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**IN THE FAMILY COURT  
AT WHANGAREI**

**FAM-2017-088-000015  
FAM-2017-088-000083  
[2017] NZFC 4817**

IN THE MATTER OF      THE DOMESTIC VIOLENCE ACT 1995

AND

IN THE MATTER OF      THE PROTECTION OF PERSONAL AND  
PROPERTY RIGHTS ACT 1988

BETWEEN                [RICHARD CARRINGTON]  
Applicant

AND                      [JOHN CARRINGTON]  
Respondent

AND                      [MRS CARRINGTON]  
Subject Person

Hearing:                12 and 13 June 2017

Appearances:        Ms E Ebborn for the Applicant  
Respondent appears in Person ([Ms J] in support)  
Mr J Adams for the Subject Person

Judgment:             26 June 2017

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**DECISION OF JUDGE M J HUNT**

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[1] [Mrs Carrington] is [in her mid to late 80s].<sup>1</sup> [Mrs Carrington] has dementia and is currently resident at [a Northland rest home]. [Mrs Carrington] has six children.

[2] [Mrs Carrington] appointed her son [Richard Carrington] as her attorney.<sup>2</sup> The capacity to grant the power of attorney was not challenged.

[3] It was conceded belatedly by her son [John Carrington] that she currently lacks capacity. This was not disputed by anyone else.

[4] [Richard] arranged [Mrs Carrington]'s admission to the [Rest Home] on 2 September 2016. The admission process to the Rest Home was not straightforward and has created significant conflict between [John] and his siblings.

[5] [John] is currently trespassed from the Rest Home<sup>3</sup> and there are issues about whether contact between [Mrs Carrington] and [John] can occur in a safe and appropriate manner.

[6] [Richard] seeks a protection order against [John] in relation to [Mrs Carrington].

[7] I heard from five of [Mrs Carrington]'s children. [Richard] and [his sisters] are aligned in their views. They support [Richard] as attorney and the need for a protection order. They do not seek to exclude [John] but they simply say his behaviour cannot be managed in any other way. They say that his conduct and his interactions with [Mrs Carrington] cause her significant distress. They support the relationship but they say it needs to be supervised and closely constrained by way of a protection order

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<sup>1</sup> [Date of birth deleted].

<sup>2</sup> Enduring power of attorney executed by [Mrs Carrington] dated 27 August 2015 at pages 7-11 BOD (Bundle of Documents) 2 tab A, accompanied by certificate of capacity dated 9 November 2015 at page 12 BOD 2 tab A.

<sup>3</sup> With effect 31 May 2017 a second notice was issued – an earlier notice issued on 26 November 2016 at page 49 BOD 2 tab A was withdrawn.

if it is to continue. They say nothing short of a protection order will suffice as promises, undertakings, a written agreement and even a Court injunction<sup>4</sup> have been ineffectual in changing [John]'s behaviour and protecting [Mrs Carrington] from it .

[8] The first without notice application for a protection order was made on 10 January. This application was not granted but placed on notice by Judge Munro. A further without notice application for protection order and interim injunction was made on 17 January. This application for protection order was also placed on notice by Judge Murfitt however he granted an interim injunction.

[9] [John] challenges the Injunction, opposes the protection order and seeks a review of the decision-making by [Richard].<sup>5</sup> At the beginning of the hearing this extended to whether [Richard] should be removed as attorney and an alternative independent attorney appointed. This was not pursued by the time of closing submissions but in any event I did not have details of the proposed replacement or a consent to act and so on the evidence could not have made such an order.

[10] The hearing proceeded over two days. [Mrs Carrington] was not present. I did not consider it appropriate or necessary that she be present. Mr Adams was appointed by the Court as her counsel.

[11] [John] had Counsel up until immediately prior to the hearing. At the commencement of the hearing Mr Magee appeared for [John] but sought and obtained leave to withdraw. [John] confirmed that he wished to proceed without Counsel. He was assisted by the presence of his partner [Ms J] as support, with my approval.

[12] The issues are:

(a) Are the grounds made out for a protection order? More particularly:

(i) Is there a domestic relationship?

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<sup>4</sup> Issued by Judge Murfitt 17 January 2017 BOD 1 tab C page 12, prohibiting removal of [Mrs Carrington] from the rest home or encouraging or facilitating anyone else to do so.

<sup>5</sup> S 103 application at BOD 1 tab B page 4.

- (ii) Was there domestic violence?
  - (iii) Is an order necessary?
  - (iv) The perception of [Mrs Carrington].
  - (v) What, if any, conditions should attach to an order?
  - (vi) How the residual discretion should be exercised
- (b) The other issue is whether a review of [Richard]'s exercise of the power of attorney is appropriate, and if so what consequential orders should be made.

### **Grounds for a Protection order**

#### *Is there a domestic relationship?*

[13] There is a domestic relationship between the parties of mother and son, so there is jurisdiction to make an order.

[14] [Richard] sought authority to act as litigation guardian for his mother and made the application on her behalf. An order was made on 10 January 2017 pursuant to s 11 Domestic Violence Act 1995. No challenge was made to the order.

#### *Domestic violence*

[15] Domestic violence has an extended definition.<sup>6</sup> In this instance, reliance is placed on psychological violence inflicted on and or directed at [Mrs Carrington] by [John]. The substance of the allegation is that [John]'s unwillingness to accept that his mother has dementia and his consequent behaviour and interactions with her are psychologically damaging to her. In addition, it is said that his unwillingness to accept

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<sup>6</sup> Section 3 Domestic Violence Act 1995.

her physical limitations and guidance by health care professionals has put her under some physical distress.

[16] A brief examination of the history is necessary to put the position of the parties and the issue into context.

[17] In 2016, [Mrs Carrington] was hospitalised because she suffered a fracture to her femur. After her rehabilitation in hospital she was released by agreement with the family into the care of [John] and lived at his home from mid-June 2016 on. The family had some misgivings about whether this was appropriate but were persuaded to give [John] and [Mrs Carrington] the opportunity.

[18] The discharge notes<sup>7</sup> from hospital record some issues with her cognitive assessment and in particular, her need for assistance with showering and dressing. It was also recommended that she be supervised with any kitchen tasks.<sup>8</sup> She was not to drive for a two month period post her operation and needed to liaise with her GP prior to considering a specialised driving assessment.

[19] These matters assume importance because they give guidance and direction about [Mrs Carrington]'s rehabilitation and care. [John] acknowledges that he knew about this information but he was vague about when he became aware and had little regard to this important information. He should have realised the importance of being aware and complying with the directions of the health professionals.

[20] Upon release to [John]'s home there were almost immediate concerns about [Mrs Carrington]'s wellbeing by family. [Jane] noted that, when she visited, [Mrs Carrington] exhibited signs of being unable to care for herself and being at risk. This included an instance where [Mrs Carrington] had been endeavouring unsuccessfully to cook a pre-prepared stew without supervision and was unaware that she had soiled herself. This instance was recounted by [Jane] and confirmed by [Susan]. It was distressing to them. [John] seemed to brush it off as of little consequence.

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<sup>7</sup> Page 50 BOD 2 tab A

<sup>8</sup> Page 52 BOD 2 tab A.

[21] There were attempts by [John] to have [Mrs Carrington] drive her motorcar which was of grave concern to the family. [John] recounted what occurred but failed to grasp the obvious risk. This occurred in the face of a clear direction that there be no driving for two months post operation and that [Mrs Carrington] needed to liaise with her GP prior to considering a specialised driving assessment. As with many things, [John] was not mindful of the directions of the health professionals and should have been.

[22] [Mrs Carrington] was taken driving by [John] on three occasions. On 30 June, she drove and made some fundamental errors, including driving on the wrong side of the road. She collided with a sign on one occasion. [John] had a [H]<sup>9</sup> undertake an assessment but I did not hear from [H] and am sceptical that there was any basis to suggest [Mrs Carrington] was safe to drive.

[23] [John] also allowed [Mrs Carrington] to drive a short distance from one property to another by herself but instead she drove to the supermarket. This was foolhardy and unsafe for [Mrs Carrington] and others. It demonstrates [John]'s determination to do things his way and failure to have regard to [Mrs Carrington]'s safety or other road users. He mentioned his own experience and judgement as a driver, [low volume] nature of the roads in combination with short distances. All of these factors overlook that she should not have been driving and there was real and serious risk to her and other road users when she did.

[24] On or about 18 August, [John] advised that he and [Mrs Carrington] decided that she would return to live in her home.<sup>10</sup> Some arrangements were made for additional care but [Mrs Carrington] did not cope. She was locking out caregivers and not managing. She was not supervised on a continuous basis and needed to be. The family (apart from [John]) were right to be concerned and to take action. The concerns about that led to [Richard] exercising the power of attorney on or about 2 September and placing [Mrs Carrington] at the [Rest Home].

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<sup>9</sup> It was said that [H] had some expertise as an instructor and I have no reason to doubt that but did not have any report from him and it was not suggested he undertook the specialised assessment as contemplated.

<sup>10</sup> Page 53 BOD 2 tab A.

[25] That triggered an immediate and aggressive response from [John] who took issue with any view that [Mrs Carrington] could not live independently. [John] strongly believed that [Mrs Carrington]'s wishes were not being considered. This response was foreshadowed in the email of 18 August from [John] to [Richard]:

I am extremely disappointed in our family being so interfering and cruel in not allowing Mum the grace to live her life to the fullest.

I'm disgusted in our family doing this out of their soft environments and a text book.

I no you think you are doing what is best for mum but Mum has proven you and the medical system that you are wrong but are to pig headed to allow our Mum some Grace...

It was a sad day when you became power of attorney and wish you had resigned.

I do wonder why you did not put your father off the road when all family thought he was a bad driver?

Funney.

He would of knocked your block or tried and I would do the same.<sup>11</sup>

[26] [John]'s demeanour was also clear in an email dated 7 September from [John] to [Richard] where he said:

I am not impressed with you coming up on Friday and organising Mum to go into the home. Don't bother crossing my path for a while until I cool down.<sup>12</sup>

[27] The ongoing tension around that decision-making and the subsequent conduct of [John] in relation to [Mrs Carrington] caused problems. Extensive efforts were made by the parties to find a path to resolution both before and after the application for protection order was made but were ultimately frustrated by [John].

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<sup>11</sup> Page 53 BOD 2 tab A

<sup>12</sup> Page 127 BOD 2 tab A

[28] [John] became insistent on taking [Mrs Carrington] out without prior arrangement and there was concern that he was not mindful of her mobility limitations or the effect of over exertion on her. He took her boating and on walks further than the time or distance recommended. He also got her Thai massage. [Ms X] <sup>13</sup>said the Thai massage was inappropriate.

[29] [John] persisted in discussions with [Mrs Carrington] that she should not be in the rest home and was disparaging of [Richard] and others.

[30] A letter<sup>14</sup> from the rest home was accepted by [Ms X] as correct and set out the concerns they held :

Our concern is for [Mrs Carrington]'s wellbeing, both physical and mental, due to the negative effect [John] causes her. [John] confuses and disorients his mother by trying to involve her in the family dispute he has with his siblings. This has included telling her information she is unable to understand and apparently trying to get her to make decisions she is not capable of making. There are numerous incidents where [John] has upset and confused his mother, which often results in making her angry with staff and other residents. This is not normal behaviour for [Mrs Carrington] and only occurs when [John] has been in contact with her.

When [John] was trespassed at the end of 2016 we then had to secure our premises against him inconveniencing and stressing all staff and residents. This put [Mrs Carrington] at physical and emotional risk.

...

In addition to this, [John] has caused so much anxiety to our staff as they try to act under instructions from the Enduring Power of Attorney. They are scared of him and we need to protect our staff from feeling unsafe in the workplace.

[31] Other letters and emails from the rest home<sup>15</sup> documented various aspects of concern. These were all adopted by [Ms X], even though she did not author all of them, as an accurate reflection of the concerns of the Rest Home.

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<sup>13</sup> The Clinical Nurse Manager at the [Northland] rest home with [almost 15 years] experience at the home and [almost a decade more] as a registered nurse.

<sup>14</sup> Page 169-170 BOD 2 tab A.

<sup>15</sup> Letter dated 2 June 2017 page 168 BOD 2 tab 1. Email dated 21 February 2017 page 110 BOD 2 tab A.

[32] In consultation with the family a trespass notice was issued by the Rest Home to [John] on 26 November 2016. The issue of a trespass notice was not something that [Ms X] had previously experienced.

[33] This led to undertakings by [John] as to how he would conduct himself. The undertakings<sup>16</sup> included limitations on the extent of physical activity and in particular the nature and extent of discussions with [Mrs Carrington] about the tensions that exist within the family and adherence to the Rest Home guidelines.

[34] The family continued in discussions and there was a memorandum produced<sup>17</sup> that further documented the understandings reached between the parties. This recorded:

[John] acknowledges that:

- (a) [Mrs Carrington] will reside in the rest home.
- (b) [Mrs Carrington] has dementia.
- (c) [Richard] is the welfare guardian for his mother pursuant to the enduring power of attorney and respects his position.

[35] The combination of the undertakings and the memorandum should have provided a formula for successful visits but [John] continued to challenge the medical opinions regarding [Mrs Carrington]'s capacity and her circumstances. He continued to involve [Mrs Carrington] in the disputes he had with the family. He was not compliant with directions given by [Richard].

[36] There is a lot of correspondence but a summary of the concerns are captured in the email from Ms Ebborn to [John]'s then solicitors.<sup>18</sup> It documents the understandings that had been reached regarding acceptance of Dr Reid's report, acceptance of a lack of capacity, acceptance of the appointment of [Richard], an agreement not to involve [Mrs Carrington] in conflict. The email indicates that the family view that all the understandings had been breached.

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<sup>16</sup> Page 112 and 113 BOD 2 tab A

<sup>17</sup> Page 97 BOD 2 tab B dated 31 March.

<sup>18</sup> Page 99 BOD 2 tab B, email 5 May 2017 Ebborn and Dodds/Nichol.

[37] There are examples that illustrate that the family were right. On 10 March 2017, [John] wrote a letter to his mother.<sup>19</sup> This letter was directed to a worker at the Rest Home, copied to [John]'s legal representatives but was intended as communication with his mother. It touched on the fact that there was lawyers involved and that a visit from Dr Reid was imminent.

[38] [John] said:

I understand you have an appointment with [Dr Reid] next week.

[Dr Reid] is gd doctor Mum so trust him a feel free to talk and answer his question freely Mum.

Mum you asked me who the well dressed man was visiting you last week.

That man is Mr Adams and he is your new lawyer and if you have any concerns that you wish to discuss Mr Adams and [the doctor] are the men to talk to.

Trust them Mum please.

[39] In the context of [John]'s relationship with [Mrs Carrington] the concern was that the issue of lawyers and assessments was being discussed with her. The letter touches on that where it should not have.

[40] This correspondence is also telling in another way. Dr Reid completed an assessment dated 8 March.<sup>20</sup> It is attached to [John]'s affidavit of 29 March<sup>21</sup> and he says at paragraph [4]:

I do not challenge Dr Reid's medical report.

[41] In evidence [John] also accepted that he had been recorded on 30 April where he was in conversation with his mother and another resident of the Rest Home. The circumstances of the recording are not entirely clear but it seems to have been inadvertent in as much as [John]'s phone rang [Richard]'s phone and [Richard] then recorded the conversation.

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<sup>19</sup> Page 115 BOD 2 tab A.

<sup>20</sup> Page 72 and 73 BOD 2 tab B.

<sup>21</sup> Page 64 BOD 2 tab B.

[42] I received a transcript and listened to the recording. [John] did not deny that the conversation occurred or that the transcript was accurate. What he said to his mother was:<sup>22</sup>

No. But the only one who can sort it is this geriatrician. He'll be the one. We're wasting our time using [the doctor], and we unfortunately; [Richard] got in his ear and the rest of the family got in his ear n' they're just being cruel.

[43] So despite expressing confidence in Dr Reid and despite having confirmed on 29 March that the report was not challenged [John] did continue to challenge it.

[44] At his request, a further assessment was undertaken because at hearing it was planned that a challenge would be made to Dr Reid's expertise and his assessment. The final assessment was not challenged<sup>23</sup>.

[45] [John]'s explanation for that sequence and apparent change of heart was unconvincing. He indicated that he had a separate conversation with Dr Reid to the effect that [Mrs Carrington] was competent. However if that had occurred he would have referred to it in his affidavit rather than give an unqualified acceptance. He did not and I do not accept that there was such a conversation.

[46] So despite having initially endorsed Dr Reid and saying he accepted his report, [John] convinced himself that Dr Reid was subject to inappropriate influence. [John] decided to engage with his mother about the report and despite his prior acceptance insisted upon a further report.

[47] This is also consistent with his attitude to the assessment undertaken by [a second doctor] on 2 September 2016<sup>24</sup>. [John] acknowledged that a certificate had been produced<sup>25</sup> confirming a lack of capacity but said:

I question the independence of [the second doctor]'s assessment of Mum's mental incapacity.

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<sup>22</sup> Page 158 BOD 2 tab A.

<sup>23</sup> Report dated 1 June 2017 from Dr Jonathan Williams consultant psychiatrist.

<sup>24</sup> Page 13 BOD 2 tab A

<sup>25</sup> Page 5 Paragraph 20 BOD 2 tab B.

[48] He was unable to articulate any basis there was for questioning [the second doctor]'s independency or assessment other than a reference to the cognitive assessment score and the relative scores from previous assessments. There was no reason to suggest [the second doctor] or Dr Reid acted in anything other than a professional manner. The accusations are baseless.

[49] It is [John]'s behaviour and allegations that are problematic. [John] is unwilling to accept advice that does not fit with his own judgment on matters and unwilling to defer to the expertise of those better placed and qualified to make decisions.

[50] Another example of [John]'s attitude arises around the medical assessment which was sought and agreed to just prior to hearing. On 26 May, [John] removed his mother from the rest home for a medical assessment.. He said that was on the instructions of counsel. I do not accept that. It was agreed that an assessment could be undertaken, but [Ms X] made it plain that that would be facilitated through the rest home. [John] insisted on taking [Mrs Carrington] to a local medical practice himself. The medical practice indicated that they would not be able to complete the assessment.

[51] The assessment was undertaken and completed by Dr Williams and at hearing [John] accepted Dr Williams' advice saying that his mother had her opportunity to persuade a medical practitioner that she was competent and had not done so.

[52] My concern is that it was not [Mrs Carrington] who required the assessment. It was [John] who convinced himself that it was an opportunity for [Mrs Carrington] to demonstrate her capacity. [John] was unwilling to accept that she lacked capacity despite what he said in his affidavit and the earlier medical advice.

[53] Finally on Saturday 27 and Sunday 28 May in defiance of the agreements about contact, [John] made arrangements for [Mrs Carrington] to be removed from the rest home and taken out. This was at a time when he knew that his visits were, on [Richard]'s direction, restricted. Nevertheless because he felt he had not seen his mother, he decided to act in defiance of the direction.

[54] A particularly compelling piece of evidence came from [Jane] about [Mrs Carrington]'s appearance on the Monday morning following those visits. She was very distressed when recounting her mother's appearance and the effect that weekend's activities had on her. There were other factors that were adverse for [Jane] [she had just become aware of an adverse family matter on the morning of Court] but her distress about her mother's state was obvious and genuine.

[55] The domestic violence I am asked to consider is the pattern of behaviour by [John] in engaging with his mother to her distress about the legal proceedings, the medical assessments and the family conflict. I am in no doubt that [John] has done exactly that and that he does so in the misguided view that it is important that his mother understands the truth.

[56] It is [John]'s version of the truth that he believes she should understand, namely that his brother [Richard] and siblings are acting unreasonably and endeavouring to strip from [Mrs Carrington] her dignity and independence. That is not my view of matters.

[57] It is not required that there is an intention cause to distress. It is sufficient that the actions of the party have that effect. I accept Ms Ebborn's submissions<sup>26</sup> on the point.

[58] There has been domestic violence in the relationship between [John] and his mother. His motivation is genuine but it is misguided and defiant. I accept the evidence as to the distress and adverse effect that the actions of [John] has on his mother and in particular, the continuing conversations about lawyers, the courts, medical assessments, the Rest Home and family relationships.

[59] Further, I accept that [John] at times becomes loud, forceful and intimidating. [Ms X] described it, others described it.<sup>27</sup> [John] concedes that he became upset, but was not prepared to concede that he became either loud or intimidating.

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<sup>26</sup> BOD 1 tab D page 6 paragraphs 14-16 inclusive

<sup>27</sup> The incident report of 13 January from the rest home reports [John] was "intimidating in his manner and used a loud angry voice" page 86 BOD 2 tab A

[60] Sadly [John] lacks insight into the effect of his behaviour on others and a realistic appreciation of how that makes them feel. This feeds into his willingness to insist upon matters proceeding in the way that he believes is correct. His deep and profound sense of justification leads to objectionable behaviour.

[61] There has been domestic violence by [John] directed at [Mrs Carrington].

*Necessity*

[62] The burden shifts to [John] to show an order is not required.

[63] The view expressed by [Richard], [and his sisters] was that [John] was someone who was unwilling to accept matters from anybody else's perspective but his own. That is a criticism [John] has made of [Richard] but I do not accept this.

[64] [John]'s personal agenda to achieve justice on his terms for his mother dictated to him a necessity to involve [Mrs Carrington] in a way that was distressing to her and amounted to domestic violence. I have [John]'s assurances that he would comply with the Court's decision and not discuss matters verbally with his mother again. [John] has a history of breaching promises on similar terms. The view of the family is that [John] will not be compliant.

[65] There have been a number of opportunities for [John] to come to terms with his mother's situation and modify his behaviour. While he may not have agreed the decision for her to be admitted to a rest home, the decision to allow her to live at his home was not appropriate and the same can be said of her living in her own home.

[66] She was not monitored on a 24-hour day basis and it is plain that at times her deteriorating health meant she was struggling. I accept [John] was doing what he could but that was not enough. There was a roster of people coming into the home but there were times, including those occasions that [Jane] referred to, where [Mrs Carrington] was not receiving the appropriate degree of supervision or support.

[67] A clear direction on discharge was that she was to be supervised with kitchen tasks but [John] left her to complete some tasks in a way that was not appropriate or

in line with her abilities. [John] thought that he was doing the right thing and assisting her with her independence but that was mistaken. The hospital discharge made it plain that there were risks of [Mrs Carrington] falling and the need for supervision. Supervision was not consistently available at [John]'s home and [Mrs Carrington] was on her own for periods of time.

[68] The decision for [Mrs Carrington] to return home was a unilateral decision made by [John] consistent with his view that [Mrs Carrington] needed to assert her independence. The fact that [John] was not aware for two days that his mother had been admitted to the Rest Home confirms that he was not in sufficiently regular contact to accurately monitor her well-being to the degree required. The arrangements for carers and visits of family were not a substitute for the supervision and support available in the Rest Home.

[69] [John] persisted right up to hearing with a view that the Rest Home arrangements were not in his mother's best interests or consistent with her wishes. His unwillingness to accept that discussions with his mother were distressing her continued and persisted in the weeks immediately prior to hearing. It culminated in one respect by the rest home determining that a trespass notice would be re-issued because [Ms X], felt intimidated and was concerned for the well-being of her staff.

[70] [John] relied upon an email<sup>28</sup> which was annexed to Mr Adams' reports as confirmation that rest home staff had no difficulty with him. The substance of that email was quite different. It confirmed that [Mrs Carrington] was upset after a visit from [John] and recorded:

24<sup>th</sup> of April: [Mrs Carrington] was very upset after [John]'s visit, "very upset after [John] left, said that rest of the family & her son [Richard] think she is mad and need to be locked away from [John]'. Told the RN 'now there are lawyers involved'. RN not sure what has been said between [Mrs Carrington] and [John] as her bedroom door is always closed.

[71] While the balance of the communications suggests that [Mrs Carrington] was not overly upset, the letter does not substantiate the proposition that the Rest Home

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<sup>28</sup> BOD 1 tab D page 49.

had no difficulty with [John] and [Ms X's] evidence ran contrary to that. It also overlooks the later correspondence that clearly points to a different picture.

[72] [John], in closing submissions, maintained that he was not a threat to his mother. He said:

Your Honour I'm not a threat to mum, I admit Your Honour, that I am threat to the interests of [Richard], my sisters and the rest of them. But I'm not a threat to mum. It shows I've always looked after mum and put her interests first and I'll continue to do so. There's been no credible evidence presented which shows on the balance of probabilities that I have, or will, commit any form of domestic violence towards mum and I submit the starting point for consideration is to determine if there has been domestic violence in this case.

[73] When asked what threat he presented to the interests of [Richard], his sisters and the Rest Home, [John]'s response was that he did not know.

[74] I am not satisfied that [John] has properly understood the concerns that have been expressed or that he accepts them. I share the family's concern that if left without further restriction or clear risk of adverse consequence, [John] will persist with the pattern of behaviour that he has demonstrated over the last months.

[75] [John] has not discharged the onus of establishing an order is not necessary by a wide margin.

[76] The protection order is necessary.

*Perception of [Mrs Carrington]*

[77] There is a requirement to have regard to the perception of the subject person or applicant.<sup>29</sup> In that regard I have not heard from [Mrs Carrington] and so I am reliant upon the reported response by her to contact from [John]. All agree that she would wish to see him and have contact with him but I am satisfied that that cannot continue in the way that it has because that has been very distressing to her.

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<sup>29</sup> Section 14 [5] Domestic Violence Act

[78] Judge Druce faced with a similar situation and made a protection order in circumstances where the protected person did not give evidence [as here] and her perception was not known because he was satisfied<sup>30</sup>:

I take into account the extreme vulnerability of Mrs M. She is fragile, she is very psychologically vulnerable and it is of primary importance that her care giving environment is a safe one.

[79] The present situation is the same. [Mrs Carrington] is to be kept safe from the conflict and free to enjoy her life as it is and her family. The fact she has not spoken for herself does not preclude the order being made. Mr. Adams was very clear that he considered an order was necessary.

### *Conditions*

[80] The Domestic Violence Act<sup>31</sup> provides that in circumstances where a protection is made, the Court may impose conditions that are necessary to protect the protected person from further domestic violence by the respondent. This allows for conditions relating to the manner and circumstances in which the respondent may make contact.<sup>32</sup> Such conditions may be for a specified period or in the absence of any period being specified or the duration of the order.<sup>33</sup>

[81] Contact is defined<sup>34</sup> and extends to all forms of direct and indirect interaction.

[82] Initially Ms Ebborn sought a condition that [Richard] was to give consent for any contact. The medical evidence<sup>35</sup> was that to an extent [Mrs Carrington] has capacity to make some day-to-day decisions. I have not received medical evidence to the extent that [Mrs Carrington] was not capable of giving consent to, for example,

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<sup>30</sup> *MMM, JEM* [representative ] v *KTM FAM* 2010-029-000141 8 November 2010 at para 23

<sup>31</sup> Section 27(1) DVA

<sup>32</sup> Section 27(2) DVA and also extends to s 27(3)DVA to imposing a condition specifying a person who for purposes under the Act is entitled to consent or withdraw consent in specified circumstances

<sup>33</sup> Section 27 [4]DVA

<sup>34</sup> Section 8 Care of Children Act 2004

<sup>35</sup> The medical evidence was the three reports from [the doctors]. The doctors were not called. None preclude decision-making in absolute terms.

having a cup of tea with someone or engaging in a conversation or, it follows, accepting a visit from [John].

[83] My concern was a potential for confusion between what [Mrs Carrington] might say, depending on who asked, and what was safe and appropriate for her. By her closing remarks Ms Ebborn had determined not to pursue a consent condition and sought simply that I specify the nature and extent of contact for [John].

[84] I am satisfied that the appropriate course is to specify the nature and extent of contact for [John] and in doing so vesting responsibility for making that decision in [Richard]. That should make plain to everybody, in particular [John], that direct and indirect contact for him is to be regulated by [Richard]. [Richard] may give consent on a very prescriptive basis or in time it is to be hoped that consent can be given to a regular pattern of contact with few limitations.

[85] What was initially sought was a monthly visit for up to two hours under supervision of [Richard] or a person nominated by [Richard]. My concern about that is that it would require an amendment to the protection order if there were to be changes to those arrangements.

[86] I accept [John]'s proposition that monthly contact with his mother at this time in her life and in her circumstances, having regard to the extensive contact which has been in place and the realities of her health and age, is likely to be a matter for considerable distress to [John]. The contact between him and his mother, if managed appropriately, could be of considerable benefit to her. For that reason I prefer the option of a condition that limits contact only on the basis that it is as agreed. For the avoidance of doubt that may extend to supervision.

[87] This will mean for [John] that he will need to engage with [Richard] but leaves open to them a process of rebuilding trust and confidence such that contact may be re-established on a proper and "normal" basis. It is for [John] to determine whether he wishes to do this with [Richard]'s responsibilities being clearly to advance his mother's interests as her attorney. It is [John]'s responsibility to conduct himself appropriately.

[88] I cannot control the Rest Homes response so that will be a matter for them.

[89] I am satisfied that a condition relating to contact is appropriate. The condition I impose on the protection order is that:

Contact between [John Carrington] and [Mrs Carrington] is to occur only in such manner including but not limited to time, place and circumstance as agreed with [Richard Carrington] and not otherwise.

*Residual Discretion*

[90] I have a residual discretion to determine whether an order should be made.

[91] This situation is a difficult one and it is my genuine wish to have found some other way to regulate the behaviour of [John] and the relationship between him and his mother.

[92] The combination of the matters I have referred to including [John]'s presentation at hearing and his unwillingness to accept the obvious combined with his unwarranted sense of injustice directed at [Richard] makes it likely there will be more behaviour of the same kind, if he is not subject to clear restrictions and consequences.

[93] [John]'s willingness to maintain and justify his position in the face of the evidence highlighted that there is little insight or appreciation of the effect of his conduct.

[94] In addition to other matters it is highly likely that [John] will raise the question of cost. He referred a number of times to the significant cost to him of securing a lawyer for his mother and enabling her right to be heard. I do not agree that was his underlying purpose or objective. [John]'s intent was to find support for his own view. His threat to review the process<sup>36</sup> was not actioned until after the protection order was

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<sup>36</sup> Page 57 BOD 2 tab A email [John] [Carrington] to [Richard], "After speaking with Mum with her approval you will get a hearing date." Email is dated 21 November 2016.

applied for. The level of costs incurred would not have been necessary if [John] had behaved reasonably.

[95] I am not satisfied that [John]'s behaviour will change without the requirements of a protection order. As a result of the protection order [Mrs Carrington] will be kept safe from ongoing involvement in [John]'s grievances about lawyers, costs, court processes, medical matters and his view of the family by way of careful management of his contact.

[96] There is no basis to conclude that a protection order should not issue. It is necessary.

### **Review s 103**

[97] The issue was whether the actions of [Richard] in placing restrictions in respect of [John]'s interactions with [Mrs Carrington] are reasonable. The findings with respect to the protection order lead me to the view that [Richard]'s conduct has been consistent with his obligations to his mother. There is nothing that suggests to me that she has not been consulted to the extent possible or that his decision-making is not mindful of her needs and his responsibilities under the Act.

[98] The view [Richard] has taken, is that it is the conduct of [John] that is causing distress and anxiety to his mother and this amounted to domestic violence. That view is justified. [Richard] has responded accordingly in his decision to make an application for a protection order. This was preceded by every reasonable effort to resolve matters in another way.

[99] Having concluded that a final protection order is necessary, I do not accept that there is a basis for reviewing the decision-making by the attorney.

[100] The decision to issue a trespass notice was by the Rest Home and is for them to decide how they will proceed. Even if the first trespass notice was the subject of consultation with [Richard] in November 2016 the decision to renew the trespass notice on 31 May plainly has been a decision by the Rest Home.

[101] The decision to place [Mrs Carrington] in the Rest Home is no longer subject to challenge as [John] accepts that that is the best place for her.

[102] [John] no longer seeks replacement of [Richard], and while his submissions strongly pointed to concerns that [Richard] had not placed his mother's interests first and considered his own interests to be superior to his Mum's, this was not expanded upon or clarified. I do not accept that is what has occurred.

[103] I am not able to discern in any way that [Richard]'s conduct or chosen course of action has not been to serve his mother's interests. I do not accept that there is a conflict such as to preclude his appointment or to compromise it, and decline to make any directions or orders in respect of that application. It is therefore dismissed.

### **Outcome**

[104] A final protection order is to issue against [John] in favour of [Mrs Carrington]. A condition of the order will be that contact between [John] and [Mrs Carrington] is to be on such terms including but not limited to time, place and circumstance as agreed to by [Richard]. For the avoidance of doubt this may include supervision by [Richard] or someone agreed to by [Richard] as suitable to undertake the task. It is to be served by the Police.

[105] I do not see any value to [John] being directed to attend a programme and he is not required to do so. It is obvious what he needs to do. That is to accept that sound decisions have been made for his mother and that it is his behaviour that needs to change.

[106] I would like to see the situation improve, so [John] can see his mother on a regular basis. I am not prepared to limit [John]'s visits at this stage to a monthly occurrence, but it may be that is what is required. The responsibility for making that decision properly rests in [Richard] in consultation with [Mrs Carrington] and those responsible for her care and addressing her needs, including the Rest Home. It will also be a factor of [John]'s decision about how he conducts himself.

[107] Ms Ebborn sought that the protection order was made in preference to continuing the Injunction. The injunction is limited to issues of removal from the Rest Home. It has not been effective and is not required to rely on that in preference or in addition to making the protection order. The interim injunction is discharged.

[108] I dismiss the application for directions under s 103.

[109] Costs are reserved but I warn [John] that, having regard to my findings, an award of costs is likely to be in favour of [Richard] as I consider much of this litigation has been as a result of [John]'s conduct and his unnecessary insistence that matters proceed in this way.

[110] If the parties cannot agree on costs, any application for costs is to be filed and served on or before 7 July 2017. Any response is to be filed and served by 21 July 2017. A decision will issue based on the papers.

[111] I will also consider, at the same time as I consider inter party costs the question of how the costs incurred by Mr Adams are to be addressed so any submission should address that aspect. Mr Adams appointment is now concluded.

M J Hunt  
Family Court Judge