

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
BETWEEN

2021/ FAM/gua/ 00090

IN THE MATTER OF O.F OF GLINTON5'S LONG ISLAND ONE OF THE ISLANDS OF THE COMMONWEALTH OF THE BAHAMAS (hereinafter referred to as 'The Patient')

AND

IN THE MATTER OF THE MENTAL HEALTH ACT PART III CHAPTER 230 OF THE STATUTE LAW OF THE BAHAMAS

AND

IN THE MATTER OF U. J.

Before: The Hon. Madam Justice G. Diane Stewart
Appearances: Mr. Elsworth Johnson for the Applicant
Mrs. Arlean P. Horton-Strachan for the Respondent
Judgment Date: November 25th 2022

RULING

1. By Summons filed 26th November 2021, RF ("**the Applicant**"), the lawful sister of OF ("**the Patient**") applied to be made a party to the existing action pursuant to Order 15 Rule 6 (2)(b) of the Rules of the Supreme Court ("**RSC**"). She applied on the ground that the Medical Affidavits of Dr. Eddison Thompson and Professor, Dr. Magnus Ekedede which were submitted to obtain the initial order failed to comply with Section 12(2) and 12(3) of the Mental Health Act, and further that the Order made on the 24th February and filed on 3rd March 2021 be set aside on the grounds that:-
 - a) The application filed on 10th February 2021 does not comply with Section 12(5)(a) of the Mental Health Act ("**the Act**") which makes it mandatory that

'no guardianship application shall be made in any case unless and until the written approval of the Minister or a person authorized by him has been given with respect to the person named in that application as the prospective guardian of the patient.'

- b) That UJ is not acting in the best interest of the Patient and has not given full and frank disclosure as required by the Mental Health Act.
 - c) Pursuant to Part VII of the Mental Health Act, that the limited assets of the Patient are not being utilized and managed with the greatest economy by UJ and/or in the alternative that UJ be made to give an accounting of the Patient's assets to the Court.
2. By an Originating Summons filed 10th February 2021, UJ, ("**the Respondent**") filed an application to be appointed Guardian to care and manage the affairs of the Patient, her mother. The Affidavit in Support of Originating Summons was filed on 10th February 2021.
 3. The Respondent sought an Order that as the only daughter of the Patient, that the Guardian shall have all powers as granted to Guardians under the Act.
 4. It was ordered on 24th February 2021, before Bowe- Darville J. that the Respondent be appointed the Guardian of the Patient with powers vested as set out in Section 35 of the Act. The Respondent was ordered to be responsible for administering all of the Patient's affairs, care and maintenance.
 5. This Court granted an interim order on an urgent application on 2nd December 2021 prohibiting the sale or encumbrance of the Patient's property situate at No. 38 Buttercup Lane, South Beach pending the determination of this application. It was also ordered that the Patient be examined by a medical doctor and a report on the Patient be provided to the Court forthwith.
 6. The Patient, a 73 year old, after living in Nassau, for the majority of her life had been relocated to Glinton's Long Island to live with the Respondent, after becoming dependent and unable to care for herself. The Patient has been unable to make any decisions as to her personal care and financial affairs. The Respondent had advanced to the Court that Guardianship was necessary because the Patient was unable to care for herself due to health issues.

Applicant's Evidence

Affidavit of RF filed 26th November 2021

7. RF filed her affidavit in support of her application and avers that she is the lawful sister of the Patient. She maintained that after the Patient's surgery for a brain tumor, she

was responsible for her care. The Respondent refused to assist with the care of her mother, and as a result the Patient lived with her until she returned to her own home. The Patient and the Respondent were not as close as the Respondent would lead one to believe and they did not enjoy a good relationship.

8. The Respondent agreed to make alternate housing arrangements for the Patient in Long Island as she could not accommodate the Patient at her home when she initially went to visit the Respondent. The Applicant acknowledged that she was a part of the decision for the Patient to visit the Respondent. At the time she believed that the Respondent would do right by her mother.
9. The Applicant was informed by SS, the Patient's caretaker that she did not live with the Respondent and that she was also concerned about the way that the Respondent was treating the Patient. She informed her that there was insufficient food and that she was advised by the Respondent to put the Patient's medication in her food.
10. In or about October 2017, the Applicant visited Long Island to see the Patient and her concerns were realized. The Respondent threatened the Applicant's life for visiting Long Island to see her sister. She reported the incident to the police. While in Long Island she would take the Patient out for rides, lunch and purchased items for her until she was advised by ASP Neely that she could no longer interact with the Patient pursuant to the Guardianship order granted 24th February, 2021.
11. She maintained that both she and the Patient were surprised at learning of the Guardianship Order.
12. The Patient informed her that she was informed by her tenants that her home was for sale. She maintains that the Respondent is not acting in the best interest of the Patient and has not given full and frank disclosure to the Court as required by the Act.

Affidavit of RF filed 9th March 2022

13. The Applicant denies that the Respondent and Patient shared a close relationship. She maintains that she provided excellent care for the Patient and no hurt ever came to the Patient while in her care. Between 2017 to 2022 when the Patient was hospitalized and underwent several surgeries, she was always there to care for the Patient. The Respondent has made no mention or reference to that time period when her mother was in her care.
14. During the time when the Patient was ill and incapacitated, she was responsible for managing the affairs of the Patient. She had preserved her assets at RBC, the Teacher's Credit Union and Scotiabank. The apartments owned by the Patient were fully rented except for one and they were used to assist with the Patient's upkeep and

care. She also confirmed that the Patient gave her permission to collect her rents from the tenants as she was concerned about her assets.

Affidavit of JB filed 26th November 2021

15. JB is the niece of the Patient. She recalled that the Applicant and her family, along with IJ, and her New Covenant Church family were principally responsible for caring for the Patient as she recovered from her surgery. She does not recall the Respondent caring for or spending any quality time with the Patient.
16. She recalled the Patient travelling to Long Island with the Applicant. She also averred that she went with the Applicant to visit the Patient. She stated that the Patient's living conditions were disappointing. There was no food or cleaning supplies in the house.
17. She was present when there was the negative exchange between the Applicant and Respondent and when the Applicant threatened the Respondent. She accompanied the Applicant to the Police Station where she made the complaint concerning the threat.
18. The next day they were advised of the Guardianship Order and the Patient had told the Police that she had no knowledge of the Guardianship Order.
19. She and the Applicant were advised the following day by the Police that they had 1 hour to leave the apartment and reminded them of the Guardianship Order.
20. She found it shocking that there was some distance between where the Applicant lived and where the Patient lived.

Affidavit of SS filed November 26th 2021

21. She was hired by the Respondent to be the caretaker of the Patient in February 2021.
22. Her duties included cooking, cleaning, taking the Patient for walks and taking her to the clinic.
23. She was concerned of the level of care and interaction that the Patient received from the Respondent. The Respondent only visited the Patient once a week. The Respondent neglected to provide the Patient with needed items.
24. Initially the Respondent and her family would visit frequently but the visits ceased except for a brief visit to drop off supplies and her salary.

25. She was told by the Respondent never to bring the Patient when they were out driving, to her house. The Respondent is usually cruel, rude and disrespectful to the Patient. She had also been instructed not to allow the Patient to communicate with anybody including the Applicant.
26. She was concerned with the distance between where the Respondent lived and the Patient lived.
27. In October of 2021 the Applicant and her niece visited the Patient who was happy to see them. The Respondent became very angry when she learnt of their visit and threatened the Applicant. She accompanied the Applicant to the Police Station to report the incident.

Affidavit of TJ filed November 26th 2021

28. He is the Senior Pastor of New Covenant Baptist Church where the Patient was a member. After her surgeries he visited with her regularly.
29. His communication with the Patient ceased when she travelled to Long Island.

Respondent's Evidence

Affidavit of UJ filed 16th December 2021

30. The Respondent claims that she and the Patient shared loving mother- daughter relationship as she was growing up. However, a rift developed for a short while when she got married but as the years past, the Patient overcame her disappointment.
31. While the Patient was hospitalized in November 2020, the Respondent states that she was advised by the Applicant to not come to Nassau as her mother was in the hospital and they were not allowing anyone in the hospital. The Applicant also told her that she would take her mother to live with her once discharged and move her back into her own home once she had recovered.
32. In November 2020, she received a phone call from IJ, who informed her that her mother, the Patient was missing and no one knew of her whereabouts. The Applicant told her that she had no idea where the Patient was and that she did not know her mother's friends.
33. The Applicant told her that she had had enough of the Patient and that the Respondent must come and get her mother. She also claimed that the Patient had accused her of stealing her rent money, jewelry and television.

34. On 17th December 2020, the Patient arrived in Long Island. The Patient was unable to live with the Respondent and her family as her home was under renovations making only one unit livable at the time. There was not enough space to accommodate an elderly parent, her two children and her husband.
35. The Respondent found her mother suitable living accommodations in Stella Marris, which was a short term apartment. The Patient's granddaughter, PB was willing and agreed to live with her grandmother in the apartment to assist taking care of her.
36. The Patient's mental health worsened and she was prescribed further medications to help her. The Patient would not take her medication and as a result she would rant and scream at persons that only she could see. She called the names of family members who were dead. The Respondent eventually moved the patient into a two bedroom apartment in Glintons. SS was hired to be the live in caretaker of the Patient. She reduced contact with her mother because of the outbreak of Covid on the island and because none of her family was vaccinated.
37. The Respondent recalled when the Applicant came to Long Island to see the Patient when she became very upset. The Applicant had brought part of a Will dated 21st October 2020 which she tried to have the Patient sign, however, the Patient refused and informed the Respondent that she thought the Applicant wanted to take her property in Nassau.
38. The Respondent maintains that the Patient gave her access to her monies at Royal Bank of Canada and that she paid her rent, bought groceries, clothing, a washer and dryer, television, installed a satellite in her apartment and took care of her mother to the best of her ability.
39. She also stated that the Patient's house in Nassau needed repairs and that she decided to have the repairs done and completely converted the home into semi-furnished apartments. She used the proceeds from the rent to upkeep her mother. The Applicant wanted the tenants to pay the rent to herself and not the Respondent.

Affidavit of UJ filed 16th March 2022

40. The Respondent stated that she initially sought to obtain Power of Attorney for her mother but was advised that she was not competent enough to execute such a document and therefore decided to apply to the Court for guardianship.
41. The Patient gave her access to her accounts at Royal Bank and Scotia Bank. She used these accounts to assist in buying necessities for the Patient such as clothing,

underwear and other personal items and paying her rent in Long Island and utilities for her house in Nassau.

42. She began renovating her mother's home in Nassau after the Guardianship Order was granted. The costs of the renovations were paid from the Patient's account at the Teacher's Credit Union. The house was converted into six semi-furnished, air-conditioned apartments. This annoyed the Applicant who came to Long Island and caused confusion between the Patient and herself. She claimed that she had obtained permission to collect the rents.

Affidavit of SJ filed December 16th 2021

43. She's the daughter of the Respondent and granddaughter of the Patient.

44. Upon her grandmother's arrival in Long Island, the family would visit her every Sunday including her sister, PB, when they would have family fun and would pamper her grandmother.

45. With the outbreak of Covid the Sunday visits as a group ceased. Her mother catered to her grandmother and there was always food to eat in her apartment.

Affidavit of WC filed December 16th 2021

46. He is a licensed realtor and a police corporal who was engaged by the Respondent to manage the Patient's property in Nassau.

47. The Property was recently renovated and now has six apartments.

48. He avers that he was advised by two of the tenants that one had paid their rent to the Applicant in October of 2021, and the other had been approached by her to pay to pay his rent to her.

49. The Applicant had also produced a Power of Attorney empowering her to manage the property and also produced a letter purportedly signed by the Applicant. The letter was dated 13th October 2020, and the Power of Attorney was dated the 13th October 2020.

Affidavit of JM filed December 16th 2021

50. He is the owner of duplex in Mills Long Island, and one of the units is rented to the Respondent where the Patient lives.

51. The rent is paid on time and the apartment is kept clean and neat.

52. He is of the opinion that the Respondent cares for her mother the Patient.

Affidavit of PB filed December 16th 2021

53. She is the daughter of the Respondent and the granddaughter of the Patient.

54. The Patient arrived in Long Island in December of 2020 and she undertook to care for her until she found work.

55. The Patient became a challenge at night talking to persons whom she alone saw and refusing to sleep. She was unable to manage her.

56. In March they searched to find the nearest accommodation for the Patient and found the apartment in Millers, and as it was a two bedroom, it enabled a caretaker to live with her grandmother.

57. They hired Ms. Smith as caretaker of her grandmother and they regularly visited her.

58. She was surprised at the contents of the affidavit of the Applicant and the caretaker because the contents were not true.

Applicant's Submissions

59. The Applicant submits that she should be joined as a party to the proceedings so that all matters in dispute are determined and adjudicated properly.

60. The Applicant was the only surviving sibling of the Patient and the principal caregiver when the patient became ill and incapacitated. Her relationship with the Patient, enables her to make the application by virtue of Sections 12(4) and 24 of the Mental Health Act which state who can make a guardianship Application.

61. The Applicant maintains that Justice Darville is functus and "not able to sit, in effect, on appeal as to the correctness of the Order granted herein on 24th February 2021. Justice Bernard Turner in **P v J [2017] 2BHS J. No. 115** stated that:-

"The Petitioner is, in effect, seeking to have me 'correct' what it is being submitted as an error I made in my decision. On that issue, I concur with the submissions of the Respondent that I am functus officio. The term of the order that the parties are at liberty to apply does not extend to the court being able to sit, in effect, on appeal as to the correctness of the order, but is intended to provide an avenue by which, should circumstances change during the life of the order, that there is an ability by either party to apply for a variation of the order."

62. There exists a jurisdiction however in the Court of first instance to review its Orders as indicated by Justice Bernard Turner in **P v J** and by Justice Ian Winder, as he then was, in **EW v PW [2017] BLR Vol. 2 No. 74** where they held:-

“The jurisdiction exists in the following circumstances:-

- i. If there has been fraud or mistake**
- ii. If there has been material non-disclosure**
- iii. If there has been a new event since the making of the Order which invalidates the basis or fundamental assumption upon which the order was made**
- iv. If and insofar as the order contains undertakings**
- v. If the terms of the order remain executory”**

63. The Applicant further submits that after a request by the Court to consider whether a review of the Order by Justice Darville was available, the same may not be necessary or available at this stage as the Order under consideration is now spent pursuant to **section 22(1) of the Act** which provides:-

“Subject to the provisions of this Part of this Act, a patient admitted to hospital under an application for admission for treatment or subjected to guardianship under a guardianship application may be detained in hospital or kept under guardianship, as the case may be, for a period not exceeding one year from the date of such application, but shall not be so detained or kept for any longer period unless the authority for his detention or guardianship is renewed under the provisions of this section.”

64. The Guardianship Order was granted more than one year ago and there has been no application for or on behalf of the Respondent to renew the Order. In the circumstances there is now no substantive Order before the Court to review.

65. The Applicant submits that Guardian application of the Respondent does not comply with The Mental Health Act, sections 12(2), 12(3) and 12(5) and is therefore void due to procedural irregularity. Section 12(5) makes it mandatory that the permission of the Minister is acquired before an application can be made before the Court. It provides:-

“No guardianship application shall be made in any case unless and until-
(a) the written approval of the Minister or of a person authorised by him has been given with respect to the person named in that application as the prospective guardian of the patient; and
(b) the written consent of the prospective guardian, if other than the applicant, has been furnished to the Minister”

66. The application before Justice Darville was not supported by any approval of the Minister or any person authorized by him in writing. Further, the Affidavits of the

medical doctors do not comply with sections 12(2) and 12(3). They do not meet the standard as set out in the Act. The requirement states that the doctor's written recommendation must specify whether there are any alternative methods of caring for the Patient, and if so whether or not they are appropriate. The affidavits do not provide this.

67. Justice Gregory Hilton in Rolle-King v Rolle BS 2016 SC 211 at page 4 stated that:-

“In this case as the requirements of sections 12(2)(b) and 5(3) of the Mental Health Act have not been fulfilled, the Court cannot accede to the application that the Applicant be appointed Guardian of the Patient unless and until those requirements are fulfilled.”

Respondent's Submissions

68. The Respondent submits that she is the only child and nearest relative of the Patient as defined by Section 24(1) of the Mental Health Act, which states as follows:-

“For the purposes of this Part and any preceding Part of this Act “nearest relative” means the first named of the following, that is to say, husband or wife, son or daughter, father, mother, brother or sister, grandparent, grandchild, uncle or aunt, nephew or niece of any patient, any such relationship being traced either through the whole blood or the half blood, but relationship of the same degree through the whole blood being preferred before that of the half blood.”

69. By this section, the Applicant does not qualify as the nearest relative of the Patient, as she is second in listing to the daughter, consequently her application is an abuse of the court process, frivolous and vexatious. The Applicant therefore has no legal right to make this application.

70. The Respondent further submit that the Court has no jurisdiction to rehear the Originating Summons filed by the Respondent regarding the Guardianship Order. In Flower v Lloyd (1877) CA; 6 CHD 297, a judgement was given by the Court of Appeal and the Order was perfected and entered. The Plaintiffs applied to the Court of Appeal to have the appeal reheard. It was then held that the Court of Appeal had no jurisdiction to rehear the appeal.

71. An Originating Summons is spent once an Order is given, unless the Judge has made provisions for the Summons to be kept alive, and in the Respondent's original action, such provision was not made.

72. In Re: Pattman's Will Trust (1963) 1 WLR, the Court held that:-

“When an Order was made on an Originating Summons, the Summons was not kept alive, unless the Order specifically so stated: and that, therefore, a fresh summons was required.”

73. Cross J., in his judgement made the following observation:-

“If the argument for the Plaintiff were well founded it would mean that if an Originating Summons was taken out, say in 1930, raising a question of construction, which the Judge answered, and then in 1955 another question of construction arose in which the same parties were interested, the Originating Summons could be amended to raise that question if it asked, as it would, for the execution of the trusts of the Will.. I do not think this can be right. If the Judge answers the specific question asked.... The Summons, therefore will die unless the Judge keeps it alive.”

74. Madam Justice Crane Scott JA, in Rosina Smith v Fidelity Bank SCCivApp No, 122 of 2020, the intended appellant sought leave to appeal the decision of the Judge who declined jurisdiction to set aside a perfected Order on the basis that she was functus in paragraph 44 of that Judgment stated:-

“The intended appeal is clearly misconceived as in her re-amended summons of 26th July 2017 and the relief which she seeks to pursue before this Court by this circuitous route. Since the Order of 30th March 2017, had been perfected, the relief sought in the re-amended summons could not be pursued in the Court below...”

75. Madam Justice Crane Scott in paragraph 45 further commented:-

“However, the law is clear. Once the Order obtained in the Supreme Courts had been perfected there was no way for it to be set aside or discharged as the Judge was clearly functus, and no Judge of the Supreme Court (or this Court on the intended appeal) has jurisdiction to grant the relief which the intended appellant sought in her Re-Amended Summons.”

76. Paquell Butterfield v Colamae Butterfield BS 2021 CA 134 was also concerned with a Guardianship Order pursuant to the Mental Health Act. At paragraph 24, Madam Justice Crane Scott opined that:-

“The documents showed the numerous applications filed on her behalf between 27th October 2016 and 21st November 2019 to have the Guardianship Order of 23rd May 2014 set aside. It does not appear that any of these applications were met with success. This is perhaps not surprising since they were all instituted well after the Guardianship Order of 23rd May 2014 had been sealed and perfected. Furthermore, given the nature of the Guardianship application (which was Ex parte Originating Summons with no identifiable claim or dispute, and no Plaintiff or Defendants properly so-called) it is doubtful whether the learned Judge would have had jurisdiction under Order

28 Rule 4(2) to vary or set aside his Order of 23rd May 2014, after it had been perfected...”

77. Order 28 Rule 4(2) of the Rules of the Supreme Court reads as follows:-

“Unless on the first hearing of an Originating Summons the Court disposed of the Summons altogether or makes an Order under Rule 8, the Court shall give such directions as to further conduct of the proceedings as it thinks best adapted to secure the just, expeditious and economical disposal thereof.”

78. It is the Respondent’s submission that this matter cannot be considered by the Court as the Order given by the Court under the Guardianship Order fully disposed of the Originating Summons without any further directions. The Order granted by Justice Bowe- Darville cannot be varied or set aside as it has been perfected, further, Justice Bowe- Darville is now functus.

Issues

79. The Court must consider the following issues:-

- i) Whether the Court can vary or discharge the Guardianship Order previously granted to the Respondent
- ii) Whether the Applicant or the Respondent should be granted guardianship over the Patient

DECISION

80. Prima facie, both parties would be allowed to make an application for guardianship of the Patient. The Act however is very instructive on the process and requirements which must be met when making a Guardianship Application.

81. The Respondent’s previous application for guardianship over the Patient was granted. The Order was made and perfected. Normally once the Order is granted and perfected, the Court is functus subject only to an appeal and to certain exceptions referred to below.

82. It must be observed that there does exist a jurisdiction where the Court of first instance may review its Orders as indicated by Justice Turner in P v J and by Justice Winder, in EW v PW [2017] BLR Vol. 2 No. 74.

“The jurisdiction exists in the following circumstances:-

- i. If there has been fraud or mistake
- ii. If there has been material non-disclosure
- iii. If there has been a new event since the making of the Order which invalidates the basis or fundamental assumption upon which the order was made

- iv. **If and insofar as the order contains undertakings**
- v. **If the terms of the order remain executory”**

83. The Applicant has not presented sufficient evidence to prove that there was a material non-disclosure by the Respondent which would permit the Court to vary or discharge an Order previously made. In the absence of this or in the absence of any of the other circumstances, the Court is not at liberty to vary or discharge the Guardianship Order.

84. Once an Order has been perfected by a Judge, the Court has no power to reconsider or vary the decision in the absence of any of the above cited circumstances or even under the authority of the “slip rule” in the absence of any error on the face of the order. The Applicant’s only viable course of action would be to appeal the Order or to make a new application for guardianship over the Patient.

85. Section 22 of the Act provides:-

“(1) Subject to the provisions of this Part of this Act, a patient admitted to hospital under an application for admission for treatment or subjected to guardianship under a guardianship application may be detained in hospital or kept under guardianship, as the case may be, for a period not exceeding one year from the date of such application, but shall not be so detained or kept for any longer period unless the authority for his detention or guardianship is renewed under the provisions of this section.

86. The Order was made on the 24th February 2021 and by law expired on the 23rd February 2022, prior to this matter being heard. At the time of the hearing there was no Guardianship Order in place to review or intervene in. Neither party has made an application to renew guardianship of the Patient, therefore I am satisfied there is no Guardianship Order in place over the Patient.

87. Both parties are at liberty to make a fresh application for the Guardianship of the Patient. However, they are reminded of Justice Hilton’s ruling in **Rolle-King v Rolle BS 2016 SC 211**, which I respectfully adopt where he states:-

“Section 12 of the Mental Health Act does not give any guidance as to who should be appointed Guardian if the court finds that a Guardian should be appointed. The Court is given a discretion and that discretion must be exercised in the Patient’s best interests.”

88. Justice Hilton also stated that:-

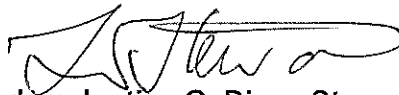
“In this case as the requirements of sections 12(2)(b) and 5(3) of the Mental Health Act have not been fulfilled, the Court cannot accede to the application that the Applicant be appointed Guardian of the Patient unless and until those requirements are fulfilled.”

89. The parties are duly reminded of these requirements. I need not make any determination as to the treatment or lack thereof of the Patient or the lack of compliance with the statute and rules, as that consideration cannot be determined in the absence of the jurisdiction in the Court to revisit an expired order.

90. The injunction against the Patient's home is discharged.

91. The Respondent is awarded her costs of the application to be taxed if not agreed.

Dated this 25th day of November 2022

A handwritten signature in black ink, appearing to read "G. Diane Stewart". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

The Hon. Madam Justice G. Diane Stewart