

Judgment 42/2010

**Webber v Mackay
- Court of Appeal (Civil Appeal 410) –
15th December, 2010**

Curatelle Rules, 1989 – application for leave to appeal from decision of Royal Court appointing a guardian – circumstances in which leave to appeal will be granted – reluctance of appeal courts to interfere with proper exercise of a judicial discretion or with findings of fact open to Jurats on the evidence before them – no reasonable chance of a successful appeal – leave to appeal refused.

IN THE COURT OF APPEAL OF GUERNSEY

The 15th December, 2010 before Dame Heather Steel, DBE, presiding, Michael Cameron St John Birt, Esq., and Sir Hugh Bennett

ANTHONY DAVID CANIVET WEBBER

(Applicant)

v

BEVERLEY JEAN CANIVET MACKAY

(Respondent)

On the application by the above Applicant for leave to appeal from the decision of the Royal Court on 25th August, 2009, leave having been refused by James Walker McNeill QC, sitting as a single judge;

THE COURT, having heard the Applicant in person and Advocate Robert Shepherd for the Respondent, this day GAVE JUDGMENT in the terms attached hereto and REFUSED the application for leave to appeal.

K H TOUGH

Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO 410

13th & 15th December 2010

Before: **Dame Heather Steel, DBE**
Mr Michael Cameron St John Birt,
Bailiff of Jersey
Sir Hugh Bennett
Judges of Appeal

Between: **Anthony D C WEBBER** **(Applicant)**
v
Beverley J C MACKAY **(Respondent)**

Renewed application for leave to appeal the decision of the Royal Court of Guernsey on the 25th August 2009 whereby an application by Mrs Beverley Jean Canivet Mackay for Guardianship of Mrs Dorothy Jean Webber was accepted and Mrs Beverly Jean Canivet Mackay was sworn Guardian of

Mrs Dorothy Jean Webber

The Applicant appeared in person

The Respondent was represented by Advocate R G Shepherd

Authority and Text referred to:

HM Revenue and Customs v Gresh and RBC Trust Company (Guernsey) Limited 2009
GLR - 10 239

The Curatelle Rules 1989 (Order No 2 of 1989)

This is the Judgment of the Court

Dame Heather Steel, DBE JA

1. The applicant made two preliminary applications to the Court.
2. He sought to challenge the constitution of the Court on the basis that the Bailiff of Jersey, being President of the States of Jersey and previously Attorney General may not apply an independent assessment to the issues of his case due to possible bias resulting from his knowledge of the applicant's political involvement in Guernsey. The Bailiff of Jersey indicated that he had never met the applicant and was unaware of his political involvement in Guernsey. This was accepted by the applicant. Dame Heather Steel had been a member of the Court of Appeal on 18th April 2008 which, in the absence of the applicant, made a preliminary ruling in a civil matter in which he was involved. He did not recollect the occasion. We were satisfied that the independence of this tribunal was not thereby compromised in any way and dismissed this application.
3. He then applied for an adjournment of the application on the ground that his Advocate, who had given him limited advice had recently withdrawn from the case due to the cancellation of her legal aid funding. He submitted that he was not in a position to represent himself, was not prepared for the hearing and had not received the transcripts of the Royal Court proceedings until 1st December. He conceded that he now had sufficient knowledge to represent himself at an adjourned hearing. We considered the history of this application which concerned a decision made in August 2009. Legal aid funding had been granted and discharged twice and following the refusal of leave by the single judge this matter had already been adjourned twice. The applicant had been intimately involved with these proceedings from the outset and we concluded that he was well aware of all the issues and well capable of representing himself. We dismissed this application and adjourned to allow the applicant to collect his papers and prepare to present his case.
4. We are grateful to the applicant for his submissions and, despite a long history of grievances, for attempting to confine his submissions to those relevant to the Royal Court decision of 25th August 2009
5. On 25th August 2009 in the Ordinary Division of the Royal Court, Lieutenant Bailiff John Russell Finch sitting with three Jurats, considered and determined a Guardianship application (brought under the Curatelle Rules 1989(Order No 2 of 1989) by Mrs Beverley Jean Canivet Mackay (nee Webber) for her mother (the Patient) Mrs Dorothy Jean Webber (nee Slough) born 7th September 1923. Having considered the evidence concerning the two issues:
 1. Whether Mrs Webber was incapable of managing her affairs for reasons of infirmity of mind or body and that the need for a guardian arose and
 2. To identify who the appropriate guardian would be, the Jurats unanimously accepted the application and Mrs Mackay was duly sworn.

6. At the conclusion of the proceedings, the applicant Mr Anthony Canivet Webber, who had attended the hearing in person to oppose the application and to challenge some of the evidence in cross examination, applied for a stay and for leave to appeal the decision. The applicant was told that he should submit an application to appeal and the application for a stay was refused.
7. By email to the Greffier and Advocate Shepherd dated 26th August 2009 the applicant indicated his intention to appeal the decision, and set out fourteen grounds for his appeal and requested an immediate stay.
8. On 2nd March 2010, James Walker McNeill QC sitting as a single judge of the Court of Appeal, dismissed the applications for leave to appeal and for a stay.
9. The judgment identified two complaints from the large number of matters set out in the email of 26th August 2009. The applicant asserted that he had inadequate time to prepare for the hearing on 25th August, and that the Court had failed to take into proper account the interests of Mrs Webber, his mother.
10. The single judge concluded that neither point had any proper foundation.
11. The judgment records *“As to a fair hearing, it must be remembered that these proceedings were not, in the full sense, adversarial. The principal interest of the Court was to provide appropriate protection for Mrs Webber. The applicant's email of 26th August clearly indicates by its detail and reasoning a thorough understanding of the issues before the court on 25th August and the contentions which he wished to be placed before the court”*. The judge concluded *“the procedure identified by the Court at the hearing of 11th August 2009 manifestly seeks to have regard to the interests of Mrs Webber”*. Further, that *“nothing put forward by the applicant in support of his contentions that there was not a fair hearing in August 2009 or that there was a failure to have a proper regard to the interests of Mrs Webber provides any foundation for those contentions”*. Having regard to the fact that the applicant made his application in person the Judge recorded that he had given careful consideration to the whole of the information placed before him.
12. He ruled that there was no basis upon which leave should be granted to appeal the appointment of Mrs Mackay or for a stay of the Orders below; and no basis for interfering with the disposal of the applicant's own application for appointment.
13. On 4th March 2010 the applicant sent an email to the Court and to Advocate Shepherd and for the attention of McNeill QC, JA indicating that as he was having to represent himself he wished to make an application for leave to appeal to the full Court for a verbal hearing in which the Court of Appeal Judges *“may come to a different conclusion after hearing all the evidence”*. He repeated his complaints regarding the proceedings in August 2009.
14. This application was originally listed before the Court of Appeal in July 2010, but vacated as McNeill JA was one of the judges. The matter was then listed for the September sitting of this Court, but was adjourned at the request of the applicant who was seeking legal

representation. Advocate Shepherd did not object, the matter was removed from the list and the applicant was informed that the Court would not be sympathetic to a further adjournment.

15. On 7th October 2010 the applicant was informed that the application was listed for hearing by the Court of Appeal on Monday 13th December at 9.30 am. On 8th December the applicant requested an adjournment indicating that he will be concerned in proceedings in the High Court in London that week. Enquiries established that he would be available for 13th December.
16. The Court informed the applicant that the matter would proceed on 13th as listed and the applicant attended to present his case.
17. In considering this application we have in mind the Court of Appeal Judgment in HM Revenue and Customs v Gresh and RBC Trust Company (Guernsey) Limited 2009 GLR - 10 239 in which at para 13 it was stated that “*It is clear that the Court of Appeal will only grant leave if there is a reasonable chance of success, and where the exercise of a discretion is challenged it has to be shown that the decision was clearly wrong*”. The authorities show that Appeal Courts have traditionally been reluctant to interfere with the proper exercise of a judicial discretion, or to the findings of fact open to Jurats on the evidence before them.
18. We turn to consider the history and background to this application and the Royal Court proceedings.
19. In August 2009 an application was made for the guardianship of Mrs Webber by Mrs Mackay, her eldest child and Michael Carey Canivet Webber, Mrs Webber's younger son. Mrs Webber was a patient at Duchess of Kent House, having been transferred from Princess Elizabeth Hospital. Her medical care was provided by her GP Dr Fazakerly and Consultant Dr Sola Olaguniju. The proposed Family Council was to comprise Mr Maurice Slough, Mrs Webber's brother and Douglas Bruce Leander Mackay, Mrs Webber's grandson. The applicant was made aware of the applications. The applicant contends that he had submitted an application on his own behalf but we had no evidence of this save as appears below regarding an application made in June 2009 and which had been considered defective.
20. On 11th August 2009 the applications were considered by Lieutenant Bailiff Finch, who stated that before proceeding further the Court required an independent report from a consultant geriatrician on Mrs Webber's condition. He stated that there was no need to go outside the Island. He asked that as far as this person can, Mrs Webber's state of mind and wishes should be ascertained and any views from the care staff at the Duchess of Kent be obtained. At this hearing the applicant appeared in person, Advocate Shepherd appeared for the applicants and HM Procureur Howard Roberts QC appeared as amicus curiae. Advocate Shepherd requested that none of the members of the family should be present at the time of the examination to ensure a wholly independent medical opinion. The applicant questioned whether there was an independent geriatrician on the island and requested that he should be with his mother at the time of examination. HM Procureur undertook the task of arranging an entirely independent medical opinion. The Lieutenant Bailiff stated that this was to be regarded as a matter of urgency and directed that the Court would reconvene in fourteen days.

21. At the hearing on 25th August the applicant appeared in person in opposition to the application. The other representation was as above. The Lieutenant Bailiff, with three Jurats, considered an affidavit dated 7th August 2009 sworn by Dr Fazakerly, a report by Karen Holbrook, Team Leader of the Duchess of Kent House dated 15th August 2009 and the report of Dr S N Evans Consultant Physician, dated the 19th August 2009 and they heard HM Procureur, the evidence on oath of Mrs Mackay, Dr S Evans and the applicant.
22. We have been much assisted by a transcript of the proceedings and have taken careful note of the cross examinations conducted by the applicant of Dr Evans regarding his examination of Mrs Webber on 20th August, his independence and his conclusion that “*This lady has significant dementia resulting in a cognitive impairment which impacts adversely on her ability to make decisions and to care for herself*”; also the evidence and cross examination of Mrs Mackay. We note the applicant's submissions to the Royal Court.
23. The Court noted the history of the application and considered that the rights of Mrs Webber had been afforded proper consideration and that she was settled where she is. The Royal Court was stated to be concerned with her interests throughout and noted that the applicant's interests were different from those of his mother. The applicant was told that if circumstances change the order is capable of variation. The Application was accepted and Mrs Mackay sworn as guardian.
24. The applicant contends that the hearing was not fair. He submits that the hearing should have been adjourned so that all the applications should have been considered together and in the alternative that the Court should have appointed an independent guardian pending the resolution of the family applications. He submits that it was wrong and unfair to appoint one guardian in isolation. Advocate Shepherd's response was that the Court was here considering a family application, one of the two submitted by the Respondent and Michael Webber, for which there was a Family Council and there was no such application from the Court or HM Procureur.
25. The applicant submitted that there was inadequate disclosure of the documentation concerning the sectioning of Mrs Webber. He accepted that this had no relevance to the proceedings on 25th August.
26. He was extremely concerned that his request of 11th August that a consultant independent from Guernsey should have been appointed to examine Mrs Webber in August 2009 had not been accepted. We noted the matters the subject of his cross examination of Dr Evans and despite the applicant's concerns we are satisfied that the Consultant appointed by HM Procureur was properly independent. The applicant now contends that he believes the diagnosis of dementia was exaggerated and he does not accept that Mrs Webber was then suffering from dementia/depression.
27. We note the applicant's concern that he was prevented from cross examining the Family Council members. The transcript reveals no application by Mr Webber for cross-examination.
28. The applicant submitted that his proposed appeal raised matters of public interest concerning the care of the elderly.

29. We note and accept the submissions set out in Advocate Shepherd's response.
30. On 29th September the Royal Court was convened to consider the application of Mr Michael Webber who had been unable to attend on the 25th August. Mr Finch (now sitting as Judge of the Royal Court) sat with three Jurats. The representation was as before. Mr Webber appeared in person. As he had started an application to the single judge to appeal the decision of 25th August the Court did not consider Mr Michael Webber's application, which was adjourned, pending the determination of the Court of Appeal.
31. The applicant had made an application to the Court for guardianship which HM Procureur had found to be defective on 30th June 2009. He failed to remedy the defects and failed to ensure that his proposed Family Council member was in Court on 11th or 25th August. On 29th September he made a further application for guardianship naming a friend, Mrs Gail Ann Russell as Family Council. Judge Finch ruled that the application was not justiciable before the Court. He stated that the formalities, were not complied with, it was not lodged in time, it was not presently notarised and the Family Council was not complete. We have noted that this application is now notarised. This appears to have taken place post the hearing on 29th September, but in any event the Court was correct not to accept jurisdiction on this document.
32. Thereafter there has been copious e-mail correspondence from the applicant to Advocate Shepherd and the Court, none of which has disclosed any arguable ground of appeal from the decisions of 25th August 2009.
33. The applicant has been unsuccessful in obtaining legal aid despite the involvement of two advocates on his behalf. Hence the applicant appears before the Court unrepresented. On 19th November 2010 at the request of Advocate Lund, then acting for the applicant she was provided with a full transcript of the proceedings the subject of this application.
34. On 4th December Advocate Lund confirmed that she was no longer acting for the applicant as the legal aid certificate had been withdrawn.
35. This Court has the benefit of a medical report set out in a letter from Dr Fazakerly dated 22nd December 2009 indicating that Mrs Webber is happy where she is living and is being well looked after at Duchess of Kent house where her nursing care can be provided. The Court also has a report from Dr Olagunju who saw Mrs Webber on 29th January 2010. He concluded that Mrs Webber suffers from a progressive and incurable condition of the brain which has resulted in her inability to manage her affairs. She will continue to require an arrangement to protect her from financial exploitation and ensure that she receives ongoing and appropriate support to meet her needs. It is worth noting that her apparent low level of involvement with managing her financial affairs in the past could have contributed significantly to her current outlook. He added that in his opinion Mrs Webber's improvement has been majorly due to the care she has received from the staff at Duchess of Kent House.

Conclusion

36. We refuse the application for leave to appeal the decision of the Royal Court on 25th August 2009. We have considered all the matters raised by the applicant and his submissions made in person. We are satisfied that the proceedings and the findings of the Court do not give rise to any arguable grounds for an appeal, and that the applicant has no reasonable chance of a successful appeal. On the Jurats' findings of fact and the exercise of the discretion of the Court we can find no basis for a submission that the decision was clearly wrong. We are satisfied that throughout the proceedings leading to the decision of 25th August the Court gave paramount consideration to the interests of Mrs Webber and that their decision that she was incapable of managing her affairs due to infirmity of mind or body was supported by clear evidence, as was the finding that Mrs Mackay was on the evidence, the appropriate guardian.
37. The Respondent made no application for costs.
38. Finally we wish to record that should Mr Webber wish to make a new application to the Royal Court in proper form he should do so.