IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2007 HCV 04699

IN CHAMBERS

IN THE MATTER of the Estate of
DUDLEY IAN WARD HORNER
of 3 Coolshade Drive, Kingston 19,
Saint Andrew

AND

IN THE MATTER OF The Mental
Health Act

Mr. Garth McBean and Mr. Carl Dowding instructed by Pickersgill, Dowding and Bailey-Williams for the Committee/Respondent

Dr. Adolph Edwards for Mr. Dudley Ian Ward Horner

Practice and Procedure – Fixed Date Claim Form not served – Order made thereon – Respondent said to be unable to manage his affairs – Application to set aside order - Whether notice of the Fixed Date Claim form should have been given - Whether any other order would have been made had notice been given – CPR, rules 5.10, 11.16 and 11.18

Mental Health – Application for order appointing Committee – Whether notice of application required – Who should be served– The Mental Health Act, section 29

10th and 12th August, 2009

BROOKS, J.

Mr. Dudley Ian Ward Horner is now 84 years old and retired. During his working years he was a successful businessman and raised a family. He is now a father, grandfather and unfortunately, a widower. He lives in his own home and has a caregiver. Mr Horner is, however, very disgruntled. He complains that his daughter, Dr. Jeanette Horner-Bryce, in or about December 2007, informed him that she was in charge of him and that she has a paper to that effect. He says that she has since padlocked the gate to his home, installed security guards there and has prevented him from receiving visitors. All this, he says, is based on an order made by this court on 23rd November, 2007, which appointed a Committee, which included Dr. Horner-Bryce, to manage his affairs.

Mr. Horner has applied to have the order discharged. He says that it was made without any prior notice being given to him. His counsel, Dr. Adolph Edwards, submits

that because of the failure to serve the fixed date claim form, or any other document, under which the application was made, the order should be set aside.

Mr. McBean appearing for the Committee demurs. He submits that there was no need to serve Mr. Horner personally with the fixed date claim form. Mr. McBean also submits that Mr. Horner needs to prove other things before this court will set aside an order made, albeit in his absence, by a judge of concurrent jurisdiction.

The questions to be answered in this judgment are, firstly, whether non-service of the fixed date claim form is fatal to the order made thereunder and if not, whether the circumstances justify setting aside an order which has been made without notice.

The Law

Service of the Fixed Date Claim Form

Rule 8.1 of the Civil Procedure Rules 2002 (CPR) allows a fixed date claim form to be used, "where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact. In the instant case the application was made pursuant to section 29 of the Mental Health Act. No complaint has been made concerning the mode of commencement of the proceedings. It is the absence of service which is impugned.

Once filed, the general rule is that a fixed date claim form must be served personally on each defendant or respondent (rule 5.1 (1) of the CPR). Similarly where an application is made for a court order, "the general rule is that the applicant must give notice of the application to each respondent". (See rule 11.8 of the CPR). The basis for requiring service is as fundamental to our system of law as it is to natural justice. It is that the other side must be given an opportunity to be heard.

Rule 5.10 of the CPR provides guidance concerning service of the fixed date claim form where the person who would normally be served, is a minor or a patient. Paragraphs (3) through (6) of that rule are worthy of being quoted in full:

> (3) Where a person is authorised under the Mental Health Act to conduct the proceedings in the name of the patient or on the patient's behalf, a claim form must be served on that person.
>
> (4) Where there is no person so authorised, a claim form must be served on the person with whom the patient resides or in whose care the patient is.
>
> (5) The court may make an order permitting the claim form to be served on the minor or patient, or on some person other than the person specified in paragraphs (2) to (4).

(6) The court may order that, although paragraphs (2) to (5) have not been complied with, the claim form is to be treated as properly served.

In certain circumstances therefore, the court may order that the fixed date claim form be heard despite the fact that the respondent, who is alleged to be a patient, has not been served. The court may make such an order on an application which is itself, made without notice but which is supported by evidence on affidavit. (Rule 5.10 (7) of the CPR)

Setting aside an order made on a without notice application

Once the court decides to hear the without notice application and makes an order in respect of it, that order ought to be served on the respondent and on any other person directly affected by it. Rule 11.16 of the CPR specifies certain requirements for the service. One of those requirements is that the person served must be informed of his right to make his own application to set aside or vary the order. Where an application to set aside or vary the order is made, rule 11.18 sets the standard which the applicant must satisfy. Rule 11.18 (3) states:

"The application to set aside the order must be supported by evidence on affidavit showing-

(a) a good reason for failing to attend the hearing; and

(b) **that it is likely that had the applicant attended** [the hearing in which the order was made] **some other order might have been made.**" (Emphasis supplied)

Application to the instant case

Failure to Serve the Fixed Date Claim Form

The normal procedure in respect of service, as set out above, must be considered in the context of the Mental Health Act. It is to be noted that Mr. Horner would, in these circumstances, be "a patient" by virtue of the definition of that term in section 2 of the Mental Health Act. That definition includes a person **suspected** of suffering from a mental disorder. A mental disorder is defined, also by section 2, to include:

"a **substantial disorder** of thought, perception, orientation or memory **which grossly impairs a person's** behaviour, judgment, capacity to recognize reality or **ability to meet the demands of life which renders a person to be of unsound mind**:" (Emphasis supplied)

It is also to be noted that a psychiatrist, a Dr. Aggery Irons, produced an expert report to the court which heard the fixed date claim form. That report contained an opinion that Mr. Horner had "an organic brain syndrome which materially interferes with his judgment and his ability to manage his own affairs". Dr. Irons was of the view that the condition would worsen over time.

Against that background, it is my view that personal service of the fixed date claim form and the supporting documents on Mr. Horner, in advance of the hearing, was a requirement which could have properly been waived in those circumstances. It would have been a farce to require service of such documents on a person who is said to be "disoriented in time, place and person", as Mr. Horner was said to have been.

There is no evidence of any previous order under the Mental Health Act and so there would have been no person who would qualify to be served under rule 5.10 (3) of the CPR. With whom, then, did Mr. Horner reside or in whose care was he?

In his affidavit Mr. Horner says that "for the last several years my affairs have been properly looked after by [a] Miss Bryson". He describes Miss Bryson as, "my fiancé and business partner of over thirty-three years", and the person who oversees the running of his house and his affairs.

Based on Mr. Horner's account, Miss Bryson would have qualified as a person to have been served with the fixed date claim form. Curiously, however, Miss Bryson did not depose to an affidavit supporting Mr. Horner. A Mrs. Lennette Johnson-Thomas was the only person who supported his application. She is a practical nurse and was his employee. Mrs. Johnson-Thomas describes Miss Bryson as Mr. Horner's friend. She says that Miss Bryson would be very attentive to Mr. Horner and that the two were very close, to the extent that his daughter was jealous of Miss Bryson. Miss Bryson did not live with Mr. Horner. What Mrs. Johnson-Thomas does not say, is that Mr. Horner was in Miss Bryson's care, so as to satisfy the purposes of rule 5.10 (4). The impression is given that, though not as dedicated as perhaps she should be, it was Dr. Horner-Bryce who was in charge of Mr. Horner. Dr. Horner-Bryce is Mr. Horner's only offspring.

Dr. Horner-Bryce, who deposed both before and after the order was made, did not initially mention Miss Bryson. She did mention, in her affidavit filed on December 19, 2007, that a "woman turned up at my father's house recently with someone who she said was a Minister of Religion with the intention of conducting a ceremony of marriage between herself and my father". It is strange that Dr. Horner-Bryce would not have acknowledged a prior acquaintance with a person who had been a business associate of her father's for over thirty years. Yet, at paragraph 7 of a later affidavit, Dr. Horner-Bryce accused Miss Bryson of going "as far as to arrange a marriage [between herself and Mr. Horner] unknown to anybody in the family to further her interests". It is clear that Dr. Horner-Bryce has no affection for Miss Bryson and certainly does not acknowledge that Miss Bryson is in any way in charge of Mr. Horner's business. Despite Dr. Horner-Bryce's lack of candour, in my view it has not been shown that Miss Bryson was entitled to have been served with the fixed date claim form in advance of the hearing.

In my respectful view therefore, the learned judge who made the order in respect of the fixed date claim form had sufficient basis on which to give effect to the provisions of rule 5.10 (6) and to treat the fixed date claim form as having been properly served. Neither the minute of order nor the Formal Order makes reference to rule 5.10 (6) having

been addressed but as a judge of concurrent jurisdiction I am of the view that I may only presume that what was to have been done was in fact done.

In those circumstances, failure to serve the fixed date claim form and supporting documents in advance of the hearing would not entitle Mr. Horner to have the order set aside as of right, as Dr. Edwards seems to imply.

Setting aside an order made without notice

If, as I have found, Mr. Horner is not entitled, as of right, to have the order set aside, one must then consider his application in the context of rule 11.18 (3) of the CPR. The first aspect of the twofold requirements of that rule is easily satisfied in this case. Mr. Horner was not present at the hearing because he was not served.

For the second aspect, dealing with the likelihood of some other order being likely to have been made if he had been present, Dr. Edwards submitted that the contents of Mr. Horner's affidavit make it likely that some other order might have been made. The aim, however, is for the order to be discharged. That is the substance of the application filed on Mr. Horner's behalf.

In his affidavit, Mr. Horner describes some of the medical conditions which have affected him but states that he has substantially recovered from them. He however has not produced any medical evidence to support his assertion that he is capable of looking after himself. Interestingly, an order was made on the 14th January, 2008 granting permission for Mr. Horner to be examined by a medical doctor and a report submitted, if necessary, by his attorney-at-law. Despite that order no medical report has been produced on Mr. Horner's behalf. Instead there has been a further report medical report exhibited by Dr. Horner-Bryce. The report is by a Dr. Wendel Abel, a consultant psychiatrist. In it Dr. Abel diagnoses Mr. Horner to be suffering from a vascular type of dementia. Dr. Abel also says:

> "Mr. Horner is incapable of making reasonable decisions regarding his personal welfare and business.
> The prognosis is poor as Dementia is characterized by a progressively deteriorating course."

Insofar as the composition of the Committee is concerned, Mr. Horner deposes to a poor relationship with his daughter and granddaughter. Both, he says, are more interested in his money than with his welfare. He has expressed confidence in Miss Bryson. As I have already indicated, however, Miss Bryson has not given any affidavit expressing an interest in looking after Mr. Horner's affairs. In light of Dr. Horner-Bryce's attitude toward Miss Bryson, it is unlikely the latter would have been accepted in the capacity of a member of the Committee.

In my view Mr. Horner has failed to satisfy the second limb of rule 11.18 (3) of the CPR. His application must fail.

Observations

I feel compelled to made two observations. One is of general application and the other with specific reference to this case.

The general comment is that this case raises important questions regarding the integrity of the procedure regarding applications to declare persons incapable of managing their affairs. As it presently exists the procedure has great potential for abuse. A perfectly capable individual could well find himself a prisoner in his own home on the basis of a court order where the court is relying only on the account of an applicant who wishes to have control of that individual's property, possibly for nefarious purposes. This court traditionally relies heavily on the integrity and professionalism of the medical evidence in making its decision concerning the relevant order. In many cases the reputation of the doctor is well known and the court is comfortable accepting the opinion rendered. There may be cases however where the reputation of the doctor is not previously known to the court. It is my view that more transparency is required.

The potential for injustice which I have identified may be addressed by a number of methods but perhaps most easily by a practice direction which requires a social enquiry report from some independent agency as to the circumstances of the patient. A hearing in open court, rather than in chambers, may also provide some protection against an order being made without complete disclosure having been made to the court.

In assessing this case, I have observed that although the original order was made on November 23, 2007, there has been no compliance with the provisions of paragraphs 9 and 10 thereof. Those paragraphs require the Committee to provide the court with an accounting of its stewardship of Mr. Horner's affairs. The requirements should not be ignored. Section 29 (2) of the Mental Health Act requires this court to, where necessary, do such things as are required for the benefit of the patient.

For transparency, a time limit should be imposed for compliance with the provisions of the order made on the fixed date claim form.

Conclusion

Although the rule of allowing the other side to be heard is fundamental to our system of law, there are certain cases where the capacity of the individual who is entitled to that hearing, prevents the normal application of the rule. One such case is where that individual is a patient as defined under the Mental Health Act. Such a person would be alerted to any pending court action, by service on a person authorised by rule 5.10 of the CPR.

In the instant case, as distressing as it may be to Mr. Horner, the person who sought the order for the committee to be appointed was also the person who was entitled to service on his behalf. The court made its order in those circumstances.

An application to set aside such an order can only be successful if Mr. Horner demonstrates that, had he been present, some other order might have been made. He has not provided any evidence to counter the expert medical evidence that he is not fit to manage his affairs. He has also not shown that there is any other person ready willing and able to act as part of his Committee, either together with or in substitution for any or all of the individuals approved by the court.

The order therefore is:

1. The application for court orders filed on December 14, 2007 is refused;
2. The Committee appointed by the order made herein by Justice Thompson-James shall comply with the provisions of paragraphs 9 and 10 of that order, on or before 30th September 2009;
3. Costs of the parties, to be taxed, to be paid by the estate of the patient;
4. Leave to appeal granted.