



[2016] JMSC Civ. 34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV01763

**IN THE MATTER OF the Judicature
(Supreme Court) Act.**

**IN THE MATTER OF an application by
'JA' for the exercise of jurisdiction by
this Honourable Court over the
management of the property and affairs
of 'MA'.**

RE: APPLICATION FOR LEGAL GUARDIANSHIP OF MA

IN CHAMBERS

**Ms. Sherry Ann McGregor instructed by Nunes, Scholefield, DeLeon & Co. for the
Applicant**

Heard: 9th of May 2016

Legal Guardianship – Vulnerable Adult – Mental Incapacitation – Applicability of the
Mental Health Act – The Judicature (Supreme Court) Act – Inherent Jurisdiction

STRAW J

[1] On the 9th of May 2016 I granted the Applicant's application, in part, and I thought
it useful to reduce my reasons to writing.

[2] The Applicant filed a Fixed Date Claim Form on the 2nd of May 2016, seeking the
following relief –

1. A Declaration that **MA** is a vulnerable adult.

2. An Order that the Applicant is the legal guardian of **MA**, with authority to do all such things as may be necessary or expeditious to manage his affairs, including, but not limited to: -
 - (i) The continuance or institution of any legal proceedings on **MA's** behalf.
 - (ii) The payment of any debts incurred by **MA**.
 - (iii) Making decisions in relation to **MA's** health and well-being and hiring and dismissing staff to care for his need.
 - (iv) Carry on **MA's** business, trade or profession.
 - (v) The sale, lease or rent [sic] **MA's** business or trade.
 - (vi) The dissolution of any partnership of which **MA** is a partner.
 - (vii) Fulfilling or terminating any contracts entered into by **MA**.
 - (viii) Managing all the financial affairs of **MA**.
3. Such further and/or other relief as this Honourable Court deems just.

[3] The application was made pursuant to the **Judicature (Supreme Court) Act**. The issues to be determined were framed as follows –

- i. Whether **MA** is a vulnerable adult.
- ii. Whether this Honourable Court's inherent jurisdiction pursuant to section 27 of the **Judicature (Supreme Court) Act** may be invoked to secure the best interests of **MA**.

- iii. Whether the Applicant is fit to be appointed as the legal guardian of **MA**.
- iv. Whether the Applicant is fit to be authorised to manage the property and affairs of **MA** in general and in particular to acquire and dispose of property in the name and on behalf of the said **MA** and to conduct all the financial affairs of the said **MA**.

Relevant Background

- [4] The Applicant, JA, swore to an affidavit in support of the Fixed Date Claim Form, in which she recounted that she and MA have been married for over forty (40) years and that they have three (3) adult children. She worked with MA in his private medical practice as an Office Manager up until the 22nd of February 2016.
- [5] She states that on the morning of the 23rd of February 2016, she found MA on the floor in a semi-conscious state. He was unable to speak or move the right side of his body. MA was admitted to the hospital where he remained semi-conscious for two (2) days until he completely lost consciousness. MA has undergone surgical procedures but has not regained consciousness. MA is unable to speak and is unable to eat or breathe on his own, as such constant care and supervision are required.
- [6] Due to MA's illness, he has not been able to deal with his business affairs and remains unable to do so. The Applicant has noted that some months prior to February 2016, MA was served with a Notice to Quit requiring MA to relocate his medical practice. Further, the practice has remained closed as MA does not have a partner and as such there is no income being earned which would cover the expenses associated with retaining possession of it. The Applicant has expressed that she now finds it necessary to take urgent steps to vacate the premises and to terminate the utility contracts. She expressed that she has already made arrangements but her enquiries at certain utility companies have

confirmed that she will not be permitted to effect termination of the services which are registered in MA's name. She has furnished the Court with utility bills reflecting such registration.

- [7] In all the circumstances, the Applicant is seeking to put MA's affairs in order while she awaits his recovery. She contends that given the unexpected and high expenses that are being incurred to care for MA's needs and to provide for the possible long-term effects of the illness, she would be in the best position to care for him if she were appointed as his legal guardian.
- [8] At the hearing of the application, the Applicant, through counsel, expressed that she needed access to MA's funds (held in bank account(s) in MA's sole name) for his medical expenses. She also expressed the desire to sell a motor vehicle which MA owns and is unable to use, to cover some expenses.

Submissions by Counsel for the Applicant

- [9] At the outset, counsel, Ms. McGregor indicated that there is no specific legislation to address the needs of **MA** or to provide the relief sought. The instant application is somewhat usual as the subject of the application, **MA**, is an adult who is in a comatose condition. This was confirmed by a letter by Dr. P. Hamilton a Resident at the UHWI (exhibited as "**JA5**") who described **MA's** condition as follows, "*MA remains stable with depressed GCS E1 VT M3 (no eye opening, tracheostomy in situ and abnormal flexion of left upper limb to pain. This is to say that his level of consciousness is very low and he is unable to represent himself to transact business.*"
- [10] Ms. McGregor submitted that due to MA's comatose condition, it would not be possible to assess his mental status and as such an application could not properly be made pursuant to the **Mental Health Act**. Further, there is no evidence that MA is mentally incapacitated and she submits therefore that he would not qualify as a patient pursuant to the **Mental Health Act**.

[11] Ms. McGregor submitted that this was an appropriate case for the Court to invoke its inherent jurisdiction pursuant to sections 27 and 28 of the **Judicature (Supreme Court) Act**. She submitted that the Supreme Court's jurisdiction is defined in section 27 which includes the power and authority that was vested in the High Court of Chancery. She referred the Court to a legal definition of "Chancery" from an unconventional source, an online legal dictionary, namely the **Free Dictionary by Farlex**, which states, *inter alia*, that -

"...where the courts of common law cannot grant the proper remedy of relief the Law of England...authorizes an application to the courts of equity or chancery, which are not confined or limited in their modes of relief by such narrow regulations, but which grant relief to all parties, in cases where they have rights, ex aequo et bono, and modify and fashion that relief according to circumstances."

[12] It was further submitted that under section 28 of the said Act, specific power is vested in the Supreme Court to exercise jurisdiction in the manner such jurisdiction would have been exercised in the court from which that power was transferred if there is no specific rule or law.

[13] Ms. McGregor referred the Court to an English Court of Appeal case, **DL v Local Authority & Others** [2012] EWCA Civ 253 which deals with the extent to which the inherent jurisdiction of the High Court may be deployed following the implementation of the **Mental Capacity Act, 2005** for the protection of adults who are perceived to be vulnerable. This case affirmatively answered the question of whether the Court's inherent jurisdiction may be deployed for the protection of a vulnerable adult who falls outside the scope of the **Mental Capacity Act, 2005**. She referred the Court to paragraphs [22] and [23] in which McFarlane LJ extracted the reasoning of Munby J from **Re: SA (Vulnerable adult with capacity: marriage)** [2005] EWHC 2942 (Fam) –

22. Following his review of the authorities (which was far more extensive than the purely illustrative text that I have extracted), Munby J drew his conclusions together at paragraphs 76 to 79:

76. In the light of these authorities it can be seen that the inherent jurisdiction is no longer correctly to be understood as confined to cases where a vulnerable adult is disabled by mental incapacity from making

his own decision about the matter in hand and cases where an adult, although not mentally incapacitated, is unable to communicate his decision. The jurisdiction, in my judgment, extends to a wider class of vulnerable adults.

77. It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.

78. I should elaborate this a little:

i) Constraint ...

ii) Coercion or undue influence ...

iii) Other disabling circumstances: What I have in mind here are the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others.

79. I am not suggesting that these are separate categories of case. They are not. Nor am I suggesting that the jurisdiction can only be invoked if the facts can be forced into one or other of these headings. Quite the contrary. Often, indeed, the facts of a particular case will exhibit a number of these features. There is, however, in my judgment, a common thread to all this. **The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors.**

23. Finally, in this regard, at paragraphs 81 to 83 Munby J offered a definition of 'vulnerable adult' for the purposes of the jurisdiction that he was describing. The definition was deliberately couched in wide and loose terms:

82. In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, whether or not mentally

incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind or dumb, or who is substantially handicapped by illness, injury or congenital deformity. This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive.

83. The inherent jurisdiction is not confined to those who are vulnerable adults, however that expression is understood, nor is a vulnerable adult amenable as such to the jurisdiction. The significance in this context of the concept of a vulnerable adult is pragmatic and evidential: it is simply that an adult who is vulnerable is more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction is exercisable than an adult who is not vulnerable. So it is likely to be easier to persuade the court that there is a case calling for investigation where the adult is apparently vulnerable than where the adult is not on the face of it vulnerable. That is all. (emphasis added)

[14] Further, Ms. McGregor submitted that in reliance on this definition and the inherent jurisdiction of the Court, MA is a vulnerable adult in respect of whom the Court should exercise its jurisdiction to provide protection by appointing the Applicant, JA, as his legal guardian. She submitted that in any event, JA by virtue of being the wife of MA, would be his nearest relative under the **Mental Health Act**.

The Law and Analysis

[15] Section 2 of the **Mental Health Act** defines a “patient” as –

a person who is suffering from or is suspected to be suffering from a mental disorder

I am inclined to agree with Ms. McGregor’s submission that due to MA’s comatose condition, it would not be possible to assess his mental status and as such an application could not properly be made pursuant to the **Mental Health Act**. I also agree that there is no evidence that MA is suffering from a mental disorder or suspected to be and therefore he would not qualify as a patient pursuant to the **Mental Health Act**.

[16] Counsel referred the Court to sections 28 and 29 of the **Judicature (Supreme Court) Act** –

27. *Subject to subsection (2) of section 3 the Supreme Court shall be a superior Court of Record, and shall have and exercise in this Island all the jurisdiction, power and authority which at the time of the commencement of this Act was vested in any of the following Courts and Judges in this Island, that is to say –*

The Supreme Court of Judicature,

The High Court of Chancery,

The Incumbered Estates Court,

The Court of Ordinary,

The Court for Divorce and Matrimonial Causes,

The Chief Court of Bankruptcy, and

The Circuit Courts, or

Any of the Judges of the above Court, or

The Governor as Chancellor or Ordinary acting in any judicial capacity, and

All ministerial powers, duties and authorities, incident to any part of such jurisdiction, power and authority.

28. *Such jurisdiction shall be exercised so far as regards procedure and practice, in manner provided by this Act, and the Civil Procedure Rules and the law regulating criminal procedure, and by such rules and orders of court as may be made under this Act; and where no special provision is contained in this Act, or in such Rules or law, or in such rules or orders of court, with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been exercised by the respective Courts from which it is transferred or by any such Courts or Judges, or by the Governor as Chancellor or Ordinary.*

- [17] Due to what can only be described as a lacuna in the law, counsel is asking the court to exercise its equitable jurisdiction, i.e. the power which was vested in the High Court of Chancery which is now vested in the Supreme Court.
- [18] In the **Black's Law Dictionary** 9th ed., "chancery" is defined as "1. A court of equity; collectively, the courts of equity. The term is derived from the court of the Lord Chancellor, the original English court of equity. – Also termed court of chancery; chancery court.

"Chancery's jurisdiction was complementary to that of the courts of common law – it was sought to do justice in cases for which there was no adequate remedy at common law. It had originated in the petition, not the writ, of the party who felt aggrieved to the Lord Chancellor as 'keeper of the King's conscience.' In its

origins, therefore. Chancery's flexible concern for justice complemented admirably the formalism of a medieval system of common law which had begun to adhere strictly, perhaps overstrictly on occasion, to prescribe forms. By 1800, however, Chancery's system was itself regarded as being both consistent and certain." A. H. Manchester, Modern Legal History of England and Wales, 1750 – 1950 135-36 (1980).

2. *The system of jurisprudence administered in courts of equity."*

[19] It should be noted that the Court's inherent jurisdiction is also statutorily recognised and preserved by section 48 of the **Judicature (Supreme Court) Act**, which states, *inter alia*, -

48. With respect to the concurrent administration of law and equity in civil cases and matters in the Supreme Court the following provisions shall apply –

(a) If a plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against a deed, instrument or contract, or against a right, title or claim asserted by a defendant or respondent in such cause or matter, or to relief founded upon a legal right which before the passing of this Act could only have been given by a Court of Equity, the Court and every Judge thereof shall give him such and the same relief as ought to have been given by the Court of Chancery before the passing of this Act.

[20] I found the case of **DL v Local Authority & Others** and the reasoning contained therein to be persuasive. I am satisfied that the inherent jurisdiction can be invoked where a vulnerable adult is for some reason deprived of the capacity to make relevant decisions or incapacitated/disabled from giving or expressing consent. In the circumstances, where MA clearly falls outside of the **Mental Health Act** but remains in a comatose condition, I would be inclined to grant the relief sought pursuant to the inherent jurisdiction. However, I am not prepared to grant a Declaration that MA is a vulnerable adult (as sought at paragraph 1 of the Fixed Date Claim Form). The term "vulnerable adult" is not one that is familiar to our common law and just as Munby J was reluctant to judicially define the term, I similarly am not prepared to do so.

Disposal

[21] It is hereby ordered as follows –

1. An order that the Claimant, JA, is the is the legal guardian of **MA**, until further Order(s) of the Court with authority to manage his affairs as set out below:
 - i. The continuance or institution of any legal proceedings on **MA's** behalf.
 - ii. The payment of any debts incurred by **MA**.
 - iii. Making decisions in relation to **MA's** health and well-being and hiring and dismissing staff to care for his need.
 - iv. Fulfilling or terminating any contracts entered into by **MA**.
 - v. Managing all the financial affairs of **MA**.
 - vi. The transfer or sale of **MA's** motor vehicle.
2. The matter adjourned for further consideration on the 6th of December 2016 at 3:30 p.m. for ½ hour.
3. The Claimant is to provide an updated medical report in relation to MA.
4. Affidavits to be filed by the children of MA (NA, CA and JNA) in relation to the application of the Applicant JA.
5. Report to be filed in relation to JA's dealings with the financial affairs of MA.
6. The above orders of the Court are to be served on NA, CA and JNA on or before the 25th of May 2016.
7. Liberty to apply.

