

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 01038

IN THE MATTER of an application by
LURLINE BRYAN to exercise jurisdiction
over the management of property owned by
GWENDOLYN JULEYE

AND

IN THE MATTER of Section 29 of the
Mental Health Act

Mr. Debayo Adedipe for Applicant

Mrs. Marvalyn Taylor-Wright instructed by Taylor-Wright & Company for Respondent

Heard: October 11, November 14, 21, and December 5, 2005

Sinclair-Haynes, J (Ag.)

Mrs. Gwendolyn Juleye (patient) and Mrs. Carmen McGregor (deceased) are tenants in common of property situate at 6 Balvenie Heights, Mandeville in the parish of Manchester. Both ladies, who were sisters, resided at the said property.

Mrs. Carmen McGregor suffered a stroke in 2000 and was removed from the home to the United States by Miss Lorna Callender, their niece and one of the applicants in this matter. They returned in November 2002. In March 2003, Carmen was again taken to the USA and in May 2004 she died.

Mrs. Gwendolyn Juleye has been diagnosed as suffering from Alzheimer's and as a result was placed in the Brookdale Nursing Home where she still resides. The cost of maintaining the patient in the nursing home has proven to be quite high. Indeed, approximately \$75,000.00 per month is required to pay the nursing home together with

the cost of her other needs. Initially, funds from an account which the patient held were used to maintain her. However, those funds have been depleted. Consequently, on the 14th April 2005 an application was made to the court under the Mental Health Act by way of Fixed Date Claim Form (FDCF) to appoint Miss Lurline Bryan, the sister of the patient, as the person having jurisdiction to handle her affairs. One of the reliefs sought was an order to sell the said property because funds were needed to maintain her.

On the 4th May 2005, an application was made by Mrs. Janet Taylor, a cousin of the patient, to be substituted as the applicant on the Fixed Date Claim Form because Miss Lurline Bryan, at that time resided outside of the jurisdiction. She was supported in her application by Miss Lurline Bryan. The application was granted by Campbell J on the 25th May 2005. On the 20th July 2005, Campbell J authorized Mrs. Taylor to sell the property. This application was made *ex parte*.

The relatives of Gwendolyn Juleye, in August 2004 after the death of Mrs. McGregor heard rumours of a will made by her.

Consequently, Mrs. Janet Taylor wrote to Mr. Norman Godfrey, attorney-at-law and an applicant herein requesting a copy of the will. She received no response. Upon obtaining the *ex parte* order, she wrote to Mr. Godfrey, requested a copy of the will and enclosed a copy of the caution against the probate of any purported will of Mrs. McGregor. She received no response to that letter or to a second letter which she wrote in January 2005.

By letter dated 1st September 2005, Messrs Brown, Godfrey & Morgan, attorneys-at-law wrote to Mesdames Taylor, Deacon & James and informed them that Mr. Norman

Godfrey and Miss Joan Callender were the executors of the will. They instructed them to remove the padlocks which were placed on the doors of the said premises.

On the 7th September 2005, Mrs. Janet Taylor applied by way of Notice of Application for court orders for a declaration that the purported will of Carmen McGregor was fraudulent.

On the 19th September 2007, Miss Joan Callender and Mr. Norman Godfrey applied to the court for an injunction to restrain Miss Janet Taylor from selling the said property and to have Miss Callender appointed as trustee for the patient instead of Mrs. Janet Taylor. It is this application that is before me for adjudication. An application for Mr. Rohan Fagan, the purported adopted son of Mrs. McGregor to have access to the premises was also before the court. Although that matter was heard, it is no longer relevant to the determination of this matter.

Submissions by Mr. Debayo Adedipe

Mr. Adedipe submits as follows:

- i. That Janet Taylor ought not to have been appointed trustee because she is not a relative within the meaning of Section 3.1 of the Mental Health Act. Miss Lorna Callender, who is a qualified relative under the Act and is both ordinarily resident in Jamaica and the US, ought to be appointed. The orders made by Campbell J are nullities as he acted outside of his jurisdiction. In the circumstances this court has the jurisdiction to set aside the order made by Campbell J.
- ii Miss Lurline Bryan cannot be appointed administratrix/trustee of the estate because there is a will in existence and an administrator cannot take

precedence over an executor. He relies on Part 68.11 of The Civil Procedure Rules (CPR). He submits that the executors should be appointed to represent the estate.

iii That Miss Lurline Bryan cannot be substituted for the applicant in the Fixed Date Claim Form for the following reasons:

- a. There is no application before the court.
- b. A party cannot be substituted after the order has already been made.
- c. The court does not have the power to order a sale of the property.

Notice has to be given to the co-owner or personal representative or an application made to dispense with service. To do otherwise would be unconstitutional. The court ought to consider whether the applicants who have a duty to protect the interest of the estate would wish to:

- i Purchase the interest of Gwendolyn Juleye;
- ii. repair the premises before sale, or
- iii. to sell.

The decision to sell cannot be imposed by an order.

Submissions by Mrs. Marvalyn Taylor-Wright

- i. Mrs. Taylor-Wright submits that an ex parte order was sought because on two occasions they requested a copy of the will from Mr. Norman Godfrey but received no response. There was therefore, no reason to believe a will existed because Carmen had suffered a stroke and lacked the capacity to execute a one. Further, she submits that full and frank disclosure was

made to the court. She relies on **Becker v Noel and Another** 1 WLR (1971) 803.

- ii. The court's protective jurisdiction, she submits, takes precedence over any estate matter. Moreover, there is no prejudice to, nor will a sale of the premises affect the interest of the beneficiaries. In exercising its powers, the court is merely ensuring that the patient receives the funds necessary to maintain her. The order simply changes the form of the legacy under the purported will from real property to a realized interest. The variation of the order sought is to have Carmen's half interest paid into court pending the decision of the validity of the will or paid to an account in the estate of Carmen McGregor.
- iii. Further, she submits that one tenant in common cannot fetter the interest of another party in land owed as tenancy in common. She submits that Miss Callender and Mr. Godfrey are seeking to prevent the house from being sold notwithstanding the patient's need for funds.
- iv. Mr. Godfrey and Miss Callender, she submits, have nothing to lose by the sale of the property as their supposed interest in the proceeds of the sale would be transferred. She contends that by virtue of the court's order for sale of the subject property Mrs. Taylor exercised the right to partition under the Partition Act. Further, the patient has no other source of income sufficient to maintain her as her teacher's pension and social security benefits are inadequate to defray the expenses.

- v. Rental of the property is not a viable option because the house is in need of extensive repairs. There is no money to undertake such repairs. The fickle behaviour of tenants would not ensure a ready and available source of income necessary in the face of Mrs. Juleye's certain expenses.
- vi. Mr. Godfrey and Miss Callender have no *locus standi* to appear under the Mental Health Act because they are executors of a challenged will. Further, since their interest is the estate of Carmen McGregor, it ought to be brought by an administrative action or by seeking leave to intervene.

Ruling

Whether Miss Lurline Bryan can be substituted

Mr. Adedipe's submission that Mrs. Taylor ought not to have been appointed because she is not a relative within the meaning of the Mental Health Act and therefore Campbell J's order ought to be set aside was eventually conceded to by Mrs. Marvalyn Taylor-Wright. An application was made during the hearing by Mrs. Janet Taylor to have Miss Lurline Bryan substituted as applicant.

Mr. Adedipe's contention that Miss Lurline Bryan cannot be appointed administratrix/trustee of the estate because there is a will in existence is in my view untenable. Miss Lurline Bryan has not sought to be appointed administratrix of the estate of Carmen McGregor. She has applied to be appointed a trustee under the Mental Health Act, to care for and to handle the affairs of Mrs. Gwendolyn Juleye who is in dire need of the funds. There is therefore no conflict with the executors who have been appointed under the purported will of Miss Carmen McGregor. In any event, the said will has been challenged.

Mr. Adedipe's submission that a party cannot be substituted after the order has been made contradicts his submission that Campbell J's order ought to be set aside and Miss Callender be substituted for Miss Bryan because he acted outside of his jurisdiction. If the order can be set aside to substitute Miss Callender, a niece, it certainly can be set aside to substitute Miss Lurline Bryan, a sister.

Lord Denning MR made the following statement in **Becker v Noel and Another** (Practice note) 1971 1(WLR) 803:

“Not only may the court set aside an order made *ex parte*, but where leave is given *ex parte* it is always within the inherent jurisdiction of the court to revoke that law if it feels that it gave its original leave under a misapprehension upon new matters being drawn to its attention.”

Whether court has power to order sale of property

I will now examine his submission that the court does not have the power to order a sale of the property. The patient and the deceased owned the property as tenants in common.

Williams on Real Property 23rd edition pages 148-149 states:

“Tenants in common are such as have a unity of possession, but distinct and separate titles to their shares.... A tenant in common is, as to his own undivided share, precisely in the same position of the owner of an entire and separate estate.

Accordingly, it is in the power of any joint tenant or tenants in common to compel his companion to effect a partition between themselves, according to the value of the share.”

Megarry's Law of Real Property page 878 states:

“Unlike joint tenants, tenants in common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. Thus tenants in common have quite separate

interest; the only fact which brings them into co-ownership is that they both have shares in a similar property which has not yet been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular part of land.”

Mr. Adedipe’s complaint that the co-owners or personnel representative ought to have been served is without merit. The application has now been brought to the attention of the executors. They have been given the opportunity to argue their position vigorously before me, which would have been the purpose of serving the application.

Section 2(1) of the Partition Act states:

“For the purposes of this Act, an action for partition shall indicate an action for sale and distribution of the proceeds and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds and it shall not be necessary to claim a partition.”

Miss Bryan has applied to the court for the sale and distribution of the proceeds.

With regards his submission that the applicants should be given the option to purchase, sell or repair the premises, the matter was adjourned to allow Mr. Adedipe to put the options to the applicants. They had no desire to purchase nor were they prepared to assist with the repairs. The patient therefore remains in need of funds for her care and existence.

I will now consider Mr. Adedipe’s submission that there is no application. In my view this is Mr. Adedipe’s strongest submission. Although the court is permitted to substitute a new party for an existing one in order to resolve the matter more effectively; this is an application under the Mental Health Act. In the circumstance there should be an affidavit satisfying the provisions of the said Act.

I am urged by Mrs. M. Taylor-Wright that the claimant is in dire need of financial assistance. In the circumstances I should consider Miss Lurline Bryan who now resides in Jamaica. Initially, Miss Callender had informed the court that Miss Lurline Bryan was senile and therefore incapable. However, Miss Bryan attended court on at least three occasions and was clearly *compos mentis*.

There is in fact an application before the court to set aside the order of Campbell J. The court, in considering the welfare of the patient, need not appoint the applicant but in the circumstances appoint the person most suitable. Miss Callender is a niece. Miss Lurline Bryan is a sister. Section 3 (3) gives a sister precedence over a niece. It is noteworthy that Miss Callender is not fully resident in Jamaica. She has not outlined to the court how she proposes in the circumstances to take care of the patient. In fact Section 3 (4) (a) of the Mental Health Act requires the applicant to be ordinarily resident in Jamaica. Miss Callender has not declared her age. Section 3 (4) (c) of the Mental Health Act requires the applicant to be 18 years or older. However, the court has observed that she is well above age 18 years. On the other hand, Miss Bryan who is above 70 years is now resident in Jamaica. She informed the court that her address is 8 Sheffield Road, Kingston 2. Section 3 (4) (d) of the Mental Health Act excludes a person against whom an order has been made under Section 52 of the Offences of the Person Act from being considered. There is no evidence from any of the applicants whether any of them is a person against whom an order has been made under the above Act. The question arises whether the absence of such evidence is fatal to the applications.

As a result of the dire circumstances of the patient and the urgent necessity to attend to her needs, the court has given effect to the overriding objective in order to deal justly, expeditiously and fairly with the matter. I have accepted the submissions of Mrs. M. Taylor-Wright that I ought to rely on the affidavit of Miss Bryan in the matter and her oral application to have Miss Bryan substituted. The original application by way of Fixed Date Claim Form was that of Miss Lurline Bryan. It was duly supported by her affidavit. She is therefore not a stranger to the application but rather she commenced it.

In the circumstances I hold that Miss Lurline Bryan can be substituted as the proper applicant on the FDCF and consequently I make the following orders:

- i Lurline Bryan is entitled to exercise jurisdiction over the management of the property and affairs of Gwendolyn Juleye.
- ii Lurline Bryan is hereby authorized to sign and execute all contracts, transfers, assignments, deeds and instruments on behalf of Gwendolyn Juleye in respect of all properties owned by her and in particular all that parcel of land part of Balvenie part of number forty three on the plan of Balvenie registered at Volume 1059 Folio 737 of the Register Book of Titles to transfer such authority by virtue of a Power of Attorney to such person or persons as she deems fit.
- iii Lurline Bryan be and is hereby authorized to conduct and/or manage all the business affairs of Gwendolyn Juleye or to transfer such authority by virtue of a Power of Attorney to such person or persons as she deems fit.

IT IS FURTHER ORDERED THAT:

1. Lurline Bryan upon obtaining current valuation from Messrs Langford & Brown is authorised to sell on the open market property being all that parcel of land part of Balvenie part of number 75 on the plan of Balvenie registered at Volume 1059 Folio 737 of the Register Book of Titles in the registered names of Gwendolyn Juleye and Carmen McGregor, deceased as Tenants in Common.

IT IS ALSO ORDERED THAT:

- a. Lurline Bryan is hereby authorized to manage and control Gwendolyn Juleye's half (1/2) share of the proceeds of the sale of the property.
- b. The other half (1/2) share of the proceeds of the property is to be paid into an interest bearing account in the court for the estate of Carmen McGregor, deceased.
- c. The Registrar of the Supreme Court is empowered to sign the Instrument of Transfer on behalf of the Estate of Carmen McGregor, deceased.
- d. Leave to appeal granted