

JERSEY / JUDGMENT

re SMF v [2003] JRC 073 (24 April 2003)

[2003] JRC 073

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judgment

the deputy bailiff: 1. On the 1 st March, 1995, the interdict was received into guardianship under the provisions of Article 21 of the Mental Health Jersey (Law) 1969 . Article 50 (3) of the Law requires the Public Health Committee, as it then was, to notify the Attorney General where there is a guardianship and no person has been appointed to manage and administer the property and affairs of the person under guardianship. 2. This was done and in due course on the nd September, 1995 the Court appointed Mr J P Kendall, a solicitor, as curator of the interdict pursuant to the provisions of the proviso to Article 50 (6) of the Law. 3. It appears that the condition of the interdict has improved. Although he is still considered to be in need of guardianship an order to ensure that he continues to take the necessary medication and that he relates in an appropriate manner to the medical authorities, he is now considered by the consultant psychiatrist with responsibility for the interdict, Dr Blackwood, and by the community psychiatric nurse, Mr Terence Hanby , to be capable of managing his own property and affairs. The interdict himself is keen to re-assume that responsibility. 4. The Attorney General has accordingly brought a representation seeking the re-instatement of the interdict and the discharge of the curator. In the light of the evidence which has been produced to the Court, we are in no doubt that that is the appropriate course to take, if we can. On the basis of that evidence, we are satisfied that the interdict is no longer incapable of managing and administering his property and affairs. 5. The matter might, therefore, appear to be relatively straight forward. But the Attorney General has identified a possible lacuna in the Law and very properly has raised the question of whether the Court has jurisdiction to re-instate the interdict and discharge the curator in circumstances where the guardianship has not come to an end. The Solicitor General has been of considerable assistance on the Law. 6. The problem arises in this way. Article 50 (2) of the Law provides that the customary law - "relating to " curatelles " shall cease to have effect except insofar as expressly provided by the Law". 7. The grounds for appointment of a curator fall into two broad categories. Paragraph (5) of Article 50 provides as follows: "Where the Attorney General -

- (a) receives a report, under the provisions of paragraph (3) or (4) of this Article, in respect of any person; or

- (b) has reason to believe that any person is incapable of managing and administering his property and affairs; he shall apply to the Court for the appointment of a curator to manage and administer the property and affairs of that person". 8. The reference under sub-paragraph (a) to a report is a reference to a situation in which a person has been admitted to hospital, or a mental nursing home, or received into guardianship under the provisions of Part III of the Law, or where a person has been admitted to a hospital, or mental nursing home, under the provisions of Article 4 of the Law and the responsible medical officer is of the opinion that the person is incapable of managing or, administering his property and affairs. 9. Similarly, there are two paragraphs of Article 50 which deal with the re-instatement of an interdict. The first is paragraph (9) which provides as follows: (9) "Where an interdict - (a) being a patient admitted to a hospital or a mental nursing home under the provisions of Article 4 of this Law, discharges himself therefrom; or (b) being a patient liable to be detained in a hospital or a mental nursing home, or subject to guardianship, under the provisions of Part III of this Law, ceases to be so liable or so subject; the Committee shall report the fact to the Attorney General who shall submit the report to the Court and, unless the Court shall otherwise order, the interdict shall be deemed to be reinstated and the curator shall thereupon cease to hold office." 10. As can be seen that only applies where the interdict has ceased to be subject to guardianship. The provision is therefore not applicable in the present case because the guardianship is to continue. 11. The second provision dealing with termination is Article 50 (10) which provides as follows: "(10) An interdict in respect of whom a curator is appointed in pursuance of sub-paragraph (b) of paragraph (5) of this Article may apply to the Court to be reinstated and, where the Court is satisfied that the grounds on which the curator was appointed no longer exist, the Court shall grant the application and the curator shall thereupon cease to hold office". 12. The difficulty with this provision is that the application by the Attorney General for the appointment of a curator to the interdict was made on the basis of paragraph (5) (a) namely receipt of a report. There is no provision in the Law dealing specifically with the re-instatement of an interdict where the curator was appointed following receipt of a report that the interdict has been received into guardianship and the guardianship order has not come to an end. 13. Despite this we conclude that the Court has an inherent jurisdiction to re-instate the interdict where satisfied that he is no longer incapable of managing and administering his property and affairs. We would summarise our reasons as follows: (i) An appointment of a curator is a gross infringement of a person's individual rights. He is no longer entitled to manage his own affairs, enter into contracts and so forth. In effect he loses the legal right to look after his own property and affairs. It is a drastic order. (ii) The underlying ground for such a drastic order is the need to protect the interdict from himself because he is no longer capable of managing his property and affairs himself. There can be no justification for making such a drastic order if a person is in fact capable of managing his own affairs. (iii) The Law clearly envisages that a person under guardianship may not need a curator even though this may be unusual. Paragraph (7) of Article 50, which is the general provision concerning the appointment of a curator, provides that the Court shall appoint a curator "if it is satisfied of the need to do so". It must follow that the Court is not bound to appoint a

curator to a person under guardianship if it is not satisfied that there is a need to do so because he is in fact capable of managing and administering his property and affairs. (iv) It would, therefore, be wholly illogical to hold that the appointment of a curator could not be terminated merely because the interdict continued to be under guardianship. (v) Furthermore, it cannot have been the intention of the legislature that a person should have to continue to be subject to a curatorship even when the medical evidence shows that he is capable of managing and administering his property and affairs. To do so would be just as wrong as making an order in the first place in a situation where he was not so incapable. (vi) It is the Court which has made the Order in the first place removing the ability of an interdict to manage his own affairs. In our judgment there must be an inherent power for the Court to reverse that order once it is satisfied the interdict is capable of managing his own affairs, and to restore to him the individual rights which are the rights of all individuals. (vii) We appreciate that the Human Rights (Jersey) Law, 2000 is not yet in force, but we are satisfied that to continue a curatorship when the interdict is perfectly capable of managing his own affairs would undoubtedly amount to a breach of Article 8 of the Convention. The Court should therefore strive to reach a conclusion which is consistent with the Island's obligations under the European Convention of Human Rights. 14. For these reasons we therefore conclude that the Court has an inherent jurisdiction to undo that which it has done and to reinstate an interdict where it is satisfied that he is now capable of managing and administering his own property and affairs. 15. We base our decision on the inherent jurisdiction of the Court. In case we were held to be wrong on that it seems to us that there is an alternative route whereby the same result can be reached, although we regard this as less attractive. It would in our judgment be possible to hold that sub-paragraphs (a) and (b) of paragraph 5 of Article 50 are not mutually exclusive provisions. In other words, even if the Attorney General's belief that the person concerned is incapable of managing and administering his property and affairs arises from receipt of a report under paragraph (3) or (4) of Article 50 the application of the Attorney General could be considered as being brought under sub-paragraph (b) as well as under sub-paragraph (a) because, as a result of the report, he does hold the belief referred to in sub-paragraph (b). If that is right this would then result in paragraph (10) being applicable to such cases in connection with possible discharge as well as paragraph (9). If paragraph (10) is applicable the Court does have a general jurisdiction to reinstate the interdict where satisfied that this is called for. 16. As we say we prefer to rest our decision on the grounds of inherent jurisdiction but we refer to this construction as an alternative, particularly bearing in mind that once the Human Rights (Jersey) Law is in force it will be the Court's duty to construe legislation where possible in accordance with the obligations and rights under the Convention. 17. So for these reasons we are satisfied that we have jurisdiction to make the order. We have referred briefly to the evidence. We are satisfied from the evidence we have heard that the interdict is now capable of managing and administering his own affairs and we therefore reinstate him and terminate the appointment of his curator. Authorities Mental Health (Jersey) Law, 1969. Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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