COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

FAMILY DIVISION

2024/FAM/men/00382

IN THE MATTER of CP (hereinafter called the Patient)

AND IN THE MATTER of an application by N

AND IN THE MATTER of Sections 47, 48 and 49 of the Mental Health Act, 2022, Statute Laws of The Bahamas ("the Act"), Section 21 of the Supreme Court Act Chapter 53 and CPR r 53.1

Before Hon. Chief Justice Sir Ian R. Winder

Appearances:	John Wilson KC with Theominique Nottage and Adriene Bellot for N Michael Scott KC with Judith Whitehead KC and Cristina Davis-Justin for C and M
Hearing date(s):	10 December 2024 and 3 January 2025

JUDGMENT

WINDER, CJ

[1.] This is the hearing of the Amended Originating Application filed herein on 11 October 2024 by N for an order (i) that CB (the "Patient") be received into guardianship pursuant to section 48 of **The Mental Health Act, 2022,** Statute Laws of The Bahamas **(MHA)**, and (ii) that Mr. Bruno A. Roberts of the Private Trust Corporation Limited be appointed the Conservator of the assets and property of the Patient pursuant to section 49 of the **MHA**.

[2.] N is a daughter of the Patient. Her siblings C and M are content that the Patient should be received into guardianship and that the three sisters be jointly appointed as her guardian. C and M are opposed to the appointment of Mr. Bruno A. Roberts or any other person be appointed as the conservator of the Patient's property.

Background

[3.] The following background facts are adopted from N 's submissions.

[4.] The Patient, who was born on 14 September 1942 and formerly resident in Switzerland, has been resident in The Bahamas since July 2020 and became a Permanent Resident of The Bahamas on 23 May 2024. The late husband of the Patient, Mr. JBV died in 2018 and by virtue of his Last Will and Testament left his estate to the Patient. As a result, the Patient has assets in Spain, Switzerland, the United States of America, and The Bahamas in addition to being a Settlor of a discretionary Caymanian Trust.

[5.] Sometime in 2014 the Patient was diagnosed with brain atrophy and in September 2017 the Patient was diagnosed with primary aphasia and frontal temporal dementia. The Patient's health has continued to decline, and she is in the final stages of progressive dementia and unable to verbally communicate (is mute) and unable to manage her own personal and financial affairs.

[6.] Recognising the need for someone to be legally responsible for the management of the care and treatment of the Patient together with the management of the Patient's financial and other personal affairs, N and her sisters applied to the Bahamian Supreme Court in Claim No. 00217 of 2023 for the Patient to be received into guardianship and for their appointment as joint receivers over her property under the provisions of the former Mental Health Act Ch 230. By Order of this Court made on 1 June 2023 and filed 5 June 2023 Lewis-Johnson J ordered that the Patient be received into guardianship and appointed the siblings N , C and M jointly as Guardians and Receivers over her property (the "First Guardianship Order").

[7.] Under section 22 of the repealed Act, the First Guardianship Order was only valid for a period of one year, unless a written request had been made to the Minister to extend it. No request was made of the Minister and as a result the First Guardianship Order expired on 4 June 2024.

[8.] Prior to obtaining the First Guardianship Order the three siblings had been managing the Patient's affairs pursuant to a Durable Power of Attorney executed by the Patient on 16 June 2017. N 's case is that the Durable Power of Attorney was terminated when the First Guardianship Order was made by The Bahamas Supreme Court. C and M 's case is that the Durable Power of Attorney did not terminate on the entry of the First Guardianship Order.

[9.] C and M do not oppose the appointment of a Guardian but oppose the appointment of Mr. Roberts as an independent conservator over the Patient's property and say that the appointment is unnecessary and that the Patient's affairs should continue to be managed by all of the sisters jointly. No challenge is made to Mr. Bruno Robert's qualifications, competence or independence.

Law and discussion

[10.] The **MHA** came into effect on 1 September 2024, shortly after the commencement of this Act. Sections 48 and 49 of the **MHA** provides as follows:

> 48. Guardianship of persons with mental illnesses
> (1) A person referred to in section 47 may be received into guardianship by order of the Supreme Court on application made by his nominated representative, caregiver, next of kin, family member or another interested person.
> …
>
> 49. Appointment by Court of conservator for persons with mental illness
> (1) Where a person has not made an enduring power of attorney and lacks mental capacity as defined in section 47 an application may be made to the Supreme Court by his nominated representative, caregiver, next of kin, other family member, friend or other interested person for a Conservatorship Order which may be granted to him as a conservator empowering him to manage and administer that person's property and financial affairs. …

[11.] The application is made by the Patient's next of kin and is supported by the opinions of a psychiatrist and medical practitioner as required by Section 48 the MHA, Dr. Denotrah Archer-Cartwright, a medical practitioner and Dr. Kirk Christie, a psychiatrist, have rendered opinions and have both diagnosed the Patient with dementia concluding that the Patient lacks mental capacity to make her own decisions regarding her personal and financial affairs. There is therefore no dispute as to the Patient's lack of mental capacity or that she should be received into Guardianship. An order had previously been made as to the Patient's lack of mental capacity.

[12.] The only real issue in dispute between the parties is whether justice and the interests of the Patient are best served by the appointment of an independent conservator as opposed to Nand her sisters acting jointly as both guardians and conservators.

[13.] N submits that given the family discord it would not be appropriate or in the Patient's best interests for the siblings to serve as joint Conservators. She says that the history of the past relationship between them clearly demonstrates that this would be unworkable. Further, she says, given the evidence of the conflict of interest of her sisters, it is submitted that they are disqualified from acting as conservators.

[14.] N relies on the English High Court decision on **Re: P (vulnerable adult)** [2010] EWHC 1592 163 (Ch.), per *Hedley J* where he states at paragraph [9] as follows:

> [9.] Therefore, the court ought to start from the position that where family members offer themselves as deputies then, in the absence of family dispute or other evidence that raises queries as to their willingness or capacity to carry out those functions, the court ought to approach such an application with considerable openness and sympathy.

[15.] C and M oppose the appointment of an independent Conservator and wish that the decisions continue to be made as they have always been done, by a majority decision of the siblings. They say that the Patient and their late father put this structure in place and, this is the position mirrored in the Durable Power of Attorney. C and M say at paragraph 7 of their outline submissions that:

> [7.] [T]he respondents seeks a new order that the three sisters, C , M and N , be appointed to act as Guardians and Conservators … but empowered sensibly to act by majority in the event of disagreement resulting in deadlock. For the avoidance of doubt, the respondents are opposed to the appointment of Bruno Roberts (and for that matter any other outside professional person) as an unnecessary expense and layer of bureaucracy quite foreign and alien to the family dynamics and certainly not in the interest of the patient either personally or financially. … It is the further contention of C and M , that N 's application is driven and motivated by the animus of Nat being required by C and M to account for her expenditure of increasing sums of money paid to her through her company, ostensively to defray the patient's Florida and Bahamian expenses but highly questionably used by N for her own personal benefit. …
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> [8.] N , in an effort to offset the complaints of C and M , levels a series of accusations and grievances against C and M ; but these are bare attacks with no substance and no evidential support. M 's rebuttal affidavit refutes N 's accusations; .... Indeed, these references additionally highlight the transparency and professionalism C and M have each dedicated in the management of their mother's financial affairs as well as provide a simple testament to the love and devotion they lavish on their mother.
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> [9.] In contrast to C and M , who perform their services essentially, without charge, N 's charges via her company have skyrocketed from $66,667.00 in 2018 to well over a quarter of a million in 2024 with no added benefit in her service or efficiency.

[16.] C and M say that as a conservatorship order may be granted only in circumstances where a person lacking mental capacity has not made an enduring power of attorney it is inappropriate to make such an order in these circumstances. They contend that the Durable Power of Authority which they argue remains effective and was not extinguished by the Order of Lewis-Johnson J.

[17.] C and M say that in accordance with the statutory scheme under the MHA, the sole and unfettered focus of the Court must be what is in the best interests of the Patient. They say that the appointment of a conservator is not, and should never be, a tool for a party to advance their own agenda in a broader family dispute.

[18.] C and M proposes, so as to ensure greater transparency in the management of the family financial assets that all accounts worldwide should be consolidated and managed monthly through UBS wealth management and as a further safeguard, that the sisters as guardians and conservators provide written reports to the Court at six monthly intervals on the state and progress of their mother's financial affairs.

[19.] C and M say that, alternatively, if the Court takes the view that it is not appropriate for all three sisters to be appointed because of the level of disagreement and distrust among them, they (C and M) should be appointed alone.

[20.] C and M oppose the making of any Order which is inconsistent with the terms of the Durable Power of Attorney, which they say remains effective. This is clearly a relevant factor having regard to the provisions of section 49 of the **MHA**, which provides, as a condition precedent to the making of an order for conservatorship, that the Patient must not have made an Enduring Power of Attorney.

[21.] N contends that the Durable Power of Attorney has been revoked in accordance with its terms as a result of the First Guardianship Order. Clause 2.03 of the Durable Power of Attorney provides:

> **Section 2.03 Termination of Durable Power of Attorney**
>
> This Durable Power of Attorney will expire at either of the earlier of:
>
> > divorce or annulment of my marriage if my husband is named as the Attorney-in-fact and I have made no provision for the naming of a successor Attorney-in-Fact;
> >
> > adjudication that I am totally or partially incapacitated by a court, unless the court determines that certain authority granted by this Durable Power of Attorney is to be exercisable by my Attorney-in-Fact;

my death (except for post death matters allowed under state law); or

my revocation of this Durable Power of Attorney.

[22.] N has provided an opinion of Florida counsel supporting the view that the Durable Power of Attorney is no longer effective. C and M have also provided a counter opinion from Florida Counsel contending that the Durable Power of Attorney remains effective.

[23.] N objects to the Court considering the opinion provided by C and M, on the basis that the opinion was supplied late, after the parties had already made their submission but before the Court had made a decision. I heard the application to adduce the additional evidence, and M's objection thereto, de benne esse, indicating that I would rule on its admissibility when I delivered the decision on the substantive application.

[24.] I am satisfied that the Court could consider the late material as there was no appreciable prejudice to N save for costs implications. And as this was a matter which could ultimately impact jurisdiction, the Court could not ignore it. The efficacy of the Durable Power of Attorney was clearly a Florida law question and the reliance of a single opinion provided by one of the parties to the exclusion of the other would not demonstrate fairness.

[25.] The broader challenge is that it is entirely undesirable to decide such a question by simply scrutinizing the two opinions having not tested the makers, on oath. If I had to decide I would probably have been more attracted to N's opinion evidence, which quite frankly appears to accord with basic principles. It is also not lost on me that the First Guardianship Order was applied for by all of the sisters jointly. Having regard to my view of the disposition of the principal issue it is unnecessary to grapple with resolving this battle between experts.

[26.] In the case of **David & Barry v Peter** [2014] EWCOP 3 the English Court considered a similar case where three brothers were at odds with the decision making as it related to their father, who lacked mental capacity over his affairs. In deciding to appoint two of the brothers to act on behalf of the father, *Senior Judge Lush* stated at paragraph 21 as follows:

> [21.] When it appoints a deputy, the Court of Protection exercises discretion and it must exercise this discretion judicially and in P's best interests. The court would prefer the appointment of a family member, if possible, in order to respect P's Article 8 right to private and family life and for a number of practical reasons that flow from that. A relative will usually be familiar with P's affairs, and his wishes and his ways of communicating his likes and dislikes. Someone who already has a close personal knowledge of P is also likely to be better able to meet the obligation of a deputy to consult with him, and to permit and encourage him to participate, or to improve his ability to participate, as fully as possible in

any act done for him and any decision affecting him. And, because professionals charge for their services, the appointment of a family member is generally preferred for reasons of economy.

The discussion of *Senior Judge Lush* is extremely instructive. At paragraphs 22-24 he stated:

> Discussion
> 22. The one thing on which the brothers are agreed is that there would be no point in the court appointing all three of them to act jointly and severally, because they simply cannot work together and would not see eye to eye.
> 23. In *In Re W (Enduring Power of Attorney)* [2000] Ch 343, at page 351, Jules Sher QC considered a similar situation where there were three siblings, and one of them consistently disagreed with the other two. He stated that "when the hostility does not interfere with the smooth running of the administration, the court should not interfere on the ground of unsuitability."
> 24. I do not believe that the hostility between David and Barry, on the one hand, and Peter on the other hand, will necessarily interfere with the day-to-day administration of DG's property and financial affairs, so I rule out the option of appointing a completely independent deputy.

[27.] I am satisfied that the best interests of the Patient is for the joint appointment of the siblings. The natural choice for the conservatorship is the same as that of the guardian, all sisters making the decisions jointly. If they can unite to make decisions jointly as the Patient's Guardian they are capable of making decisions for her financial affairs. Despite their disagreements, this is therefore not a case where "*they simply cannot work together and would not see eye to eye"* as in the case of **David and Barry v Peter**. It be noted that despite the sibling distemper (as Scott KC terms it), there are no allegations of theft, fraud, serious financial irregularity or other wrong doing from either side as against the other, or that the Patient's finances have suffered at all.

[28.] I accept the submission of N , as reflected in the case of **Re: P (2009)** [2009] EWHC 163 (Ch), that it is not a question of substituted judgment but rather one of considering the best interests of the Patient. Notwithstanding the overriding concern, the English Court of Protection nonetheless did note in **David and Barry v Peter** that "a person's will may sometimes assist the court in exercising its discretion as to whom it should appoint as a [conservator] for property and affairs." Similarly in **London Borough of Haringey** [2014] EWCOP B23, attributed value to the Patient's views. There is no dispute that the wish of the Patient was for her three daughters to jointly make decision on her behalf. This was codified in the Durable Power of Attorney.

[29.] I am satisfied that the appointment of an outsider, in these circumstances, would not be necessary desirable as the sisters could jointly act as both Guardian and Conservator. If N does not wish to act in such an arrangement, she should so indicate within seven (7) days and C and M only would therefore be appointed jointly to act as the conservators. I am satisfied that sufficient

safeguards and guardrails could be put in place to ensure transparency and deal with issues of potential conflicts.

[30.] The Conservators will be required to:

(a) Report to the Court every six months as to the conservatorship;

(b) Obtain the Courts sanction with respect to:

i. The sale or purchase of any real estate;

ii. Any transaction which has the potential for conflict of interest of any of the conservators and the Estate of the Patient;

(c) Engage independent financial wealth management advisors as proposed to ensure transparency and professional support to the conservatorship.

[31.] Unless the parties contend for some other order, I will order that the reasonable costs of all parties be covered by the Patient's estate.

Dated the 16th day of January 2025

Sir Ian R. Winder
Chief Justice