 672 at 688.

⁷⁶ The *parens patriae* jurisdiction was entrusted to Chancery, and Chancery does not know of a will except by probate: *Re Vallance, ex parte Limehouse Board of Works* (1883) 24 Ch D 177.

[92] Further, the well established principle that the inherent jurisdiction of the Court cannot be exercised in a manner that is inconsistent with statutory provisions⁷⁷ is relevant in this context. The net effect of the orders and declarations sought by Mrs Carrington would be to “lock in” Mr Carrington’s 2004 will, even if it does not reflect his present desires and intentions. The orders sought would therefore prevent the Family Court from exercising its statutory jurisdiction to oversee the making of a new will for Mr Carrington, if it believed it was appropriate to do so. The *parens patriae* jurisdiction cannot be invoked to over-ride statute in that manner, particularly given that the sole intent and effect of the relevant statute is to protect the vulnerable. It necessarily follows that this aspect of the originating application should also be struck out.

Order sought in relation to evidence in potential future proceedings regarding Mr Carrington’s will

[93] Mrs Carrington seeks an order that “the evidence taken in this case be perpetuated for any subsequent hearing on the validity of the new will and any subsequent will of the respondent”.

[94] It is not appropriate for this Court to make such an order. Obviously, some of the (voluminous) affidavit evidence in this case may be relevant to future proceedings. In that event, the appropriate course would be for any interested party to make an appropriate application to the Court having jurisdiction over such proceedings for the admission of affidavit evidence from this case in those proceedings. It is not appropriate for this Court to seek to predetermine relevance or admissibility issues in proceedings that may well be in another Court and have yet to be filed.

[95] I also note that the High Court Rules specifically provide a procedure for witness testimony to be taken in advance to establish a later claim.⁷⁸ Mrs Carrington has not, however, brought such an application.

⁷⁷ I H Jacob “The Inherent Jurisdiction of the Court” (1970) 23 CLR 23. See also *Re JSB*, above n 45 and *Chief Executive, Ministry of Social Development v S*, above n 46.

⁷⁸ High Court Rule 9.47.

Declarations sought in relation to whether Mr Carrington had capacity in 2011 to bring proceedings in the Family Court

[96] The final declarations sought are to the effect that Mr Carrington did not have capacity in 2011 to bring proceedings in the Family Court for dissolution of his marriage or the division of relationship property.

[97] Counsel for Mrs Carrington referred to a number of cases⁷⁹ in support of the submission that the High Court is able to determine whether a party has capacity to bring proceedings. In each of those cases, however, the Court was considering or determining the ability of a party to appear in a proceeding which was already before it. Those cases did not involve the High Court exercising its inherent jurisdiction to determine the capacity of parties to proceedings in other, inferior, courts.

[98] Both the PPPRA and the Family Court Rules 2002⁸⁰ provide mechanisms for the protection of incapacitated persons involved in litigation in the Family Court. Rule 90F⁸¹ provides for the appointment of litigation guardians for incapacitated persons. That rule provides that any person may apply for a litigation guardian to be appointed. No further steps can be taken in a proceeding involving an incapacitated person until they are represented by a litigation guardian.⁸² In this context, I note that a temporary property manager has now been appointed for Mr Carrington who will, I assume, be his litigation guardian in the Family Court proceedings.

[99] I further observe that although only the High Court possesses inherent jurisdiction, all courts possess inherent powers, which are ancillary to their substantive jurisdiction. Inherent powers are procedural, rather than substantive in nature. They enable a court to give effect to its jurisdiction by enabling the court to regulate its procedure and protect its proceedings.⁸³ Accordingly, if there were any

⁷⁹ *Pomery v Pomery* (1909) 53 Sol Jo 631, [1909] WN 158; *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] 2 WLR 953; *Drew v Nunn* (1879) 4 QBD 661; *Yonge v Toynbee* [1910] 1 KB 215; *Beall v Smith* (1873) LR 9 Ch App 85; *Richmond v Branson & Son* [1914] 1 Ch 968; *Johnston v Schurr* [2012] NZCA 363, [2012] NZFLR 753.

⁸⁰ Protection of Personal Property Rights Act, s 24; Family Court Rules 2002, rr 89-98.

⁸¹ Previously rr 90(3A), (3B), (3C) prior to 1 March 2014.

⁸² Rule 90E.

⁸³ Rosara Joseph, "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 *Canta LR* 220 at 221 citing *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) at 689 and *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA); [2005] 1 NZLR 577 (SC) at [35]. See also *Sutherland v Sutherland* (2001) 21 FRNZ 529 (HC) at 536.

lacuna in the Family Court Rules, it would be possible for the Family Court to rely on its inherent powers to take appropriate steps to protect its processes.

[100] The Family Court accordingly has sufficient powers to regulate its own procedures and determine the capacity of parties before it. It is not necessary for Mrs Carrington to issue separate proceedings in this Court, by way of originating application, to determine whether Mr Carrington had capacity to bring proceedings in the Family Court. It follows that this aspect of the originating application should also be struck out.

Confidentiality and suppression orders

[101] I also heard submissions from counsel on confidentiality issues. I have concluded that the subject matter of these proceedings, to the extent that justiciable issues are raised, falls within the scope of the Family Court's jurisdiction under the PPPRA. It is therefore appropriate that these proceedings be afforded the same degree of confidentiality as they would if brought under the PPPRA. By virtue of s 80 of the PPPRA, ss 11B-D of the Family Courts Act would apply to such proceedings. I therefore make confidentiality orders in these proceedings that mirror those set out in those sections.

Summary and conclusion

[102] Mrs Carrington has filed an originating application in this Court, in which she claims that Mr Carrington was unduly influenced to execute a new will and enduring powers of attorney in 2011, at a time when he lacked mental capacity to do so. She also claims that he did not have capacity to file proceedings in the Family Court in 2011 seeking dissolution of marriage and a division of relationship property. Mr Carrington has applied to strike out the proceedings, primarily on the basis that this Court has no jurisdiction to make the various declarations and orders sought.

[103] The PPPRA establishes a comprehensive statutory scheme for the protection of mentally incompetent adults. The Family Court has original jurisdiction under that Act. The High Court's role is an appellate one. The High Court also has an inherent jurisdiction in relation to vulnerable adults which is complementary, rather

than parallel, to the Family Court's jurisdiction under the PPPRA. In particular, the High Court's inherent jurisdiction operates as a "safety net" to provide a remedy where statute does not. Where a matter falls within the scope of the PPPRA, however, it would be inappropriate for this Court to invoke its inherent jurisdiction, or its jurisdiction under the Declaratory Judgments Act, to enable a litigant to circumvent the jurisdiction of the Family Court. Statutory remedies and procedures under the PPPRA must be exhausted before relief can be sought in this Court, unless the proceedings are transferred to this Court by the Family Court under the Family Courts Act 1980.

[104] It follows from these conclusions that the originating application must be struck out, to the extent that it raises issues within the scope of the PPPRA. In this context, I have concluded that:

- (a) The Family Court has jurisdiction to determine whether Mr Carrington had capacity in March 2011 to revoke his existing powers of attorney and appoint new attorneys.
- (b) The Family Court has extensive powers under the PPPRA in relation to the wills of mentally incompetent persons. If Mr Carrington lacked testamentary capacity, or has been subjected to undue influence, the Family Court has the necessary powers to remedy that situation. This Court, on the other hand, has no jurisdiction to determine the validity of the purported will of a living will-maker. The High Court can only determine the validity of a will after the will-maker's death, in the exercise of its probate jurisdiction.
- (c) The Family Court has sufficient inherent and statutory powers to regulate its own procedures and determine the capacity of parties before it. It is not therefore necessary or appropriate for this Court to make a declaration as to whether Mr Carrington had capacity to file proceedings in the Family Court in 2011.

[105] All of the matters raised in the originating application, to the extent they are justiciable, fall within the scope of the Family Court's jurisdiction under the PPPRA. The proper forum for determination of those issues is therefore the Family Court, which has power in appropriate cases to transfer proceedings to this Court. Whether it is appropriate to do so is, however, a matter entirely for the Family Court. It is not open to a litigant to circumvent the Family Court's determination of that issue by filing proceedings directly in this Court.

[106] Given my conclusion that this Court lacks the necessary jurisdiction to determine these proceedings, it is not necessary to determine the alternative ground relied on in support of the strike out application, namely that the proceedings are an abuse of process.

Result

[107] The second amended originating application is struck out.

[108] I make confidentiality orders that mirror those set out in ss 11B-D of the Family Courts Act 1980.

[109] I reserve leave to file memoranda on costs issues. Any memorandum on behalf of Mr Carrington is to be filed and served by 23 May 2014. Any memoranda in reply by Mrs Carrington and any of the interested parties are to be filed by 6 June 2013. Leave is also reserved to seek an oral hearing on costs issues. In the absence of any such request a decision on costs will be made on the papers.

Katz J