

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Family Division

2019/FAM/men/00175

IN THE MATTER OF an application under the Mental Health Act
of The Bahamas Chapter 230 of the Statute Laws of the Bahamas
AND

IN THE MATTER OF an application by the Petitioner for
The appointment of a Guardian or Guardians for (1) Minard
Ulric Johnson and (2) Eloise Butler Johnson (husband and wife, respectively)
both of the Commonwealth of the Bahamas

B E T W E E N

LIBBYE DARVILLE

Applicant

AND

MINARD ULRIC JOHNSON

First Respondent

AND

ELOISE BUTLER JOHNSON

Second Respondent

AND

NIOSHIE JOHNSON

Third Respondent

AND

RICHARD LOBOSKY

Fourth Respondent

Before: The Honourable Justice C.V. Hope Strachan

Appearances: Joseph Jerome Darceuil for the Petitioner

Ian Cargill for the Respondent

Hearing date: 23rd July 2021; 24th March 2021; 8th December 2021; 25th May, 2022; 21st June 2023;
1st November 2023; 4th December 2024; 26th February 2025; 11th June 2025; 29th October 2025

*Mental Health (MHA), Guardianship, Requirements of MHA 1969, Requirements of MHA 2022,
Criteria Needed to Satisfy the Act, and Deemed Service.*

RULING

C.V.H. STRACHAN, J

Background Facts

[1.] This matter involves an Application under the Mental Health Provisions of this country and concerns Two (2) elderly persons, whom it is being claimed are incapable of managing their affairs. The Application is an Originating Summons issued on 9th March 2019, whereby the Applicant, their daughter, is seeking to become their permanent guardian.

[2.] It is momentous that although this claim was brought in 2019, it has not been pursued and/or managed with the aplomb with which an application of this nature should have been. Seven (7) years later instead of a trial, this decision is in answer to objections taken by the Respondents that the First and Second Respondents were never served with the Originating Application or subsequent Notices and/or the Application is incompatible with the Mental Health Act (1969) (MHA 1969), or is deficient under the Mental Health Act 2022 (MHA 2022). They contend that any amendment asked for and granted to the Applicant should incur a grant of costs to them.

[3.] To be clear, most of the delay in the matter was caused by the absence of the requisite Medical Reports and the court's forbearance with the Applicant to produce the medical Reports required under the relevant legislation.

[4.] The Applicant is the daughter of the First and Second Respondents. She has also made her brother and sisters party to the action, who are the Third and Fourth Respondents. The application is seeking the following reliefs;

- i. A Declaration that the aforesaid First and Second Respondents are incapable by reason of a mental disorder to manage and administer their affairs and/or property either jointly or severally.
- ii. A Declaration that the affairs of the aforesaid First and Second Respondents be transferred to and managed by the Petitioner to the exclusion of the Third and Fourth Respondents.
- iii. A Declaration that the First Respondent is incapable by reason of mental disorder to provide for the necessities of the Second Respondent (his wife), who suffers severe mental disorder.
- iv. An Order that the aforesaid Petitioner be appointed to control and manage the real and personal property of the aforesaid First and Second Respondent permanently.

[5.] The gravamen of the Applicant's claim is to be found in a plethora of Affidavits sworn by the Applicant and several other witnesses, between March 2019 and September, 2025. The minutiae of the witnesses Affidavits as irrelevant to this preliminary issue. The Applicant's numerous affidavits were filed on 20th March 2019, 7th January, 2021; 11th June 2021; 3rd December 2024; 12th February 2024; 12th February 2025. The opinions of the medical doctors in the persons of Dr. Kirk Christie, whose Report is dated 13th May, 2019, Dr. Timothy Barrett, whose report is dated 8th October, 2019, Dr. Nelson Clarke, whose report is dated 24th January, 2019, and finally Dr. David Allen, whose report is dated 4th September, 2023 is ultimately dispositive of this matter.

[6.] To provide some context to the Originating Application, some factual background is necessary. When this action commenced, the First and Second respondents were Eighty-three (83) and Eighty-one (81) years old. Currently, they have attained the ages Eighty-nine (89) and Eighty-seven (87) years respectively. The pandemic Covid-19 had reached the shores of The Bahamas around the time of the filing of the Application. The elderly couple is reputedly very successful business people, although the applicant placed greater emphasis on the First Defendant as the owner of considerable real estate holdings, including rental apartments. The Applicant had previously been responsible for collecting the rents by authority of The First Respondent. Things have changed, and those rents are now being collected by the Third and Fourth Respondents. The Applicant, who previously resided with the First and Second Respondents, has now seemingly been barred from the family home. The Third and Fourth Respondents have assumed her previous role as caretaker of her parents and confidante to the Fourth Respondent. The current living arrangements and her estrangement from her parents, coupled with other behaviour of the First Respondent has caused her to believe that there has been such a decline in the First and Second Respondent's mental state that they are both in need of a guardian, particularly to manage and control their considerable real estate holdings. Of the three children, she is the best one to do be her parents' guardian. She states:

- b. *"Starting in October 2017, I started to notice a decline in my father's mental health after he had been hospitalized for two weeks after having experienced a serious bout of pneumonia. I had always known him to be a sharp businessman, always on top of things. However, I noticed that his behaviour was starting to change and he was doing things that were totally out of character for him. For example, a. He stopped paying attention to things around the home (such as repairs) as he had done before; b. He had never in the past missed family functions, whether weddings, funerals, parties, or other get-togethers. However, starting in 2017, he seemed to lose interest in such functions. He even appeared to lose interest in church, which he had always attended regularly. c. He started to talk about things that had happened a long time ago, such as trips he had taken, as if they had just recently happened. d. He signed his name to letters saying that I fraudulently pretended to own the apartments which I had managed for him for more than 20 years when he knew or would have known had he not been losing mental capacity that he had authorized me to manage the apartments."*

[7.] Speaking of the Second Respondent, she said:

“My mother experienced early memory loss since the 1990’s. My father relied on me heavily after my mum was unable to care for herself and her household. I took care of my mother, maintained the family’s household, and was given full responsibilities to manage my parents’ estate....

I was the only child given responsibilities of managing my parents’ estate when my father was known to be fully cognitive. To date, I am the only child privy to and knowledgeable about my parents, the first and Second Respondent’s entire estate, including where their many properties are located, and when and how these properties were obtained. My parents made a conscious decision to not give my siblings their worth or what they owned, they never took them to any of their properties nor businesses when my siblings visited. It is my opinion that this was because they were embarrassed and disappointed in the poor choices my siblings constantly made over the years.”

[8.] Notwithstanding that her siblings have not filed a Defense or a Counter-claim for guardianship of their parents, in her Affidavits, the Applicant focused on their unfitness and unsuitability to be guardians of her parents. She disparaged their characters to enhance her own suitability for the task. As far as her brother, the Fourth Respondent, is concerned, he is a criminal, drug and alcohol abuser. Neither he or her sister, the Third Respondent, has shown any interest or regard for their parents for many years. As regards the Third Respondent, she said;

“My father had never allowed my brother, Richard, to live with him in his home since the late 1970’s. However, when Richard returned to The Bahamas after having lived in the United States for more than Forty Years, he moved into my father’s house and took over control of the home and my father’s affairs. It is my opinion that, had my father been in full control of his faculties, he would not have allowed this to happen.”

[9.] Her sister is unfit because she has also had incidents with the police, resulting in her having to leave the United States. Moreover, she has colluded with the Fourth Respondent to bring legal proceedings in the Magistrate’s court against her. They have ousted her from the family home and have impeded her and other visitors from access to their parents.

The First Respondent’s Case

[10.] On 18th July 2019, he filed an Affidavit in response to the Affidavit filed by the Applicant on 20th March, 2019. In summary The First Respondent categorically denied that he is in any way incapacitated, saying, “I am of sound mind and fully capable of making decisions for my wife and myself.” He then set out an account of his relationship with the Applicant, which had soured, and stated, “I am extremely disappointed in her efforts to deceitfully try to take control of everything that I have worked so hard to accomplish.” Further extracts from the First

Respondent's affidavit depict a serious breach in the relationship between the Applicant and the Respondent;

"2. My wife, Eloise Butler Johnson, and I have four children, two sons and two daughters. My son Richard Lobosky is fifty-nine years old, has lived in New York, but now resides in Nassau, Bahamas. My son Ricardo Johnson is Fifty-eight years old, is married, and resides in Florida, U.S.A. My last child, Nioshie Johnson, is Forty-seven and resides in Nassau, Bahamas. Then there is Libbye Darville, the Applicant."

"6. Paragraph 6 of the said Affidavit is denied. There was no mandate given by myself to the Applicant to run the family affairs. She began collecting rent initially because she was still living at home, unemployed, and wanting something to do. At this time, both my sons were living in the United States, and my other daughter was at the time running a business for her then Fiancée. The Applicant was collecting the rent with the understanding that she was doing so for the entire family, but as the years went by, she became greedy, started misusing and abusing my hard-earned money, and began telling people that the apartments were hers and not mines. I was left with no other choice in 2018, to solicit the assistance of my wife and other three children to regain control of my apartment complexes from the Applicant. This was facilitated in part through the Magistrates' Court in the Commonwealth of the Bahamas.

"20. (d) I do not trust the Applicant and would never entrust her with guardianship of myself or my wife, should the need arise. She is not an only child. I have three other children. The applicant has constantly proven herself to be deceitful, disrespectful, and greedy and has no idea of what true family means. I do not want her back in my home under any circumstances. Further, the Applicant is extremely disruptive and confrontational. Since she has departed the house, the entire family is enjoying living in a peaceful environment.

"23.I am currently retired, and my wife does have dementia. I am quite capable of taking care of my wife of many years. My son and daughter, Fourth and Third Respondent, live with me and my wife and assist with the home and business investments, according to my instructions. I am very satisfied with my other children managing my rental properties on my behalf as per my instructions. My other son, Ricardo, who lives in Florida, is also very supportive of me and my wife and his siblings and often reminds me that if the need arises, he can be in The Bahamas within thirty (30) minutes. The Three of my children (excluding the Applicant) work together to look after my wife and my needs. I trust them, and I know that they love us and have our best interests at heart.

"28.Being of sound mind, I have made all the provisions necessary for myself, my wife, and my personal assets. I reiterate that my other three children being Nioshie Johnson, Richard Lobosky, and Ricardo Johnson, jointly, have been given responsibility, should I ever be rendered incapable of handling my own affairs and responsibilities, which include my wife.....

"29. I pray that this Honourable Court dismiss the Applicant's Application to appoint her Guardian for me and my wife and to appoint her to control my finances on the grounds that, I do

have the mental capacity to do all of these things and further that, I have made the necessary arrangements should I be rendered unable to do the same, for my other three (3) children jointly to assume this role.

The Second, Third, and Fourth Respondents' case

[11.] Affidavits were sworn jointly by the Second, Third, and Fourth Respondents on 19th July, 2019, and another on 28th January, 2021. Not all of the contents of both affidavits are pivotal to the present application, but some relevant extracts are:

From the Affidavit filed 19th July, 2019, the Second, Third, and Fourth Respondent says:

"3. We adopt the Affidavit of Minard Ulric Johnson filed on 18th July, A.D. 2019. The many paragraphs of personal attacks and character assassinations against the family, we do not feel justify any further comment, and so we have made a decision not to dignify them, and so therefore we adopt the Affidavit of the First Respondent, who is the main character in this action."

"5 (a) the whole premise of this Application for guardianship is false. The First Respondent is, to our knowledge, information and belief, and based on regular and recent examinations, of sound mind and has not been rendered psychologically unfit or incapacitated."

"(c) The genesis of this application is the Applicant's greed. She has taken advantage of the First Respondent's good nature for a long time and has misused and abused his finances to the point where he has become financially embarrassed. When he was finally ready to put his foot down and put an end to it, he did so with the assistance of his other children and after having sought legal advice. The relationship became so strained that he made a decision not only to remove the management of his financial affairs from the Applicant but to have her removed from his home."

[12.] While the First, Third, and Fourth Respondents acknowledge that the Second Respondent suffers from Alzheimer's, they are capable and are now taking care of her. However, they deny that the First Respondent is incapacitated in any way. They together aver that;

"..... Libbye was never concerned with her mother's condition. She never saw to it that her mother took her medication. In fact, she took every opportunity to start arguments with her mother, knowing she had Alzheimer's and was fragile, just to upset her."

"a) The First Respondent states that he does not wish the court to grant guardianship of himself and his wife to his daughter Libbye. He is quite satisfied with their living arrangements and the Third and Fourth Respondents having day-to-day care of them. He and his wife found Libbye to be manipulative, dishonest, verbally abusive, disrespectful, and mean. Further, she has stolen money from him in the past when she assisted him in collecting his rent, and so therefore, he does not trust her having control over them neither their finances."

“d) Libbye does not have any authority to demand her (the third Respondent) removal, immediate or otherwise, because she does not own this house..... ”

“e) Again, Libbye is out of her bounds in asking that the First and Second Respondents’ other children be denied access to their bank accounts or funds. They have been given authorization by the First Respondent to act on his and his wife’s behalf, which is something Libbye once had access to but has been denied because of her dishonesty. The Respondent believes that Libbye only wants guardianship of the First and Second Respondents for her selfish financial gain.”

“f) (i)..... The First Respondent reiterates that he removed Libbye from his home after her doing whatever she felt like with his rent money collections with, no accounting from 1994 up until about two years ago. Even after the removal of Libbye from his home for misappropriation of his rental monies, he made no such request.”

“f(ii) The First Respondent has no desire to give Libbye access to his finances. He states that, unfortunately, sheer greed, money, and control is the whole reason she has dragged her family through the courts, and she has to answer to God for her lying, mistreating, and manipulating himself, his wife and her siblings. He feels that at this point it seems that Libbye will do anything to regain control of his finances, which includes risk he and his wife’s exposure to Covid-19 by attempting to force them to come to court.”

RELEVANT LEGISLATION

[13.] Current legislative authority for making provision for the promotion, protection, and enforcement of rights of persons diagnosed with, or exhibiting symptoms of mental illness; the care and treatment of such persons, is currently to be found in the **Mental Health Act 2022 (MHA 2022)**. This act repealed and replaced the **Mental Health Act 1969 (MHA1969)**. A distinction to be drawn between the former legislation and the current is that the current legislation casts a much wider net, covering persons who just exhibit symptoms of mental illness as opposed to persons already diagnosed as mentally disordered. [Emphasis Mine]

[14.] Notwithstanding the distinction, in both instances, the provisions are strict and compulsory when seeking to have the Courts declare any person incapacitated by way of a mental illness or disease. Such applications were subject to the Mental Health Act 1969 until 2022, when New Provisions were brought into effect through the Mental Health Act 2022. Should the Respondent prevail in their argument that the MHA 1969 provisions, having been repealed, no longer apply, and the MHA 2022 are incompatible, the application should be dismissed. A comparison of the 1969 provisions and the 2022 provisions sheds light on this premise.

[15.] The Mental Health Act 1969 (MHA 1969); The Mental Health Act 2022 (MHA 2022); The Interpretation and General Clauses Act 1976 (IGCA); The Supreme Court Civil Procedure Rules 2023 (CPR), The Rules of the Supreme Court 1976; the relevant sections are extracted and specified immediately hereafter:

[16.] **s. 12 Mental Health Act 1969** provides;

s. 12. (1) A patient may be received into guardianship for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as a guardianship application) made in the prescribed form and in accordance with the provisions of this section.

(2) Every guardianship application shall be founded on the written recommendation in the prescribed form of two medical practitioners, including in each case a statement that, in the opinion of the practitioner, the patient —

(a) is suffering from a mental disorder being —

(i) in the case of a patient of any age, mental illness, or severe sub-normality; [Emphasis Mine]

(4) The person named in a guardianship application may be any person, including the applicant himself, but any person other than the applicant who is named as a prospective guardian shall be served with a copy of such application at least seven clear days before the effective date of the application.

(5) No guardianship application shall be made in any case unless and until —

(a) the written approval of the Minister or of a person authorized by him has been given with respect to the person named in that application as the prospective guardian of the patient; and

(b) the written consent of the prospective guardian, if other than the applicant, has been furnished to the Minister.

s.13. (1) A guardianship application duly made under this Part of this Act shall, subject to the provisions of any regulations made by the Minister under this Act, confer upon the person named therein as guardian, to the exclusion of any other person, all such powers as would be exercisable by him in relation to the patient if he was the father of the patient and the patient was under the age of fourteen years.

[17.] In comparison, s.47 **Mental Health Act [2022]** provides;

- (1) A judge of the Supreme Court shall have jurisdiction to make decisions for a person diagnosed with, or exhibiting symptoms of, a mental illness who, because of his condition, lacks mental capacity, whether due to temporary loss due to sudden illness, or due to onset of long term mental illness, to the extent that he cannot make any personal and medical decisions, decisions for managing or administering his property, or managing his personal financial affairs, even with the support and assistance of others. [Emphasis Mine]
- (2) An application under subsection (I) may be made by any person who is authorized to do so pursuant to section 48 or 49, or by any person authorized in that behalf by the Minister.

S. 48 Guardianship of persons with mental illness

- (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. [Emphasis Mine]
- (2) An application under subsection (I) shall be supported by a written recommendation of each of a psychiatrist and one other medical practitioner, and shall include a statement in each case that in the opinion of the psychiatrist and medical practitioner, the person- [Emphasis Mine]
 - (a) is suffering from a mental illness of a nature or degree which renders him unable to make personal decisions for himself;
 - (b) cannot meet his own needs for medical care, food, clothing, shelter, and safety; and warrants guardianship in the interests of his health and
 - (c) safety, or for the safety of other persons.
- (3) An order of guardianship made under this section shall -
 - (a) come into effect on the date of the order of the court;
 - (b) confer upon the person named therein as guardian -
 - (i) full physical custody of the person named in the order;
 - (ii) the power to make personal and medical decisions for that person;
 - (iii) all other powers of a father as would be exercisable by him if the person was a child, including everyday care and activities, providing shelter, nourishment, protection, and education (if possible); [Emphasis Mine]
 - (c) provide for the appointment of a medical practitioner to act as a medical attendant for the person received into guardianship;

(d) state whether guardianship is of limited or indefinite duration.

s. 50. Powers of guardian appointed under section 48.

A person appointed as guardian of a person lacking mental capacity under section 48 shall, in exercise of the powers granted by the Court thereunder, have power to secure the doing of all such things as appear necessary or expedient for

- (a) the maintenance or other benefit of the person;
- (b) the maintenance or other benefit of members of the person's family;
- (c) making provision for other persons or purposes for whom or for which the person might be expected to provide if he was not lacking mental capacity; or
- (d) otherwise for administering and managing the person's personal and medical affairs.

s. 73 Repeal.

The Mental Health Act (Ch. 230) is hereby repealed.

s. 74 Savings and transitional provisions.

On the commencement of this Act -

- (e) An order made under the repealed Act and in force shall continue as if made under this Act;
- (f) Any estate or property of a person being administered under the repealed Act shall continue to be administered as if the order for the administration of the estate or property was made under this Act:
- (g) a person under an order of detention pending removal shall be deemed to be lawfully detained under this Act;
- (h) An institution established for the reception, treatment, or detention of a person with mental illness shall continue to exist as if established under this Act;
- (i) wherever in any written law a reference to a lunatic or to lunacy, to an asylum or similar terms are contained, that reference shall be read and construed as a reference to a person diagnosed with mental illness or similar terms, within the meaning of this Act;
- (j) wherever in any written law a reference to mental disability or legal disqualification, or similar terms are contained, that reference shall be read and construed as a reference to a person who lacks mental capacity for the purposes of this Act.
- (k) any reference in any written law to a hospital which provides mental health care and treatment shall be construed within the meaning of this Act, as a reference to a health facility or mental health facility where persons diagnosed with mental illness are provided mental health

services, or where persons exhibiting symptoms of mental illness are examined, assessed, and diagnosed.

[18.] Interpretation and General Clauses Act, 1976.

- s. 20. Where a written law repeals in whole or in part any other written law, the repeal shall not —
- (a) revive anything not in force or existing at the time at which the repeal takes effect;
 - (b) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed;
 - (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any written law so repealed;
 - (d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any written law so repealed; or
 - (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

[19.] Rules of the Supreme Court 1976 (RSC)

RSC 12 (8) (1) Subject to paragraph (2), an appearance must be entered to every originating summons (other than an ex parte originating summons) by each defendant named in and served with the summons.

RSC 12 (2) (1) A memorandum of appearance is a request to the Registry to enter an appearance for the defendant or defendants specified in the memorandum.

RSC 12 (4) References in these Rules to the time limited for appearing are references —

- (a) in the case of a writ served within the jurisdiction, to fourteen days after service of the writ (including the day of service) or, where that time has been extended by or by virtue of these Rules, to that time as so extended; and

12 (6) (1) A defendant to an action may, with the leave of the Court, enter a conditional appearance in the action.

[20.] CPR 2022

Part 9(1) This Part deals with the procedure to be used by a defendant who wishes to contest proceedings and avoid a default judgment being entered.

9 (1) (2) The defendant does so —

(a) by filing —

- (i) a defense in accordance with Part 10; and
- (ii) an acknowledgement of service in Form G9 containing a notice of intention to defend within the time limit under rule 9.3; or

(b) by filing a defense in accordance with Part 10 within the time limit under Rule 9.3 or

(c) where applicable, by filing an acknowledgement of service in accordance with rule 8.22.

9 (1) (3) The filing of an acknowledgement of service is to be treated as the entry of an appearance for the purpose of any enactment referring to the entry of such an appearance.

Part 9.3 The period for filing an acknowledgement of service.

9(3) (1) The period for filing an acknowledgement of service is the period of 14 days after the date of service of the claim form.

Part 9.7 (5) A defendant who —

- (a) files an acknowledgement of service; and
- (b) does not make an application under this rule within the period for filing a defense, is treated as having accepted that the court has jurisdiction to try the claim.

An Order under this rule may:

- (a) discharge an order made before the claim was commenced or the claim form served;
- (b) set aside the service of the claim form; and
- (c) Strike out a statement of claim.

The Issues

1. Whether the Respondents were duly served with the Originating Applications and the subsequent Notices of Hearing?
2. Whether the application, as it stands, is incompatible with the Mental Health Act (1969) (MHA 1969) or is deficient under the Mental Health Act 2022 (MHA 2022).
3. Whether the subject application, since it was brought under the now-repealed Mental Health Act 1969, is incompatible with that act, or does it still subsist?

4. Whether the application in its existing state is deficient under the new Mental Health Act 2022, such that it should be dismissed?
5. If so does the pleadings as they exist meet the criteria laid down in either the MHA 1969 or the MHA 2022?

DISCUSSION AND ANALYSIS

[21.] Both Counsels have provided written submissions to the court in support of their contentions, which have been helpful to the court in determining this matter.

Non-Service of Originating Process

[22.] Subsequent to the filing of the Originating Application, a Notice of Appearance and a Memorandum of Appearance were entered on behalf of all of the Respondents on 9th May, 2019. Thereafter, the First Respondent appeared together with the Third and Fourth Respondents at the first hearing on 24th March, 2021. They were represented by legal counsel. They have appeared, if not in person, by their legal counsel at all of the subsequent hearings. Additionally, the First Respondent filed Affidavits on 18th and 19th July, 2019 and again on 28th January, 2021. Even if oral protestations of non-service were sometimes raised, no application with or without notice was ever made to the court. This action, having commenced in 2019, is subject to the Rules of the Supreme Court RSC as the CPR did not come into force until 2023. By virtue of RSC 12 (4), the Respondents had Fourteen (14) days to enter an appearance to the originating application or to apply to the Court for leave under RSC 12 (6) to enter a conditional appearance. The appearance entered was not with leave, nor was it conditional. By that failure, the respondents are deemed to have waived any irregularity in the service of the documents on the First and Second Respondents. This is borne out by the case of **Fry v Moore** 23 QBD 395:

“A writ was issued in the general form, without the leave of the court, against a person who at the date of the writ was out of the jurisdiction. The plaintiff obtained an order for substituted service of the writ within the jurisdiction, and, having served the writ in accordance with the order, signed the judgment against the defendant for default of appearance. The defendant took out a summons asking that the judgment might be set aside, and that the plaintiff might be ordered to deliver a statement of claim. The Court of Appeal held that the order for substituted service was not void, but it was only an irregularity which could be waived. By taking out the summons for the plaintiff to deliver a statement of claim, the defendant waived the irregularity and was not entitled to have the judgment set aside.”

[23.] While the CPR modernized the procedure, utilizing the completion and filing of the Acknowledgement of Service as the lone document to convey, what is intended by the Respondent/Defendant the underlying principle in the RSC has been maintained in that a defendant who takes a step in the action that recognizes the court’s jurisdiction (such as failing to

challenge service within a prescribed period) is deemed to have waived any objection to service or jurisdiction. This principle has consistently been maintained since the early 20th century, as evidenced in **Keymer v Reddy [1912]** 1 K.B. 21, where the omission of a Defendant to apply to set aside a writ within the prescribed period raised the presumption against him that he had waived the objection to the jurisdiction and entitled the court to treat the appearance entered as absolute.

[24.] In **Deutsche Bank AG London Branch v Petromena ASA [2015]** EWCA Civ 226, it was held that Defendants must be careful not to take any step that could be construed as engaging with the merits of the claim before the jurisdictional challenge is resolved.

[25.] In addition to the First Respondent's own Affidavit, no less than Ten (10) Affidavits were filed by various intended witnesses for the Respondents. This is a clear indication to this court that the Respondents have submitted to the jurisdiction of the Court. I am satisfied that the claim has been brought to the First and Second Respondents' attention, they know and understand the nature of the claim, any objection they may have had at one stage has been overtaken by fresh steps taken in the action, and their objections based on non-service of the Originating Claim and or subsequent Notices or Summonses are wholly without merit.

[26.] **Does the 1969 or 2022 Statute govern the proceedings?**

The submission by the Applicant's attorney that the MHA 1969 still governs this application, notwithstanding its repeal and replacement by the MHA 2022, has merit. Not only are the transitional and savings provisions included in the 2022 Act, but also 74, but the principle in the Interpretation and General Clauses Act 1976 s.20 applies; "Where a written law repeals in whole or in part any other written law, the repeal shall not —

"b) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed."

Support for the principle is found in **Yew Bon Tew v Kenderaan Bas Mara [1982]** 3 WLR 1026, where it was held that the general interpretive principle is that repeals do not affect accrued rights or pending proceedings unless the new legislation clearly provides otherwise. Notwithstanding, it was also determined that every case where this is at issue should be carefully reviewed for any express transitional provisions in the new Act or in the relevant Interpretation Act. It has also been expressed that as a "clear intention to the contrary" or "clear language or necessary implication." [Emphasis Mine]

[27.] In **R v West London Stipendiary Magistrate, ex parte Simeon [1982]** 3 WLR 289, the *House of Lords* held that, even where a new Act contains multiple repeal mechanisms, this does

not amount to a contrary intention sufficient to displace the default rule in section 16 of the U.K. legislation. The Court found that proceedings commenced before the new Act 's commencement could continue under the old law, absent clear language to the contrary. Our IGCA responds similarly to repeals in certain circumstances. [Emphasis mine]

[28.] The Court of Appeal in **Re Barretto** [1993] EWCA Civ J1019-3 emphasized that the repealing Act must manifest a contrary intention to displace section 16 of the Interpretation Act, U.K., and that silence implies the default rule applies. The courts will look for express words or necessary implication in the new statute to determine whether ongoing proceedings should be governed by the new law. [Emphasis mine]

[29.] Notwithstanding the repeal of the 1969 Act, the provisions of s. 20 and s. 21 of the Interpretation and General Clauses Act together with the numerous foregoing authorities, would lead to the interpretation that the repeal did not affect the previous operation of the law, nor does it affect anything duly done or suffered under that repealed act. Moreover, that it does not affect any right, privilege, obligation or liability acquired, accrued or incurred under that repealed act. A fortiori, would be the savings clauses to be found in the new or replacement legislation to the repealed act. However, this is not necessarily the case. [Emphasis mine].

[30.] As indicated before s. 74 does in fact preserve the governance of the 1969 provisions in that the reference to s. 12(1)(f) to mental disability made by the Applicant accords with the terms "lacks mental capacity for the purposes of the MHA 2022. These are the express words which preserve the operation s.12 of the MHA 1969 and indicate that the repeal did not affect the previous operation of the law nor any right or privilege; **Re Baretto** supra. s. 12 of the Act having been preserved the Claimant is mandated to meet the requirement in s. 12 to provide a written recommendation in the prescribed form of two medical practitioners, including in each case a statement that in the opinion of the practitioner the patient is suffering from mental disorder or severe sub normality; or to obtain the written approval of the Minister or of a person authorized by him would need to be given with respect to the person named in that application as the prospective guardian of the patient.

[31.] There is no paucity of medical reports in evidence in this matter attesting to the imperative that they need to be provided. On record, there are reports from Dr. Kirk Christie, Dr. David Allen, Dr. Timothy Barrett, and Dr. Nelson Clarke.

Dr. Kirk Christie opined – "Based on the most recent psychiatric evaluations of 11th May, 2019, and past diagnostic evaluation of 20th October 2018, Mr. Minard Ulric Johnson does possess the mental capacity to make decisions regarding matters concerning his economic estate, legal estate, and all related matters. Secondly, based on the recent psychiatric evaluations, Mr. Minard Ulric Johnson does possess the mental capacity to amend an existing will; prepare a final will and testament, and to prepare a living will and trust." [Emphasis mine]

Court records suggest that this report, which was relied on by the Respondents, was not considered pertinent to the issue, as the report by Dr. Christie was based in part on an evaluation which preceded the filing of the originating Application on 29th March 2019.

[32.] While Dr. David Allen's report was accepted by the court, it did not support the Applicant's case as Dr. Allen found the First Respondent competent. He opined;

"I was very impressed concerning my interview with Mr. Johnson. I found him to be a solid, honest, and hard-working Bahamian hero. He was the epitome of being industrious, ambitious, and at the same time, having a strong determination to be fair and kind to people. He is a gentle giant of a man who has made a tremendous contribution to our Bahamian economy, but also is a model of hard work, commitment, and never-dying creativity. He is highly trained in business through his experiences, and even at the age of 85, I find him exciting to talk to and extremely knowledgeable about his business. I do not doubt that he is competent to make decisions about his business affairs." [Emphasis Mine]

Like Dr. Christie's report, Dr. Allen's report did not support the Applicant's claim that the First respondent is suffering from a mental disorder or lacks mental capacity. Notwithstanding, on 25th May, 2022, Justice Donna Newton ordered that further evaluations of the First Respondent be carried out. Dr. Timothy Barrett was approached by the Applicant.

[33.] Dr. Timothy Barrett chose the path of least resistance and opined that he could not make "any definitive statement" about the First Respondent's mental health status from the brief encounter he had with him. He opined in an Affidavit:

"Based on the report provided to me from family members along with their obvious concerns about Mr. Johnson's decision making and in particular, being shown the court order and a copy of the cheque which Mr. Johnson is either contesting or querying, I respectfully suggest that the Court requires two independent assessments of Mr. Johnson's cognitive state by trained psychiatrists or gerontologists" [Emphasis Mine]

This is obviously not an opinion that the First Respondent lacks mental capacity or is suffering from a mental disorder.

[34.] Dr. Nelson Clarke (Dr. Clarke) enters the picture as the psychiatrist chosen to conduct an assessment after Justice Newton's order in December 2021. Based on the assertions of the Claimant that evaluation took place only after numerous appointments were missed, ostensibly at the hands of the Third and Fourth Respondents. Later, after much ado, Dr. Clarke was able to review the patient, and a medical report from Dr. Clarke was later filed, which stopped short of the critical diagnosis that the First Respondent, Mr. Minard Ulric Johnson, has a mental disorder or is mentally incapacitated. He opined;

"Mr. Minard Johnson is a pleasant, likable gentleman, who was very cooperative. Mr. Johnson was disoriented in time, being unable to correctly give the day, date, month, or current year. He has significantly impaired short-term memory. His long-term memory is less impaired. He had difficulty following simple instructions, even when given guidance. The results of the MMSE revealed significant cognitive impairment. The findings indicated that Mr. Johnson suffers

from moderate sever cognitive decline. (memory, thinking, judgment, and decision-making skills) which might lead to difficulty in conducting his own affairs, but with assistance, he may yet be good to have honest, capable, and trustworthy assistance providing oversight to ensure that Mr. Johnson's general well-being (mental, emotional, physical) and financial interests are being adequately protected. [Emphasis mine]

[35.] It is also critical to note that no report was filed to verify the mental capacity of the Second Respondent at all.

[36.] Clearly, under the provisions of the MHA 1969, applications are subject to approval by the Minister. There has been no involvement of any Minister in the present application. Nor is there any Medical report that diagnoses the First or Second Respondents as having any mental disorder.

[37.] I have considered the possibility of the Applicant being given Leave to Amend her Application, as referenced by counsel for the Respondents'. Under s. 12 MHA 1969 and s. 48 of the MHA 2022, the Applicant falls within the category of persons who are empowered to make an application for guardianship of the First and Second Respondents. While the criteria for obtaining such an order under the current provisions are similar to the criteria in the 1969 Act, there are clear distinctions. Under MHA 2022, the application must be supported by a written recommendation of not just two medical practitioners, which is the MHA 1969 requirement, but one must be a psychiatrist and the other a medical practitioner. Their report shall include a statement in each case that in the opinion of the psychiatrist and medical practitioner, the person either suffering from a mental illness of a nature or degree which renders him unable to make personal decisions for himself or cannot meet their own needs for medical care, food, clothing, shelter and safety; and warrants guardianship in the interests of his health and safety, or for the safety of other persons. A statement that the patient is suffering from a mental disorder, mental illness, or severe abnormality suffices under the MHA 1969. No such report has been provided to the court. I am of the view that even an amendment to allow the Applicant to be governed by the MHA 2022 and its mandate and requirements would not assist the Applicant because of the fundamental, fatal flaws in her application. Both Dr. Nelson Clarke and Dr. Timothy Barrett (now deceased) are renowned psychiatrists. However, neither of their reports or findings meet the threshold established under the MHA 2022 criteria. [Emphasis Mine]

[38.] It is also striking, a matter which was drawn to the court's attention by the Respondent's counsel, that the Applicant has failed in her application to show that she wants the full responsibilities that accompany a court-ordered guardianship of adult mentally incapacitated persons. s. 48 (4) MHA 2022 confer upon the person named therein as guardian full physical custody of the person named in the order; the power to make personal and medical decisions for that person; all other powers of a father as would be exercisable by him if the person was a child, including everyday care and activities, providing shelter, nourishment, protection, and

education (if possible); provide for the appointment of a medical practitioner to act as a medical attendant for the person received into guardianship. The Respondent confined her specific application to having the First and Second Respondents declared mentally incapacitated, and once that is determined, to take control of their real and personal property. Her fitness as a guardian is immediately called into question in light of the averments made not only by the First respondent but also by the Third and Fourth Respondents. [Emphasis Mine]

[39.] It is not lost upon this court that there is a rift in the relationship between the Applicant and all of the Respondents. The vitriol is purposely expressed. It does not imbue this court with confidence that even if the First and Second Respondents were to be found mentally disordered or lacking mental capacity, the Applicant would be the most suitable candidate to be appointed guardian of the First and Second Respondents. The court is aware that the effluxion of time in this matter may have put the First and Second Respondents at risk of mental deterioration in any event, given their respective ages. However, the present application has no chance of success based on the absence of any medical reports in conformity with MHA 1969 or MHA 2022. The Doctor's reports simply do not meet the criteria. Moreover, and finally, the fact of the Affidavit sworn by the First Respondent in answer to this application and the contents thereof does not portend any obvious mental disorder or mental lack. The originating application simply does not comply with the required criteria for proof of mental incapacity.

CONCLUSION

[40.] I am satisfied that the Originating Application for permanent guardianship and the subsequent Notices of adjourned hearings were duly served upon the First and Second Respondents.

[41.] I am satisfied that, given the law, the authorities, the facts and circumstances of this case, counsel's submissions and considering the state of the pleadings, the absence of any medical reports notwithstanding that Six (6) to Seven (7) years have passed since the filing of the originating application and the many court adjournments in this matter, that the Applicant has failed to satisfy the requirements of both the MHA 1969 and the MHA 2022 and cannot therefore succeed at a trial of this matter.

[42.] Due to the absence of the required Medical Reports, this court refuses the Application for a Declaration that the aforesaid First and Second Respondents are incapable by reason of a mental disorder to manage and administer their affairs and/or property either jointly or severally.

[43.] Due to the failure to produce in evidence the required Medical Reports, the court refuses a Declaration that the affairs of the aforesaid First and Second Respondents be transferred to and managed by the Petitioner to the exclusion of the Third and Fourth Respondents.

[44.] Due to the absence of the required Medical Reports, the court refuses the application for a Declaration that the First Respondent is incapable by reason of mental disorder to provide for the necessities of the Second Respondent (his wife), who suffers severe mental disorder.

[45.] Due to the absence of the required medical Reports this court refuses the Application for an Order that the aforesaid Applicant be appointed to control and manage the real and personal property of the aforesaid First and Second Respondent permanently.

Disposition

1. The Originating Application herein is dismissed.
2. Costs of the proceedings to the Respondents to be taxed if not agreed.

Dated the 23rd day of February, 2026



The Honorable Justice Hope Strachan

