

JERSEY / JUDGMENT

In the matter of II [2015]

JRC 194 (23 September 2015)

[2015] JRC 194

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judgment

the master:

Introduction

1. This judgment represents my reasons both for appointing an amicus curiae on 17 th June, 2015, and my decision on 27 th August, 2015, on the scope of the authority of that amicus curiae .

Procedural History

2. To explain my reasons for appointing an amicus curiae and my decision in relation to the scope of the role the amicus curiae will play, it is necessary to refer to the history of this matter. 3. Proceedings were commenced by the plaintiffs in March 2012. It is a matter of real regret that these proceedings have not yet reached a trial date and are some way from doing so. I will deal later in this judgment why this is the case. 4. The proceedings commenced were brought by A as first plaintiff and her two children K and L, the second and third plaintiffs. For ease of reference I will refer to them in this judgment as A, K and L. L was a minor when the action was first commenced, represented by A as guardian ad litem , but L subsequently came of age. 5. The first defendant in the proceedings is H the brother of A. The second defendant is the law firm Appleby. 6. The essence of the claim brought by A and K, initially for themselves and by A as guardian for L against the first defendant relates to the estate of the mother of A and H, whom I will refer to as J. 7. In 2008 J made Wills of her moveable and immoveable estate with the assistance of the second defendant. These Wills left the whole of the immoveable and moveable estate of J to H. 8. The plaintiffs claim that J was concerned about the 2008 Wills as they did not protect the interests of the plaintiffs. The plaintiffs further allege that H assured J that notwithstanding the Wills he would divide the estate equally with A provided that A's divorce had been completed and, if it had not been completed, the first defendant would hold half of the estate on trust for A. 9. The plaintiffs further criticise H for his conduct prior to J's death in 2011. 10. The plaintiffs therefore claim from H half the value of J's former home, in the sum of £500,000 plus her légitime of J's

moveable and immovable estate. 11. The claims against the second defendant are founded in negligence based on the second defendant failing to advise J properly or at all and are for damages. 12. While A's right to *légitime* is accepted, the plaintiffs' claims are disputed. In relation to the *légitime* claim, H contends that sums paid from the estate to the benefit of A as *avancement de succession* will have exceeded any such entitlement. The second defendant disputes any allegations of negligence. 13. On 7 th September, 2012, and 14 th January, 2013, the plaintiffs issued two applications for an interim payment of £100,000. Both these applications were dismissed on the basis that none of the grounds set out in Rule 8/2(1) of the Royal Court Rules 2004 , as amended, which deals with when interim payments can be made, were satisfied. 14. In respect of the first application the Royal Court stated that the plaintiffs' claims might succeed, but they might not; it all depended on the evidence. The Court also encouraged the parties to mediate. Sadly this has not happened. 15. In respect of the second application, the Royal Court gave directions and expressed its concern that the matter was making no progress towards a hearing. Directions were therefore given for discovery. 16. Regrettably the order for discovery was not adhered to by the plaintiffs and further orders were made on 20 th February, 14 th May, 6 th August and 16 th September, 2013. Ultimately this resulted in me making an Unless Order on 18 th December, 2013, which led to some discovery being provided by the plaintiffs; however discovery is still not complete. Directions were also given for affidavits of witness of fact to be produced on 20 th February, 14 th May, 6 th August and 16 th September, 2013, and 11 th June, 2014. Such evidence has still not been produced. 17. It is however right to observe that in relation to the directions given, some of these dates have been varied or set aside because of serious health issues which it is not necessary to specify but which clearly have affected A by reference to independent medical evidence provided through A. In particular, on 16 th September, 2013, A raised an issue that the proceedings should be adjourned by reference to a letter from her consultant for six months. However, she only wanted to delay matters for a shorter period because of the risk of losing the property in which she resided in Jersey and because she was facing other financial difficulties. Accordingly I extended the obligation to provision of discovery until the end of December 2013. 18. While detailed directions were given on 14 th and 11 th June, 2014, by an act of 17 th September, 2014, the effect of these directions were stayed and trial dates fixed set aside, again because of A's health reasons. The matter was stayed until 4 th February, 2015. 19. At the directions hearing 11 th June, 2014, directions were given covering the following issues:- (i) the plaintiffs were required to set out what losses that they incurred; (ii) the plaintiffs were required to set out particulars as to why it was said that each had suffered severe emotional distress as a result of the defendants' conduct, separated between each of the plaintiffs; (iii) finally the plaintiffs were required to particularise whether or not they were alleging fraudulent conduct or dishonesty against each of the defendants and if so the grounds relied upon. It is also right to record that the first and second defendants reserved their rights to seek to strike out part of the plaintiffs' claims if fraudulent or dishonest conduct was alleged. 20. There are also issues about specific discovery which have been raised and which, as far as I am aware, have not yet been dealt with. 21. Directions were also given in respect of expert evidence concerning the

capacity of J to make her Wills, the severe emotional distress of the plaintiffs, if so alleged, and in respect of quantum by reference to accounting evidence. None of this has been produced. 22. At the hearing on 11 th June, 2014, the plaintiffs also asked me to recuse myself in relation to this matter, which request was repeated for the same reasons on 4 th February, 2015. For reasons set out in my letter dated 20 th June, 2014, to the plaintiffs I refused to recuse myself. The request to recuse myself on 4 th February, 2015, was also refused for the same reasons. 23. On 4 th February, 2015, A asked for a stay for two months based on a letter from her General Practitioner which I acceded to. However, I also gave directions to take effect from the expiry of the stay, firstly requiring the plaintiffs to specify all grounds relied upon in respect of allegations of fraudulent misrepresentation against H, secondly whether they alleged fraud or dishonesty against the second defendant and if so the basis of any such allegation and thirdly that, if the plaintiffs wished to apply for a split trial, they should issue such an application as soon as possible. 24. Also at this hearing although the plaintiffs had not provided a statement of the categories of losses they said they had incurred or explained the severe emotional distress, as required by the orders I made in June 2014, I deferred consideration of this until after adjudication of any application for a split trial. 25. During this hearing A raised an issue (which she had referred to in earlier hearings) concerning the fact that Advocate Richardson, then appearing in person for Appleby, had made an incorrect submission on the law on the first application for an interim payment to the Deputy Bailiff. This submission related to the burden of proof because of *Trigg v Crapp*

[1984] JJ 21 which held that the burden of proof was on the person seeking to prove the Will, to prove testamentary capacity. 26. I informed the plaintiffs that this issue had been corrected by the time of the second hearing and that ultimately, as Deputy Bailiff W. J. Bailhache, (as he was then) noted, whether or not the testator had testamentary capacity was ultimately a matter of evidence. The burden of proof did not affect the need for evidence for the claim to progress to trial to permit the Royal Court to adjudicate on the issue of J's testamentary capacity. 27. An application for a split trial was issued by the plaintiffs after expiry of the stay granted in February 2015 and was due to be heard by me on 17 th June, 2015. However, the application was adjourned until 5 th October, 2015, because on 17 th June, 2015, I ordered an *amicus curiae* to be appointed for the plaintiffs. The appointment of an *amicus curiae* 28. What led to an *amicus curiae* being appointed is that just before the intended application for a split trial to be heard on 17 th June, 2015, Advocate Wilson drew to my attention a decision of Commissioner Clyde-Smith given earlier in the year which concerned A and an application for maintenance made against her former husband. In the course of this judgment at paragraph 21 in dismissing A's application, Commissioner Clyde-Smith expressed the view that A would be incapable of preparing an affidavit of means on her own with the result of an *amicus curiae* would have to be appointed, if such an affidavit were needed. This view appeared to be expressed by reference to A's demeanour and submissions before the Court which led Commissioner Clyde-Smith to express concerns about A's well-being and her capacity to represent

herself. In fact no amicus was appointed as the application was struck out and so no affidavit was needed. 29. Advocate Wilson for the second defendant said it was his duty to draw this judgment to the Court's attention and in light of this decision, it was open to me to appoint an amicus curiae . This was notwithstanding the fact this would delay the litigation even though his clients wanted a resolution of these proceedings. I agree it was his duty to draw Commissioner Clyde-Smith's earlier decision to my attention. 30. A and K attended the hearing in June. L at the last minute was unable to attend for reasons I accepted. A supported an amicus curiae being appointed and at that time stated she was struggling to cope with the litigation. I therefore ordered an amicus curiae to be appointed. I made clear this was for all the plaintiffs. This was because A had very much taken the lead in terms of presenting the case for K and L. 31. Since my decision in June, A has objected to Advocate Wilson referring the decision of Commissioner Clyde-Smith to me because it was reported in the restricted section of JLIB on an anonymised basis and has stated that it should not have been referred to me. I observe that at the June Hearing A did not raise this objection, did not dispute that Commissioner Clyde-Smith's decision did refer to her and welcomed an amicus curiae being appointed. 32. At the hearing in August A challenged the appointment of an amicus curiae . I therefore now set out in detail my reasons for making such an appointment in June. 33. Firstly, I reached the view that the appointment of an amicus curiae is a matter of discretion - see paragraph 18 to 24 of I v J (Family)

[2014] JRC 021 which I adopted in I v J (Family)

[2015] JRC 025 . 34. Secondly, I hoped that appointing an amicus curiae would speed up resolution of the issues that remain in this case and how these issues should be taken forward to trial. 35. In view of the history of this matter which I have set out above in this judgment, I was also concerned about the ability of the plaintiffs in particular A to cope with the issues that required determination to progress the plaintiffs' claims. Notwithstanding the fact that these proceedings commenced in March 2012, the dispute was a very long way from being ready for trial with there being outstanding issues of discovery, no witness statements exchanged, no expert evidence produced, possible strike out applications, no confirmation of loss, including what losses of K and L might have suffered, and arguments over a split trial. These issues are not straightforward. 36. Ultimately I also took into account the impact the litigation appears to have on A's health from time to time which has led to the adjournments I have referred to. Having seen her in Court, it is also clear to me that A finds the claim and the whole process extremely stressful and difficult to manage. 37. I was also concerned about the impact of this case on K and L. K has not yet completed his studies and L has just started at university. Both of them are trying to find their way in the world and yet are trying to help their mother in respect of this case and the different issues it raises. That is not easy for them. 38. Finally, despite the best efforts of the Court this case has not progressed, albeit for a variety of reasons. Yet, as the Royal Court stated at the end of 2012, this is a case that cries out for any resolution. Although the Royal Court and I encouraged the parties to try to resolve

their differences through mediation, this has not happened. While it is not for me to speculate on all the reasons why, from what has been said to me in Court, I was and remain of the view that there is a serious lack of trust by the plaintiffs of the defendants, the Courts and anything suggested by the Court to encourage settlement. I hoped that the role of an amicus curiae might assist in progress of any litigation or settlement discussions and address any suspicions the plaintiffs have about the defendants and agreeing to settle their claim. 39. For all these reasons, by reference to the facts of this case, I concluded that an amicus curiae could assist in the progression of this case which needs to move to some form of conclusion, notwithstanding the complexities I have referred to. The scope of the role of an amicus curiae 40. Following my decision to appoint an amicus curiae, an issue arose between Advocates Franckel and Wilson for the defendants and Advocate Steenson, who had been appointed as amicus curiae by the Bâtonnier, as to the scope of Advocate Steenson's role. I am informed that the plaintiffs also wanted clarity on the role. 41. This led to Advocate Steenson issuing a summons before me asking me to elaborate on the role to be played by him as amicus curiae. The summons was listed before me on 27 th August, 2015. 42. On 24 th August, 2015, at 14:40 pm Advocate Wilson for the second defendants sent an email copied to all other parties including Advocate Steenson setting out his views as to the role of an amicus curiae. Paragraphs 5 to 10 of his email stated as follows:- "5. We suggest that the overriding objective of the appointment is to achieve a final resolution of this dispute as speedily and efficiently as possible, consistent with doing justice to all parties.

6. Consistent with that objective, we suggest that Advocate Steenson will need to be involved in any trial, and indeed in any settlement discussions (we have given the example that if any mediation were to take place, we would expect Advocate Steenson to attend and to sit with the Plaintiffs in their room, in order to help them to come to a settlement in their own best interests).
7. In order to be able to discharge his role, we suggest that Advocate Steenson will need to ensure that he has a full understanding of the Plaintiffs' case, and to communicate confidentially with the Plaintiffs, so that the Plaintiffs: a have a full appreciation of the legal remedies available to them; b have a full appreciation of the merits of their case, and of any settlement proposal, and of the consequences of proceeding (or not proceeding) to trial; c submit to the Court appropriate evidence and make appropriate legal submissions; and d act in their own best interests.
8. In doing so, we envisage that Advocate Steenson will be reviewing drafts of communications and documents which the Plaintiffs wish to send to the Defendants and to the Court, to ensure that they are in a coherent and suitable form. However, we do not envisage that Advocate Steenson will have any primary responsibility for preparing draft documents or communications for them, nor for formally advising the Plaintiffs on the contents of such.

9. Nor do we envisage that Advocate Steenson will have any primary responsibility for presenting the Plaintiffs' case for them at trial. Indeed, we suggest that would not be appropriate; it would align the amicus entirely with the Plaintiffs and not allow the amicus to discharge his obligation to the Court (see *I v J*). (An additional point here is that the one that has been made by Advocate Franckel in the past, namely that it is not clear that the interests of the Plaintiffs are in fact aligned.)
10. We do anticipate that the amicus will be of assistance to the Court (and the Plaintiffs) at any trial by:
 - a. dealing with any submissions or matters of evidence not covered by the Plaintiffs in their own best interests; and
 - b. giving the Court the benefit of his own views on any factual or legal submissions." 43. Advocate Steenson responded the following day at 10:33am indicating that his view was he thought he would formally present the plaintiffs' case for them making clear the distinction between their submissions as plaintiffs and his position, if called to explain it, as amicus curiae . He also indicated at the hearing he would explain his position in response to paragraph 10 of Advocate Wilson's email. During the hearing the real issue following on from the above exchanges that required adjudication was the extent to which Advocate Steenson as amicus might assist the plaintiffs at trial. 44. Advocate Franckel referred me to the decision of Commissioner Clyde-Smith in *I v J* to which I have made reference above and in particular emphasised paragraph 27 of that decision which stated:- "The function of the amicus curiae is to assist the Court in the manner set out above or in such other way as the Court may approve. For the avoidance of any doubt, the amicus curiae will not represent the father, who will continue to represent himself, preparing his own documentation and making his own submissions." 45. When the matter came before me, I indicated to the parties my preliminary view on how I saw Advocate Steenson performing the role of amicus as follows:- (i) Firstly, I agreed it was important that the amicus curiae remained independent from the plaintiffs and did not become their de facto advisor; (ii) Secondly, I indicated that Advocate Steenson needed to, as the defendants accepted, have a full understanding of the plaintiffs case. If a more restrictive approach to his role were adopted then the objective which Advocate Steenson and counsel for the defendants accepted of achieving a final resolution of the present dispute as speedily and as efficiently as possible, consistent with doing justice to all parties, would not necessarily be met. (iii) This therefore led me to indicate, subject to further argument that Advocate Steenson should approach matters as follows:- (a) Insofar as the defendants issued procedural applications against the plaintiffs concerning adequacy of discovery, whether claims should be struck out, or the adequacy of the pleadings, it was appropriate for the amicus to be provided with sufficient information about the case to be able to inform the plaintiffs of his view on the merits of such an application. This would be to allow the plaintiffs to decide what stance they wished to take in relation to any such application. (b) If the plaintiffs decided to resist any such application, the role of the amicus would be firstly to assist the plaintiffs to set out their

arguments. This would be by commenting on any skeleton argument they produced, or by presenting the key points they wished to make. (c) I reached this view because of the reasons why I ordered an amicus to be appointed in the first place namely concerns about the impact of this litigation on the plaintiffs. (d) However, it was essential that the amicus at all times remained impartial and notwithstanding any assistance to the plaintiffs and indeed the Court in setting out the plaintiffs' concerns, the amicus' overriding duty was to the Court. The amicus therefore always had to provide his independent view of the merits of any application to the Court, whether or not helpful to the plaintiffs. (e) Insofar as proactive steps were required to be taken to progress the matter to trial, the onus to take such steps remained on the plaintiffs, such as completion of any discovery obligations, production of witness statements and any obtaining expert evidence that is required. The role of the amicus was therefore to explain the general practice required by the Court in respect of these steps. (f) If any arguments arose before the Court in relation to whether or not the plaintiffs had complied with such steps, again it was open to the amicus to present the plaintiffs' view and then his own independent view on the particular procedural issue, just as for any applications brought by the defendants. (g) I was already aware from previous applications and hearings before me, that there was an issue as to whether or not parts of the claims should be dealt with by way of preliminary issue or some form of split trial. I again considered it appropriate for the amicus to explain to the plaintiffs the general principles in respect of when the Court might order a preliminary issue or a split trial and to help the plaintiffs formulate any such application they wished to make. Again I considered the amicus could set out the points the plaintiffs wished to make in respect of any such application and his own view of the merits of any such application. (h) In respect of trial, ultimately I drew a distinction between presentation of evidence, questioning of witnesses, whether factual or expert and the presentation of arguments. These were issues for the plaintiffs to deal with as they were matters of evidence. The amicus could assist the plaintiffs in formulating skeleton arguments as long as the amicus remained clear as to the distinction between assisting formulating the plaintiffs' case and his ultimate obligation which was to present his own view of the case to the Court. To that extent, I considered that the amicus might open the case for the plaintiff. I also consider that the amicus could assist the plaintiffs make their final submissions before providing his own observations on the merits of any evidence at trial. (i) What the amicus could not do in my judgment was become involved in the presentation of evidence, cross-examination or re-examination of witnesses. However, difficult it might be, this was a task for the plaintiffs to pursue. (j) Finally, I made it clear that this guidance was peculiar to the facts of this case and should not be taken as being of general application where an amicus is appointed. The role of an amicus in each case will depend on the reasons why an amicus is appointed and the particular circumstances of the case. 46. However, following this indication, A made it clear that she did not want Advocate Steenson to carry out the role in the manner that I had indicated. This was for the following reasons:- (i) A felt that the appointment of an amicus curiae was contrary to her human rights; (ii) The role of an amicus curiae would take away the function of the Court which was to adjudicate upon disputes; (iii) To provide information to an

amicus curiae involved too much effort on her part; (iv) She expressed concern whether Advocate Steenson was independent based on him meeting with the other advocates involved although she accepted that she was aware of the meetings and received reports of what was discussed; nevertheless she felt that he was conceding matters (this was disputed) which he ought not to have done; and (v) She also asked for an adjournment as she had not had sufficient time to consider the email of Advocate Wilson which was only received on 24th August, 2015. 47. It is right also to record that Advocate Franckel indicated that my preliminary view was acceptable to his client. Advocate Wilson did not make any observations on my preliminary view as a result of the intervention of the plaintiffs. 48. In response to the plaintiffs' submissions set out in paragraph 46 above and having heard further from Advocates Wilson, Franckel and Steenson, I decided as follows:- (i) Firstly, since A, K and L were no longer supportive of an amicus curiae, my choice was either to set aside the appointment of Advocate Steenson or to limit his role. I address this part of my decision later in this judgment. (ii) Secondly, the appointment of an amicus curiae was not contrary to the European Convention on Human Rights and in particular the right to a fair trial. The appointment of an amicus curiae did not any way prevent the plaintiffs from setting out any points they wished to make or adducing any evidence they would wish to rely on. The role of an amicus curiae in relation to this case was to assist. The offering of such assistance did not mean that the plaintiffs' right to a fair trial had been affected simply because the Court had appointed an amicus curiae to try and help the plaintiffs to achieve a fair resolution of their claims. (iii) The appointment of an amicus curiae did not take away the Court's obligation to decide a case. The amicus curiae was not deciding the dispute but merely, presenting it, if assistance to present it was required, and otherwise providing the Court with an independent view. The Court, as I stressed during the hearing to the plaintiffs, was entirely free to and was required to make its own decision. While it might have regard to the views of an amicus curiae, especially an advocate as experienced as Advocate Steenson, ultimately the duty to make a decision was the Court's alone. The appointment of an amicus curiae did not and could not ever take away that duty. (iv) As far as A finding it too difficult to briefing an amicus curiae in the sense of such a task being a drain on her, that is ultimately the choice of A. The appointment was designed to assist but, where the plaintiffs do not want to take up that assistance in the way I indicated would be appropriate in this case, then no one is compelling the plaintiffs to do so. (v) Nothing that I heard in submission indicated to me that Advocate Steenson was doing anything other than seeking to discharge his duty as amicus, including seeking clarity as to the scope of his role, and acting independently, as is required of an amicus. The fact that the plaintiffs may not have agreed with views being expressed by Advocate Steenson (and I have not been privy to any such views) does not make Advocate Steenson biased or lacking the independence required of an amicus. (vi) As far as the request to adjourn the giving of directions to an amicus curiae was concerned, I refused this because it was clear that A did not in fact want the benefit or the assistance of an amicus curiae and therefore there was little point in granting an adjournment. In any event, I did not consider that the receipt of the email from Advocate Wilson on 24th August, 2015, which was two working days before the Advocate Steenson's hearing for directions as

to his role was sent too late to enable A, K and L to consider the position. It was clear during the hearing itself they had considered the position because they did not want an amicus curiae appointed. (vii) The plaintiffs were also clear that they wanted their summons for a split trial listed for hearing on 5 th October, 2015, adjudicated upon. The appointment of an amicus curiae , although this had been accepted by A in June, had delayed the determination of this summons. The plaintiffs wanted to focus their energies on this summons being heard. Adjourning Advocate Steenson's summons would also have had the consequence of delaying determination of the application for a split trial. I did not want this to happen and certainly did not want it to happen as a result of the position the plaintiffs had taken in respect of Advocate Steenson. 49. What is also right to record is that K and L indicated they wanted to obtain their own legal advice by way of separate representation and were seeking legal aid. Given the issues I have referred to in this judgment I encouraged K and L to apply for legal aid and to take such advice. I should also add that I encouraged A to take such advice in view of the issues that need to be dealt with, if she is eligible for legal aid. 50. As far as Advocate Steenson is concerned, the view I reached is that, for the present, he should remain in post but his role should be simply be limited to attending at hearings and commenting on whatever the parties chose to file with the Court, which should be copied to him. The plaintiffs other than providing him with copies of any material filed with the Court do not therefore need otherwise to communicate with Advocate Steenson or to explain their case to him. I reached this view because I felt an amicus curiae would still be helpful to the Court having regard to the issues in this case and the need to achieve a final resolution of this matter in an efficient but just fashion. 51. As part of my reasoning, because the plaintiffs are litigants in person, I was concerned about an inequality of arms in this complex dispute. Yet the Court has to avoid descending into the arena or being seen to take steps or give guidance to the party that is not represented, or to help that party shape its case. Although the difficulties a litigant in person might face to a case is not a basis, of itself, to justify the appointment of an amicus curiae , the existence of an amicus curiae has the benefit of ensuring fair play, in the sense that an amicus curiae can provide independent observations on an unrepresented party's case, so that all relevant issues or materials are drawn to the Court's attention. In this case in light of the many issues that still need to be addressed and the complexities of this dispute, I reached the view that the assistance of an amicus will benefit the Court. I should add however that I would wish to review this decision should any of the plaintiffs obtain separate legal representation under the legal aid scheme. 52. Finally, as noted above, I was not aware of any matter to indicate that Advocate Steenson could not perform his duties in the independent manner required of an amicus . 53. In conclusion, I repeat the encouragement given to all parties to try to resolve their differences through mediation for the reasons already referred to in this decision. This is a case that relates to events going back a number of years and concerns a breakdown in family relations. For so long as this dispute is ongoing, it does not allow any family member to the dispute to move on from events of the past. All family members involved will also continue to be subject to the stress that this dispute appears to cause. These are both strong reasons for trying to find an alternative solution to further Court hearings and a trial. Authorities

Royal Court Rules 2004. Trigg v Crapp

[1984] JJ 21. I v J (Family)

[2014] JRC 021 . I v J (Family)

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