

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 134/2005

**BEFORE: THE HON. MR JUSTICE COOKE, J.A.
 THE HON. MR JUSTICE HARRISON, J.A.
 THE HON. MRS JUSTICE HARRIS, J.A.**

**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**

| | | |
|----------------|--|-------------------|
| BETWEEN | LORNA OPHELIA CALLENDER NORMAN WEDLEY GODFREY | APPELLANTS |
| AND | LURLINE BRYAN | RESPONDENT |

Debayo A. Adedipe for the appellants.

Michael Lorne for the respondent.

2 December 2009 and 23 April 2010

HARRIS, J.A.

[1] In this appeal the appellant challenges the following orders made by Sinclair Haynes J on 6 December 2005:

- 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 Title 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 authorized 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..."

[2] On 2 December 2009 we allowed the appeal and promised to put our reasons in writing. This we now do in obedience to our promise. Sometime in the year 2003, Gwendolyn Juleye (hereinafter called "the patient") became mentally incapacitated. In 2004 she was diagnosed as suffering from Alzheimer's disease. The patient was possessed of an undivided interest in property at Balvenie Heights, Mandeville in the parish of Manchester, registered at Volume 1059 Folio 737 of the Register Book of Titles. This she held as a tenant in common with her sister Carmen McGregor.

[3] On 14 April 2005 the patient's sister Lurline Bryan, who is resident in the United States of America, by way of a fixed date claim form, sought the following orders:

- "1. A declaration that LURLINE BRYAN is entitled to exercise jurisdiction over the management of the property and affairs of GWENDOLYN JULEYE.
- 2. An order that 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 Title or to transfer such authority by virtue of a Power of Attorney to such person or persons as she deems fit.

3. An Order that 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."

[4] Miss Bryan, in her affidavit in support of the fixed date claim form, records her place of residence as Fontana, California in the United States of America. On 4 May 2005, an affidavit was filed by Lurline Bryan, paragraphs 7 and 8 of which were couched as follows:

- "7. That Janet P. Taylor has agreed to be substitutes [sic] as the Applicant herein and I refer to her affidavit in support of my Application for substitution sworn to on the day of May 2005.
8. That in light of the foregoing I humbly pray that this Honourable Court will grant the order sought and substitute the name of JANET P.TAYLOR as the applicant herein and grant her the following orders:
 - (a) A declaration that JANET P. TAYLOR is entitled to exercise jurisdiction over the management of the property and affairs of GWENDOLYN JULEYE.
 - (b) An order that JANET P. TAYLOR 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 YWENTY-THREE (sic) GREENVALE ROAD in the parish of MANCHESTER being the lot

numbered FORTY-THREE on the Plan of Balvenie registered at Volume 1059 Folio 737 of the Register Book of Titles or to transfer such authority by virtue of a Power of Attorney to such person or persons as she deems fit.

- (c) An Order that JANET P. TAYLOR is 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."

[5] On 5 May 2005 Campbell J made the following orders:

- "1. JANET P. TAYLOR is substituted as the applicant in the Fixed Date Claim Form herein.
2. JANET P. TAYLOR is entitled to exercise jurisdiction over the management of the property and affairs of GWENDOLYN JULEYE.
3. JANET P. TAYLOR 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 Title or to transfer such authority by virtue of a Power of Attorney to such person or persons as she deems fit.
4. JANET P. TAYLOR 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."

[6] On 20 July 2005, on the application of Mrs Taylor, further orders were made by Campbell J. The orders read:

"1 Further to Court Orders granted by the Honourable Mr Justice Campbell in the matter herein on the 5th day of May 2005:

- (a) JANET P. TAYLOR is hereby authorized to obtain a current valuation on and to sell on the open market property being 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 in the registered names of Gwendolyn Juleye and Carmen M^cGregor, deceased as tenants in common.
- (b) JANET P. TAYLOR is hereby authorized to manage and control GWENDOLYN Juleye's half share of the proceeds of the sale of the property pursuant to the Court Order dated the 5th day of May 2005.
- (c) The other half share of the proceeds of the sale of the property be paid into an interest bearing account in the name of Lurline Bryan as administrator/trustee for and on behalf of the estate of Carmen McGregor, deceased."

[7] By a notice of application for court orders filed on 19 September 2005, Lorna Ophelia Callender and Norman Wedley Godfrey, the executors of the estate of Carmen McGregor, sought the following orders:

- "1) That service of the orders made herein on (sic) and on the Applicants herein be dispensed with.
- 2) That the time for serving this application on Janet Taylor be abridged having regard to the urgency of the situation.
- 3) That Janet Taylor be restrained from selling the property at Lot 43 Balvenie registered at Volume 1059 Folio 737 of the Register Book of Titles.

- 4) That the orders appointing Janet Taylor to exercise jurisdiction over the management of the property and affairs of Gwendolyn Juleye and to sell the said property registered at Volume 1059 Folio 737 of the Register Book of Titles be revoked/set aside.
- 5) That Lorna Ophelia Callendar be appointed to exercise jurisdiction over the management of the property and affairs of Gwendolyn Juleye
- 6) That an injunction be granted restraining the said Janet Taylor by her self or otherwise from excluding the said Rohan Fagan from occupying the property as caretaker as he had done hitherto.
- 7) That we the executors be made respondents in this matter and granted permission to represent the estate of the late Carmen McGregor herein..."

[8] Five grounds of appeal were filed. Ground 2 was abandoned. Grounds 1, 3, 4 and 5 may be conveniently considered simultaneously.

The grounds are:

- "1. The learned Judge erred in law in failing to deal with the only proper application which was before her – the application by the Appellants to set aside the orders made by Mr. Justice Campbell, to appoint the applicant Lorna Ophelia Callendar as the person to be in charge of the affairs of Gwendolyn Juleye etc.
3. The learned Judge erred in purporting to make orders on the Fixed Date Claim Form Dated April 12, 2005 when it was already spent, because orders had already been made on it, and, in any event, there was no or no proper application before the Court by Lurline Bryan or Janet Taylor for any such orders.
4. The learned Judge erred in making the order for sale of the property at lot 43 Balvenie registered at Volume 1059 Folio 737 for the following reasons:

- a) this was not an order sought in the Fixed Date Claim Form dated April 12, 2005
 - b) there was no application before the Court for a sale of the property
 - c) the Court has no power, in proceedings under the Mental Health Act, which are not served on the owner or the representatives of the owner of property, to order the sale of that owner's interest in real estate, when that owner is not the subject of the Mental Health Act proceedings.
5. The learned judge erred in law in appointing Lurline Bryan in substitution for Janet Taylor for the following reasons:
- a) there was no application by Lurline Bryan to be substituted
 - b) even if there had been an application for Lurline Bryan to be substituted this could not been [sic] done after the order had been made on the Fixed Date Claim Form. There would have had to be an application for an order to be made in Lurline Bryan's favour to exercise the powers under the Mental Health Act. There was no such application.
 - c) Further, the provisions of the Mental Health Act require an applicant for an order thereunder to be resident in Jamaica. There still is no evidence, on affidavit or otherwise, that she is so resident. She had been replaced by Janet Taylor earlier in the proceedings precisely because she was not resident in Jamaica."

[9] Mr Adedipe argued that the learned judge had no power to have substituted Mrs Taylor in place of Miss Bryan as neither Mrs Taylor nor Miss Bryan was qualified to be appointed under the Mental Health Act. Miss Bryan was resident outside the jurisdiction and did not qualify as the nearest relative

while Mrs Taylor did not fall within the class of persons who are designated nearest relatives under the Act, he argued.

[10] Mr Lorne argued that the learned judge could have properly acted upon the fixed date claim form, notwithstanding that there was no application from Miss Bryan to show that since the making of the order by Campbell J, she had taken up residence in Jamaica.

[11] The learned judge, after acknowledging that there was, among other things, an application before her to set aside the orders of Campbell J went on to state at page 9 of her judgment:

"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."

She later stated:

"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 ..."

[12] The primary issue in this case is whether Mrs Taylor or Miss Bryan could have been appointed to manage and administer the patient's affairs. This leads me to examine the provisions of the Mental Health Act but I will confine my deliberations only to such sections of the Act as are relevant to this appeal.

Section 3 (1), (3) and (4) states:

"3 (1) In this Act "relative" means any of the following –

- (a) husband or wife;
- (b) son or daughter;
- (c) father;
- (d) mother
- (e) brother or sister;
- (f) grandparent;
- (g) grandchild;
- (h) uncle or aunt;
- (i) nephew or niece.

(3) Subject to the provisions of this section, in this Act the "nearest relative" means a husband or wife, or if there is no husband or wife, any of the persons mentioned in subsection (1) (b) to (i) in order of precedence, who is for the time being surviving, relatives of the whole-blood being preferred to relatives of the same description of the half-blood, and the elder or eldest of two or more relatives described in any paragraph of subsection (1) being

preferred to the other or others of those relatives, regardless of sex.

- (4) Where the person who, under subsection (3), would be the nearest relative of a patient –
 - (a) is not ordinarily resident in Jamaica; or
 - (b) being the husband or wife of the patient, is permanently separated from the patient, or has been deserted by the patient; or
 - (c) not being the husband, wife or mother of the patient, is for the time being under eighteen years of age; or
 - (d) is a person against whom an order has been made under section 52 of the Offences against the Person Act (which relates to the encouragement of seduction or prostitution of a girl under the age of sixteen years) divesting that person of authority over the patient and the order has not been rescinded,

the nearest relative of the patient shall be ascertained as if that person were dead.

Section 29 provides:

- "29. (1) The Supreme Court, or a Resident Magistrate's Court in the case of property the value of which is within the monetary jurisdiction of that Court, may, on the application of the nearest relative or the Attorney General, exercise jurisdiction over the management of the property and affairs of a patient if the Court is satisfied by evidence (medical and otherwise) on affidavit that the patient is incapable by reason of mental disorder of managing and administering his property and affairs."

[13] As prescribed by section 29, upon the application of a nearest relative or the Attorney General, the court may make an order for the management and administration of the affairs of a patient who, due to his or her incapacity is not competent so to do. It would seem therefore that the Act contemplates that such an application should be made by a nearest relative or by the Attorney General.

[14] Section 3 (1) of the Act prescribes with definitive particularity the classes of persons who qualify as nearest relatives. It is without doubt that under section 3 (4) a person who would ordinarily fall within that class of persons who can be treated as nearest relative, if resident outside the jurisdiction, must be treated as dead. The appointment of such a person to manage the affairs of a patient is prohibited. It cannot be denied that a sister of a patient would have the capacity to apply for an order under section 29. However, in order to obtain same, residence in Jamaica would be a prerequisite.

[15] Miss Bryan, who at all material times was resident abroad, did not qualify as a nearest relative to whom the order could have been granted nor could Mrs Taylor, a cousin of the patient, be so classified. Mrs Taylor nor Miss Bryan, not having been clothed with the authority to make an application to manage the patient's affairs, certainly neither would have been entitled to an order for that purpose. Campbell J was therefore not empowered to have made the original order appointing Mrs Taylor to manage the affairs of the patient, in lieu of Miss Bryan nor could he have made the consequential orders. He had clearly erred.

[16] This error was compounded by the learned judge. The fact is that Miss Bryan did not qualify as a nearest relative for the purpose of section 3 (1) of the Act, nor was Mrs Taylor so qualified, Mrs Taylor could not have been lawfully substituted in place of Miss Bryan in the first place. The learned judge had no foundation upon which she could have made her orders. An oral application was made by Mrs Taylor Wright for Miss Bryan to be substituted in place of Mrs Taylor. However, there was no application by Miss Bryan before the learned judge, requesting that she be appointed to manage the patient's affairs nor was there any evidence showing that she was at that time resident in the island. The fact that she informed the learned judge that she was resident at Sheffield Road was insufficient. This, clearly, was not material upon which the learned judge could have acted.

[17] It was further submitted by Mr Adedipe that even if Miss Bryan could have been appointed to manage the affairs of the patient, the learned judge could not have made the order for sale of the property. Section 65 of the Registration of Titles Act, he argued, recognizes separate ownership by proprietors who hold property as tenants in common. He contended that a co-owner may contract to sell his undivided share without the consent of the other co-owner but where the interest of one co-owner is an undivided share of the entire property; he may not contract to sell the entire property. In support of this submission he relied on the

case of **Leiba v Thompson (Administrator of the Estate of Herbert Leston Thompson) and in his personal capacity** (1994) 31 JLR 183.

[18] In **Leiba v. Thompson** (supra) an action was brought by the appellant seeking specific performance of a written agreement for the sale of $\frac{3}{4}$ acre of land which was part of a larger piece of land. The entire property was held by the respondent and Herbert Thompson as tenants in common, each holding undivided shares in the property. The contract for the sale of the land was made without the consent of the co-tenant. Herbert died prior to the completion of the purported sale. Upon the co-tenant's refusal to complete the agreement, the appellant brought a suit. The trial judge found in favour of the respondent. Allowing the appeal, the court held, among other things, that although a co-tenant may contract to sell without the consent of the other in that case the interest of the deceased was an undivided share in the entire property and he could not have contracted to sell $\frac{3}{4}$ of an acre of the property as his interest therein could not be quantified as $\frac{3}{4}$ of an acre.

[19] It is clear that where property is held by two registered proprietors as tenants in common in undivided shares, a co-owner cannot alienate the interest of the other by selling the entire property. Accordingly, the sale of the entire property requires the consensus of both owners. One co-owner may only alienate his share of the property if he holds a distinct share therein.

[20] The property at Balvenie Heights is owned by the patient and the estate of Carmen McGregor as tenants in common. This they hold in undivided shares. Carmen McGregor died testate. The sale of the entire property without the consent of Carmen McGregor's executors is impermissible. It follows therefore, that the learned judge was wrong in making an order for sale of the property and the consequential orders thereunder.

[21] For the foregoing reasons we allowed the appeal.

ORDER

COOKE, J.A.

1. The executors of Carmen McGregor are granted leave to intervene.
2. Time for service of the application of 19th September 2005 on Janet Taylor is abridged.
3. The appeal is allowed. The orders of Sinclair-Haynes J. are set aside. Costs of the appeal to the appellants to be agreed or taxed.