In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: 10

LATISHA CHERYL MORANDA LIGHTBOURNE

Appellant

-v-

SHAWN AMIEL AINSWORTH THOMAS

Respondent

REASONS FOR DECISION

(in Court)[1]

Appeal- challenge to jurisdiction of Family Court- custody care and control jurisdiction vulnerable adults-limited jurisdiction of Family Court-inherent jurisdiction of Supreme Court

Date of Decision: March 23, 2016
Date of Reasons: April 5, 2016

Ms. Nancy Vieira, MacLellan & Associates, for the Appellant
Ms. Alma Dismont, Marshall Diel and Myers Limited for the Respondent

Introductory

1. On November 3, 2015, the Family Court (Wor. Shade Subair Williams, Acting) ruled (upholding the preliminary objection of the Respondent) that it lacked jurisdiction to make orders for the custody, care and control of the parties' child, a vulnerable young adult whose care had previously been supervised by the Family Court before she attained 18 years of age. The Learned Acting Magistrate further found that relief

[1] The present judgment was circulated to the parties without a formal hearing in order to save costs.

sought by the Appellant could only be sought from the Supreme Court, because the Family Court had no inherent jurisdiction to grant relief beyond the limits of its statutory jurisdiction. The Appellant appealed against this decision on various grounds, but only actively pursued the complaint that this jurisdictional determination was legally flawed.

2. On March 23, 2016 I dismissed the appeal[2]. I indicated that while the appeal had been found to lack merit, it had usefully served to highlight the need for a legislative framework to regulate the welfare of vulnerable adult persons.

3. I now give reasons for that decision.

The Family Court Ruling

4. After summarising the facts and the respective arguments of counsel, the Learned Acting Magistrate set out the following conclusions:

> "*Counsel, through their written and oral submissions, referred this Court to various previous cases and a thorough review of the provisions of the Children Act 1998 and the Minors Act 1950. I have carefully considered all material referred for consideration.*
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> *It is clear that there is no statutory provision in place from which this Court would be expressly empowered in these circumstances to make an order of guardianship over* [S]*, a person now having attained as least 18 years of age. It is apparent that High Courts in other commonwealth jurisdictions have previously invoked an inherent jurisdiction to make orders of guardianship. The real question is whether the Magistrates' Court possesses such jurisdiction. In my view, it does not.*
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> *In Re C (a child) [2012] Bda LR 88 Ian Kawaley CJ ruled on the question of sufficient jurisdiction in the Magistrates' Court in relation to section 18J (4) of the 1998 Act which specified the Supreme Court's power to compel a person to submit to a blood test where the court considered it necessary in order to protect the health of a child. In that case, at the stage of first instance, the Magistrates' Court had wrongly assumed jurisdiction to make an order under these provisions which were expressly reserved for the Supreme Court.*
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> *The Learned Chief Justice at paragraph 15 (page 3) of this Ruling observed as follows:*

[2] I also awarded costs to the successful Respondent.

> *'The jurisdiction of the Family Court, a creature of statute with no inherent jurisdiction, must be found in statutory from. The Children Act does not confer an unfettered discretion on the Family Court to make whatever order it deems fit in the best interest of the relevant child . . .'*

> *Kawaley CJ helpfully reiterated in this ruling that ordinarily, unless otherwise specified in the 1998 Act, statutory jurisdiction is conferred upon the Special Court of the Magistrates' Court. That is to say, unless the act specifically refers to the Supreme Court being empowered, the statutory powers given in the Act are assigned to include the Special Court. In this case, no such statutory powers have been given to the Special Court and so the order sought calls for the use of an inherent power which may only be exercised by the Supreme Court.*"

5. This was, at first blush, a straightforward decision in which the Family Court had correctly applied a decision of this Court which was binding on it, because there was no clear statutory jurisdiction to supervise the affairs of a vulnerable adult in the same manner as the Family Court could plainly oversee the welfare of a child.

The jurisdiction of the Family Court in relation to custody, care, control and access

6. The Appellant's counsel implicitly assumed the burden of persuading this Court that its earlier judgment in *Re C (a child)* [2012] Bda LR 88 was wrong. Although the narrow jurisdictional question in *Re C* was different, the central finding relied upon by Ms Dismont before the Family Court and in response to the appeal was a principle of general application:

> "*15. The jurisdiction of the Family Court, a creature of statute with no inherent jurisdiction, must be found in statutory form.*"

7. However, Ms Vieira did not attack this finding head on. She sought instead to establish that the Family Court did have statutory jurisdiction to supervise the welfare vulnerable adults who had previously been supervised as children. This proved to be an insurmountable obstacle. Further, relying on English High Court authorities on the inherent jurisdiction of the English High Court, the Appellant's counsel urged this Court to find that the Family Court had a corresponding inherent supervisory jurisdiction over vulnerable adults capable of filling any statutory void.

Statutory jurisdiction of the Family Court

8. The relevant application was made under section 36D of the Children Act 1998 ("the Act") which provides:

> "(1) *A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of or access to the child.*"

9. Section 2(1) of the Act defines child in the following way:

> "*'child' means, except in Part IX*[3]*, a person who is under the age of 18 years…*"

10. Section 36D is in Part IVA of the Act so 'child' clearly means a person under the age of 18 years. Express language is accordingly required to justify construing any powers conferred in relation to a child as applicable to a person who is not a child as defined generally by the Act. An example of such a provision may be found in Part IVB, which Ms Vieira relied upon to demonstrate that maintenance orders could be made past the age of 18. Section 36.1B confers this jurisdiction in explicit and unambiguous terms:

> "(1) *Every parent has an obligation, to the extent the parent is capable of doing so, to provide support, in accordance with need, for his or her child who is unmarried and is under the age of eighteen years or, if eighteen years of age or over, is enrolled in a full-time program of education or is unable, by reason of illness, disability or other cause, to withdraw from the charge of his or her parents or to obtain the necessaries of life.*
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> *(2)The obligation under subsection (1) does not extend to a child who is sixteen years of age or older and has withdrawn from parental control.*" [Emphasis added]

11. Far from supporting the proposition that custody orders could be made in respect of young adults who were vulnerable or adults who were vulnerable more generally, section 36.1B makes it clear beyond sensible argument that clear wording is required to expand the jurisdiction primarily conferred by the Act in relation to children alone.

[3] In this Part ("***DAY CARE***") "child" means pre-school age children (section 65).

12. The Minors Act 1950 took the statutory jurisdiction position no further. Reference to it before the Family Court may explain why the Learned Acting Magistrate described the application as being for a guardianship order. The Minors Act permits guardianship applications but also only deals with the welfare of persons of less than 18 years of age. It was difficult to comprehend how this Act was in any way responsive to the jurisdictional challenge raised by the Respondent and accepted in the Court below.

Inherent jurisdiction of the Family Court

13. The Appellant's counsel cited no authority which supported the incredible proposition that the Family Court, a Special Court established by the Magistrates' Act 1948, had inherent jurisdiction corresponding to the Supreme Court of Bermuda and the High Court of Justice of England and Wales.

14. In addition to relying upon *Re C* in the Court below, Ms Dismont referred the Learned Acting Magistrate to the following provisions of the Magistrates' Act 1948:

> "*11. A Special Court shall exercise such jurisdiction as may be conferred upon a Special Court by or under any Act*…"

15. Ms Vieira relied at first instance and on appeal on a *dictum* of Thorpe LJ in *Re F (Adult: Court's Jurisdiction)* [2001] Fam 38 at page 53, which was approved by Baker J in *O-v-P* [2016] 1 All ER 1021; [2015] EWHC 935 (Fam) (at paragraph [10]):

> "*It would in my opinion be a sad failure were the law to determine that [the court] has no jurisdiction to investigate and, if necessary, to make declarations as to T's best interests to ensure that the protection that she has received belatedly in her minority is not summarily withdrawn simply because she has attained the age of 18.*"

16. All the English cases cited which have deployed the inherent jurisdiction of the court to fill statutory voids in relation to vulnerable persons have involved the High Court. As I observed in the course of the hearing, the Supreme Court of Bermuda is a court of unlimited jurisdiction similar to the High Court of England and Wales. It may be helpful to refer to the statutory basis for this assertion.

17. Section 12 of the Supreme Court Act 1905 provides:

> "(1)*The Supreme Court shall be a Superior Court of Record, and, in addition to any other jurisdictions conferred by this or any other Act or Act of the*

Parliament of the United Kingdom, shall, subject as in this Act mentioned, possess and exercise the jurisdiction which, at the commencement of this Act [6 June 1905], was vested in, or capable of being exercised by, the Governor as Ordinary relative to the grant of probate of wills and letters of administration of the personal estate of persons deceased and by all or any of the following courts, that is to say—

(a) the Court of General Assize;
(b) the Court of Chancery;
(c) the Court of Exchequer;
(d) the Court of Probate;
(e) the Court of Ordinary;
(f) the Court of Bankruptcy.

(2)The jurisdiction transferred to the Supreme Court by virtue of this Act shall include the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the Judges of the aforementioned courts, respectively, sitting in court or chambers, when acting as Judges or a Judge in pursuance of any Act, law or custom, and all powers given to any such court, or to any such Judges or Judge, by any Act or Act of the Parliament of the United Kingdom, and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdictions so transferred." [Emphasis added]

18. Section 12 of the Supreme Court Act preserves not just the statutory powers of those ancient courts, but also their common law and customary powers. The Supreme Court's jurisdiction under Bermudian law consciously mirrored the jurisdiction conferred on the English High Court by section 16 of the Judicature Act of 1873, which vested in the High Court the original civil jurisdiction previously dispersed amongst multiple separate courts, courts upon which our own pre-1905 courts were in turn largely based[4]. However, as regards inherent jurisdiction, it is noteworthy that section 12(2) of the 1905 Bermuda Act is substantially the same as the second paragraph of section 16 of the English Judicature Act 1873. From inception therefore, the Bermuda Supreme Court's inherent civil jurisdiction has corresponded to that of the English High Court.

19. The Learned Acting Magistrate was accordingly clearly right to reject the proposition that the Family Court (which is essentially a court of summary jurisdiction) possessed the same inherent jurisdiction enjoyed by the English High Court and/or the Bermudian Supreme Court.

[4] The Bermudian pre-1905 courts did not exactly correspond to the English pre-1873 courts and some existed only in name. For instance, in England there was no Court of Ordinary by 1873 (this was probably replaced by the Probate Court); Bermuda notionally had both a Court of Ordinary and a Probate Court. Bermuda had no Court for Divorce and Matrimonial Causes, while England did. The English High Court's criminal jurisdiction was dealt with by a separate section of the 1873 Act, section 29, while section 12 of the 1905 Act dealt with both criminal and civil jurisdiction.

The inherent jurisdiction of the Supreme Court to supervise the care of vulnerable adults

20. The English courts have, pending legislative intervention to fill the gap in the law, cautiously used declaratory relief appreciating the fact that the line demarcating the courts' inherent common law powers and the constitutional role of Parliament is not always an easy one to draw. In identifying the legal basis for a common law power, the English courts have identified the common law doctrine of necessity. This doctrine not only needs to be conservatively exercised with a view to avoiding trespassing on the proper domain of the Legislature. It must also be deployed with an awareness of the patient's own fundamental human rights. As Sedley LJ observed in *Re F (Adult: Court's Jurisdiction)* [2000] 3 W.L.R. 1740[5]:

> "*The legal power to bring this about by declaration was confirmed by the decision of the House of Lords in In re F (mental patient: sterilisation) [1990] 2 AC 1 that the common law of necessity would in appropriate cases permit otherwise tortious interferences with the personal integrity of the mentally incapacitated. In the Court of Appeal Lord Donaldson MR had said:*
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> > *'…the common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges.'*
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> *I do not accept Mr Gordon's submission that necessity is limited to medical and similar emergencies. Lord Goff in R v Bournewood Mental Health Trust, ex parte L [1999] AC 458, 490, having cited early cases on the permissibility of detention of those who were a danger to themselves or to others, said:*
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> > *'The concept of necessity has its role to play in all branches of our law of obligations – in contract …, in tort … in restitution … and in our criminal law. It is therefore a concept of great importance.'*
>
> *Lord Nolan said of the applicant (at 491):*
>
> > *'It would have been wholly irresponsible for those monitoring him to let him leave the hospital until he had been judged fit to do so.'*
>
> *I would accordingly not think it right to set prior limits to the applicability of the doctrine.*
>
> *But it is equally a part of Mr Gordon's case that Parliament has made its own safety net provisions for the mentally disordered or incapacitated. He points to s. 47 of the National Assistance Act 1948 which permits local authorities to remove to suitable premises people who – in broad terms – are sick or are*

[5] At 1756 F-1757H; 1758E-G.

infirm and living in squalor, and who are in want of care and attention; and to s. 135 of the Mental Health Act 1983 which permits the removal of mentally disordered persons pending, among other things, the making of arrangements for their care – but only if they are being ill-treated or neglected or are living alone and unable to care for themselves, and then only for 72 hours. Both are cast in terms which exclude T.

If this case had come before the courts in the mid-1980s, Mr Gordon's case, however troubling in terms of outcome, might well have been unanswerable. The court would have had to confront the fact that it was being asked to sanction state intervention in a situation which Parliament had recently removed from the state's sphere of influence[6]*. But, as the Scottish jurist Stair wrote more than three centuries ago:*

> *'[T]he nations are more happy whose laws have been entered by long custom, wrung out from their debates on particular cases, until it came to the consistence of fixed and known custom. For thereby the conveniences and inconveniences thereof through a long tract of time are experimentally seen…. But in statutes the lawgiver must at once balance the conveniences and inconveniences; wherein he may and often doth fall short ...' (Stair, Institutes, I.1.15, quo. Bennion, Statutory Interpretation (3rd ed.) s. 319)*

Since the conflict and settlement of the seventeenth century the courts have recognised the ultimate legislative authority of Parliament, and Parliament in its turn has respected the authority of the courts within their self-delineated sphere as the authors of the common law and the source of equity. The relationship between the two is a working relationship between two constitutional sovereignties (see R v Parliamentary Commissioner for Standards, ex parte Fayed [1998] 1 WLR 669, 670H, per Lord Woolf MR). Thus Parliament, on the one hand, has more than once had to legislate to rescue the courts from difficulties of their own making, while the courts for their part, from the refusal of Holt CJ (Smith v Gould (1706) 2 Salk. 666) to recognise slavery in England to the recent decision by the House of Lords on withdrawal of life support (Airedale NHS Trust v Bland [1993] AC 789), have from time to time had to speak where Parliament, although the more appropriate forum, was silent. Both can find themselves left behind by time and tide, and that is what has happened here….

It does not of course follow that the courts are free to devise new forms of social control unsanctioned by Parliament. Apart from the constitutional inhibitions on any such development (Mr Gordon reminds us of R v Home Secretary, ex parte Fire Brigades Union [1995] 2 AC 513 and A-G v De Keyser's Royal Hotel [1920] AC 508, both of which, however, concern the supplanting of statutory by prerogative powers), Article 5 of the European Convention on Human Rights will in the very near future form a legal constraint on what a court, as a public authority, may do. It is worth

[6] The receivership regime for adult patients under the Mental Health Act 1968 appears to derive from the original 1968 enactment and to be accordingly nearly 50 years old.

observing that the Article's guarantee of security of person, even taking it to be concerned only with arbitrary detention, is potentially engaged in the present case by both parties' proposals, the mother's and the local authority's, inexorably making the resolution of the problem in part a Convention issue[7] *...*" [Emphasis added]

21. An alternative basis for the inherent jurisdiction to make orders to regulate the care, control and custody of a vulnerable adult has been expressed by way of continuing existing custody orders beyond the age of 18 years. That was the approach adopted through the grant of an injunction in *O-v-P* [2016] 1 All ER 1021, upon which Ms Vieira relied. *O-v-P* entailed extending a non-molestation order beyond a child's 18th birthday based in this respect on a decision made by current Court of Appeal for Bermuda President Scott Baker J (as he then was). Baker J (at paragraph [8]) of his judgment *O-v-P* stated:

"*8. It is Mr Lyon's primary submission that the orders made during the currency of the wardship proceedings made before the ward's 18th birthday can be extended beyond that date. He submits that such a step can be taken "in order to preserve the integrity of the proceedings." He cites in support of that proposition the earlier decisions of Sir John Arnold P in Re P (Minors) (Wardship: Surrogacy) [1987] 2 FLR 421 and of Scott Baker J in Re E (A Minor) (Child Abuse: Evidence) [1991] 1 FLR 420. In Re P, the issue concerned the preservation of the identity of twins born to a surrogate mother who then refused to give them up. The twins were warded and orders made preserving confidentiality, and the President continued those orders notwithstanding the termination of the wardship. In Re E, orders were made in wardship preserving the anonymity of a number of those involved during a fact-finding into allegations of sexual abuse of very young children. Those orders were continued following the discharge of the wardship. It was submitted before Scott Baker J that it would be a surprising void in the law were the court to have no power to grant an injunction whose effect continued after the discharge of the wardship proceedings and that such a void would be inconsistent with the court's established inherent jurisdiction to protect minors. Scott Baker J concluded at page 455 F to G:*

'In the absence of any provision to the contrary, any injunction would ordinarily terminate on the discharge of wardship proceedings. It is,

[7] Section 5 of the Bermuda Constitution is broadly derived from article 5 of the European Convention of Human Rights.

however, open to the court, if it deems necessary to direct that an injunction made during the currency of wardship proceedings do continue after their discharge."" [Emphasis added]

22. Ms Dismont also referred the Court, by way of illustrating that the Supreme Court was the proper forum to invoke inherent powers, to the decision of Hellman J in *Re C (a minor); A-v-B* [2012] Bda LR 84. In that case Hellman J primarily held that this Court had no inherent jurisdiction to supplement the statutory scheme for periodical payments in relation to children. However, in affirming that a residual jurisdiction to deal with matters not covered by the statutory scheme did exist, Hellman J lucidly summarised the parameters of this Court's inherent jurisdiction thus:

> "*The Court exercises a closely analogous inherent jurisdiction with respect to incompetent adults. See, eg, the judgment of Munby J (as he then was) in Re SA (Vulnerable Adult with Capacity: Marriage) [2006] 1 FLR 867 , HC, at paragraph 37. In Westminster City Council v C and others [2009] 2 WLR 185 the Court of Appeal considered the relationship between that inherent jurisdiction and the Mental Capacity Act 2005. Ward LJ, with whom Hallett LJ agreed, approved at paragraph 55 the following formulation of Roderic Wood J at first instance:*
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> > '*Consistent with long-standing principle, the terms of the statute must be looked to first to see what Parliament has considered to be the appropriate statutory code, and the exercise of the inherent jurisdiction should not be deployed so as to undermine the will of Parliament as expressed in the statute or any supplementary regulatory framework.*'"

The need for legislative reform

23. The Mental Health Act 1968 provides for the hospitalisation of "patients" and for the appointment of a receiver to manage a patient's property and related affairs. That jurisdiction, conferred exclusively on the Supreme Court, does not expressly contemplate a regime such as guardianship or orders relating to the patient's custody, care and control. Vulnerable adults would potentially qualify as patients, but there is

no express statutory power to exercise a jurisdiction akin to the guardianship regime for minors.

24. The above superficial review of case law on the inherent jurisdiction to fill statutory gaps in the interests of protecting vulnerable adults in the absence of a statutory scheme demonstrates how potentially complicated and contentious this residual jurisdiction generally is. It would surely provide more cost-effective access to justice and better serve the interests of vulnerable persons that few would argue do not deserve legal protection if Parliament were to enact an appropriate statutory code.

Conclusion

25. For the above reasons, on March 23, 2016, I dismissed the appeal against the preliminary jurisdictional ruling of the Family Court and affirmed the November 3, 2015 decision of Acting Magistrate Ms Shade Subair.

Dated this 4th day of April, 2016 _____

IAN RC KAWALEY CJ