

COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

HCVAP 2007/006

BETWEEN:

VICTORIA GREENAWAY a.k.a.
GLADYS GREENAWAY nee Harney
by Roma Eutheley Harney her next friend

Appellant

and

MAGDALENE AUGUSTINE

Respondent

Before:

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

Appearances:

Dyer & Dyer for the Appellant

Don Christopher & Co for the Respondent

2008: January 25.

JUDGMENT

[1] **BARROW, J.A.:** This procedural appeal is brought by the claimant in the court below against an order that Baptiste J made on the application of the defendant/respondent for the court's permission to put in an expert's report. The notice of application was headed "CPR Part 32.6 Notice of Application".¹ That rule provides² that a party may not call an expert witness or put in the report of an expert witness without the court's permission. The rule goes on to provide for when such permission is to be given, the identification of the expert and his area of expertise, and service of a report of the proposed evidence.

¹ Filed 18 April 2007

² Rule 32.6(1)

- [2] The order³ that was made on that application was for a psychiatrist to be appointed as a visitor pursuant to section 24(1) of the **Mental Health Act** (the Act),⁴ for the psychiatrist to visit the claimant and interview her in private, and for various other things to be done. Counsel for the appellant contends on a number of grounds that the judge erred in making that order; the principal ground being that the matter of the claimant's mental capacity had previously been determined.
- [3] The claim from which this appeal lies is claim No 381 of 2006. There had been an earlier, separate claim, No 354 of 2006, entitled, "In the Matter of Victoria Greenaway a.k.a. Gladys Greenaway nee Harney for the appointment of Roma Eutheley Harney as receiver under section 17, 18 and 21 of the Mental Health Act Chapter 40:62 of the Revised Laws of Dominica, 1990." In that earlier claim Baptiste J had declared⁵:
- "The Court is satisfied from the evidence that Victoria Greenaway ... is incapable by reason of Mental Disorder, from administering her affairs. The Court therefore in (sic) pursuant to section 21 of the Mental Health Act ... appoints Roma Eutheley Harney as Receiver of Victoria Greenaway ..."
- [4] In her written submissions Mrs. Dyer, counsel for the appellant, emphasized that there has been no setting aside of that order. Mr. Christopher, counsel for the respondent, stated in his written submissions⁶ that the respondent had filed an application to set aside that order but had withdrawn the application.
- [5] Having appointed the receiver, the order in claim No 354 of 2006 went on to give the receiver power to commence any legal action on behalf of Mrs. Greenaway and powers incidental thereto. As the title of the present appeal suggests, the receiver brought proceedings in claim No 381 of 2006. She brought the proceedings in the name of Mrs. Greenaway as claimant, with the receiver as next friend. It should go without saying that the claimant is Mrs. Greenaway and not the receiver.

³ Entered 18 May 2007

⁴ Chapter 40.62 of the Laws of the Commonwealth of Dominica

⁵ Order dated 9 November 2006

⁶ At paragraph 60

[6] The claim in No 381 of 2006 is to recover \$462,580.81 that the claimant alleges she, being 85 years old and suffering from schizophrenia and dementia for over 5 years, withdrew from various bank accounts and transferred into the joint ownership of herself and the defendant. The claimant alleges that she acted under the undue influence of the defendant and without independent legal advice. The defendant denies the allegations including that the claimant is mentally ill and incapable of managing her affairs and asserts there has been no determination of the question or investigation in accordance with section 24 of the Mental Health Act.

[7] Section 24 of the Act states, in part:

- “24. (1) For the purposes of investigating matters relating to the capacity of any patient to manage and administer his property and affairs or otherwise relating to the exercise in relation to him, of the functions of the Court under this Part, the Court may appoint –
 - (a) a medical practitioner who appears to it to have special knowledge and experience of cases of mental disorder to be a medical visitor; and
 - (b) a barrister or solicitor of not less than seven years standing to be a legal visitor.
- (2) A visitor appointed under subsection (1) shall –
 - (a) visit a patient in accordance with the directions of the Court; and
 - (b) make such report to the Court about his visit as the Court may require.
- (3) A visitor may, while making a visit, interview a patient in private.
- (4) A medical visitor making a visit under this section may carry out in private a medical examination of a patient and may require the production of and examine any medical records relating to the patient.
- (5) ...
- (6) A report made by a visitor under this section and information contained in such a report shall not be disclosed except to the Court and any person authorised by the Court to receive such disclosure.”

[8] Proper weight must be given to the limitation of purpose for appointing a visitor with which the section opens. The purpose is to assist the court in “the exercise ... of the functions of

the Court under this Part” in relation to a patient.⁷ The court is a court of protection and the functions of protector are conferred on the judge. The jurisdiction to appoint a visitor conferred by the section is conferred for the purpose stated – to assist the court in protecting the patient. I can see no assistance to the court by the appointment of a visitor if the court is not engaged in investigating matters relating to the capacity of a patient to manage and administer his property or affairs, or is not engaged in investigating matters otherwise relating to the exercise in relation to the patient, of the functions of the court. If the court has no need, for the stated purpose, to appoint a visitor it has no jurisdiction to appoint a visitor.

- [9] Whether it is open to the court in claim No 381 of 2006 to order that the defendant’s expert be allowed to examine the claimant to test the claimant’s contention that she is suffering from mental illness is not a question on which I express any view but if the court may, and chooses to make such an order, that order cannot be a section 24 order. That order would be an order in adversarial proceedings in which it is the responsibility of the parties to present evidence to advance their cases and the court leaves it to the parties to obtain and present such evidence. In contrast, a section 24 order is an order made by the court for the purpose of itself investigating the matter of a person’s mental capacity in the exercise of its jurisdiction as a court of protection.

⁷ Support for this view is found in volume 30, Halsbury’s Laws of England, 4th edition Reissue, Mental Health, paragraph 1506, dealing with the comparable provision in the English Mental Health Act 1983.

[10] For the reasons given I allow the appeal and set aside the order the judge made that was entered on 18th May 2007. I award costs of \$1,500.00 to the appellant.

Denys Barrow, SC
Justice of Appeal