

Application seeking the appointment of joint guardians and a request for permission for the guardians (if appointed) to sell a property on the Patient's behalf

[2020]GRC012

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

IN THE MATTER OF THE GUARDIANSHIP OF A PATIENT

Judgment handed down: 25 February 2020

Before: Sir Richard Collas, Bailiff and Jurats D J Robilliard, M J King and T J Le Poidevin

Advocate for the proposed guardians: Advocate S Geall

Introduction

1. We have produced this written judgment to explain the circumstances in which the Court appointed the Patient's two sons as his joint guardians in circumstances which gave some cause for concern to the Advocate initially instructed to present the application. We have done so in order to set out the basis on which the Court agreed to grant the application. If the matter were to come back to the Court at a future date, it will be helpful to refer to this judgment. At the hearing of the application there were no members of the public present but, as is normal with such applications, it was not in private so we have written the judgment anonymously to avoid the possibility of the Patient and the family being identified if it were to be published.
2. The application is in two parts (hereafter "the Application"). It seeks the appointment of joint guardians to the Patient and also requests permission for the guardians (if appointed) to sell a property on his behalf. The Application was presented to the Court by Advocate Simon Geall in the absence of Advocate Catherine Fooks who was first instructed but was not available on the day of the hearing. During the course of investigating her instructions, certain matters came to the attention of Advocate Fooks which she rightly drew to the attention of the Court. We are grateful both to Advocate Fooks and to Advocate Geall for their attention to the matter and their assistance with the Application.

The Circumstances

3. The Patient is a gentleman of 92 years, soon to be 93, a widower with three children. The Application was made by his two sons ("the First Son", "the Second Son" and together "the Sons"). His daughter ("the Daughter") was a member of the Family Council together with a grandson ("the Grandson") of the Patient. The Patient has four other grandchildren, two of whom are minor, another was not considered suitable as he has mental health problems and the fourth supported the Application but did not wish to be involved.

The Family Business

4. The Patient is the owner of a well-established local business ("the Family Business") to which he has devoted much of his life and which has been, and still is, his pride and joy. The Sons

and the Daughter each thought that they might have one share in the company that owns the Family Business (“the Company”) but they all consider their father to be the true owner. The three of them are all directors of the Company. The Patient was a director and may still nominally be a director although by reason of his current state of mental health it may be that in law he is deemed to have retired.

Other Assets

5. The Patient owns two residential properties adjacent to the premises occupied by the Company and lives in one of them. His only other asset, apart from the Company, is a bank account with a small balance. The Patient’s income is derived from pensions and from the Company which pays him approximately £250.00 per week and pays for his utility bills.

The Sale Property

6. One of the two residential properties owned by the Patient is currently uninhabited and untenanted. The second limb of the Application is for permission to sell the property (“the Sale Property”). The Court received valuation evidence from an independent valuer who confirmed that a fair value for the Sale Property was lower than the price that had been agreed with the prospective purchaser. The agreed sale price included an apportionment of 2½% to personalty. The valuer gave evidence that notwithstanding that the property could be lived in with the personalty that is there, including kitchen fittings, in reality they are old and have little or no value. Consequently, the Application was amended so that the whole of the agreed sale price approved by the Court was attributed to realty.

Circumstances giving rise to the application

7. The Sons work full time in the Company with their Father. The Daughter used to work there but retired some years ago. Trading conditions have been difficult for some time and the Company is now burdened with some £95,000.00 of debt. The reason for selling the Sale Property was to raise capital to enable the Patient to pay off that debt and to invest a further sum not exceeding £50,000.00 in the business. In the view of the Sons, it would then be viable and sustainable. It would also continue to provide employment and income for them and three other employees as well as enabling the Patient to continue to draw an income from it. He would also be able to continue to have the pleasure of attending the business daily as at present which is important for his sense of wellbeing. It was the wish of all the family that he should be able to continue to do so. However, the Sons want to be able to take greater control of the Company which they believe has suffered in recent times because of their father’s deteriorating health.
8. When Advocate Fooks and her conveyancing clerk were taking instructions from the Patient for the sale of the Sale Property, they became concerned as to his mental capacity to give proper instructions and also as to the possibility that the Sons were exerting some pressure or undue influence on him to make a sale against his wishes.
9. Initially, the medical advice was that the Patient had the capacity to take the decision to sell and was doing so of his own free will. The medical evidence has since changed partly as a result of other medical practitioners becoming involved and partly because of a continuing deterioration in the Patient’s condition. We describe the Patient’s current medical condition later in this judgment.

10. Further concerns of undue pressure possibly being applied to the Patient were raised by his bank. The Second Son had accompanied the Patient to his bank when he attempted to withdraw money from his account to pay for a holiday to be taken by the Second Son and his family. The Patient could not remember his PIN number which was supplied by the Second Son. The Second Son denied any wrong doing. His explanation was that he had an opportunity to book a cruise and his father agreed to lend him the money on the understanding that it will be repaid at the end of the current month when the Second Son's wife receives her annual bonus.
11. There is a history of short term lending both by and to the father within the family and to others. Advocate Fooks' concern, agreed by the Court, is that it amounts to evidence of the potential vulnerability of the Patient and the need for him to be protected both from himself and from anyone who might have an opportunity to exploit that vulnerability even if doing so unknowingly.

The Patient's health

12. The Application was supported by an affidavit sworn by the Patient's General Practitioner who has been his regular doctor for nearly 20 years and who had examined him on 14 February, 2020. His examination was supported by an assessment from the Memory Clinic confirming that the Patient's memory is problematic and has been deteriorating for some time. The Patient has poor understanding of monetary value, gets muddled up between his late brothers and the Sons and also muddled with card machines and the telephone when taking payments from customers of the Family Business which has resulted in customers being lost. He relies on receiving Meals on Wheels on six days a week and on the family providing a meal on the seventh day without which he would not have an adequate diet.
13. The GP's conclusion was that the Patient's medical condition is such that he is unable to manage his affairs to such an extent that he requires a guardian to be appointed for him. The GP also said that the condition is unlikely to improve to an extent that the need for such a guardian will be abated. Earlier correspondence with Advocate Fooks had indicated that there might be an underlying physical problem which, if addressed, might alleviate some or all of the symptoms of dementia. It appears that may no longer be so but, if by good fortune, the Patient's medical condition were to improve such that he does not need a guardian, it would be the responsibility of the joint guardians to refer the matter back to the Court or, if they fail to do so, for the Family Council to bring it to the attention of the Court, and to support the Patient in making his own application to have the guardianship lifted. Sadly, it appears that will not be the case, but it is important that the family are made aware that the guardianship can be reversed if their Father's health improves.
14. The Grandson informed the Court that he does not see his grandfather as often as he would like or perhaps should do but he does see him once or twice a month. On a recent occasion his grandfather did not recognise him and mistook him for a customer.
15. The Court was satisfied on the evidence presented that there was a need for the Patient to be placed under guardianship.

Suitability of the proposed guardians

16. The Court was concerned to ensure that the guardians would be able to protect the best interests of the Patient. The Sons had potential conflict of interest.

17. The greater cause for concern is their involvement in the Family Business. If their prediction is correct that an injection of capital to repay existing indebtedness will be sufficient to ensure the long term viability and sustainability of the Company, it will continue to provide an income not only for them and the Patient but also employees and will preserve the enjoyment of the Patient of his life's work. However, conflict could arise if even more capital is needed and the Sons are placed in a position where they are having to make a judgment between on the one hand their personal interests in ensuring their continued employment and on the other hand their father's interest in preserving a capital sum which can be used to support him if it were necessary for him to pay for a carer or to move to a care home. It could also create tensions within the family if, for example, the Daughter felt that the future estate from which she might hope to benefit was being dissipated not for her father's benefit but for the benefit of her brothers. A further concern is the history of lending money within the family with loans being made that may not always have been documented.
18. The Daughter did not wish to be appointed as a joint guardian as she did not wish to be closely involved with her father's affairs. It had been suggested that a professional person, a lawyer or an accountant, might be appointed as a joint guardian. That proposal was considered impractical largely because of the costs that would be incurred if a professional person were to have to devote the time that would be necessary for him or her properly to discharge their duties as one of the guardians. However, the Court took some comfort from the fact that the auditors of the Family Business are located close by, they know the Family and the business well.

Conclusion

19. The Court concluded that:

- (1) the Patient's health is such that he needs to be placed under guardianship;
- (2) the Sons are the persons best placed to be appointed joint guardians;
- (3) it is in the Patient's best interests that the Sale Property be sold at the agreed price;
- (4) however, some safeguards are needed in order to ensure that the best interests of the Patient are protected.

20. The Court did not wish to attach any conditions to the appointment of the guardians because that would create uncertainty especially when dealing with third parties such as a bank who would need to be constantly reassured that the conditions were being complied with. The appointment has therefore been made without conditions attached but subject to a number of understandings.
21. First, it is important that the Daughter continues to hold the post of director of the Company for so long as she wishes. The Sons are not to use the power that they will have as the owners of their father's shares to remove her against her will. The Daughter indicated that she might wish to be paid a fee for her services as director. That is a matter for her to discuss with the Sons and not one for the Court to become involved with (unless there is a dispute). We would add only that it is important that the duties she is to perform are clearly understood by her and that she has a clear understanding of the responsibilities which attach to the office of director.
22. Second, no moneys shall be lent or otherwise advanced from the Patient's estate to the Family Business without the consent of both members of the Family Council as well as both of the Joint Guardians.

23. Third, the Family Council are to be kept fully informed of the conduct of the guardianship and shall have such access to the Patient's bank account and other financial details as they may require from time to time.
24. Fourth, the Family Council and the joint guardians are at liberty to apply to the Court for directions or further orders at any time if they consider that there is any need to do so. If in doubt, the guardians and the Family Council are to be free to take both accountancy and legal advice if and when they wish to do so.