NOVA SCOTIA COURT OF APPEAL
Citation: ***Nova Scotia (Public Trustee) v. I.W.***, 2014 NSCA 10

Date: 20140130
Docket: CA 414744
Registry: Halifax

Between:

The Public Trustee (A Corporation Sole As Constituted by the *Public Trustee Act*, Chapter 379, Revised Statutes of Nova Scotia 1989)

Appellant

v.

I.W.

Respondent

Judges:	Saunders, Oland and Bryson, JJ.A.
Appeal Heard:	September 23, 2013, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bryson, J.A.; Saunders and Oland, JJ.A. concurring
Counsel:	Peter C. McVey and Shannon Ingraham-Christie, for the appellant No one appearing for the respondent

Reasons for judgment:

Introduction:

[1] The Public Trustee comes before us as manager of the property of I.W. She enjoys that status originally because Ms. W. was found to be "an adult in need of protection" under s. 13(2) of the *Adult Protection Act*, R.S.N.S., 1989, c. 2 and latterly because her status as manager has been continued under s. 14A of the *Public Trustee Act*, R.S.N.S., 1989, c. 379.

[2] The Public Trustee asks us to overturn the decision of The Honourable Justice Michael Wood who declined to grant an order authorizing the sale of Ms. W.'s home by the Public Trustee, (2013 NSSC 134). The Public Trustee had argued that Ms. W. is not capable of managing her affairs; that her home is at risk and an unnecessary burden on her modest resources; in short, that it is in her best interest to sell the home.

[3] The Public Trustee's nuanced argument is that authority to grant the order she seeks is founded both in the court's inherent jurisdiction and various statutes. She submits that possible alternatives – such as a guardianship application under the *Incompetent Persons Act*, R.S.N.S. ,1989, c. 218 are not practical. She advises that the Supreme Court has often endorsed this process in the past and it is important for the future because she has management of the property of many persons in similar circumstances.

[4] In essence, the Public Trustee urges that powers not granted to her under the *Adult Protection Act* and the *Public Trustee Act* can be obtained by invoking the court's inherent jurisdiction and/or by other legislation.

Facts:

[5] In August 2012, the Public Trustee assumed possession and management of the estate of I.W. pursuant to the authority of s. 13 of the *Adult Protection Act* following notification by the Minister of Health and Wellness that 76 year old I.W. had been placed in a long-term care facility. The Public Trustee advises that the original Adult Protection order expired and that management of her property continues under s. 14A of the *Adult Protection Act.*

[6] In October 2012, I.W. was diagnosed with "vascular cognitive impairment dementia". Her assessing physician opined that Ms. W. could not live alone in her house; that she lacked insight and her judgment was poor. No opinion was expressed on Ms. W.'s global competence.

[7] Ms. W. has a modest income which is effectively exhausted by the cost of her care. She owns her home jointly with her husband from whom she has been separated for many years.

[8] The Public Trustee concluded that Ms. W.'s home should be sold. She considered that there was a real risk of damage to and depreciation of the property. Mr. W. was also in favour of selling. The home is subject to a mortgage which secures a line of credit of approximately $40,000.

[9] The Public Trustee obtained appraisals indicating a value of $58,000 to $65,000. An agreement of purchase and sale was negotiated with a buyer for a price of $60,000, conditional on court approval. Net equity from the sale would have resulted in approximately $7,500 to Ms. W.

[10] The Public Trustee applied in chambers to Justice Wood for an order to authorize the sale. Justice Wood was not satisfied that he could authorize sale of the property and dismissed the application. With respect to the authority granted by the *Adult Protection Act*, Justice Wood concluded:

> [16] It is obvious that there are a wide range of situations where the Minister may choose to become involved. In some cases it may be a temporary problem which is resolved relatively quickly. It may also be a circumstance where the person requires medical services which have not been provided to them. The Minister's involvement is clearly limited in time and is intended to provide protection to someone in relatively urgent circumstances. With that background, when one considers the authority of the Public Trustee under s. 13(2) of the *Adult Protection Act*, it appears to be custodial in nature. She is specifically directed to "safely keep, preserve and protect" the property of the person until they no longer need protection, the order expires, the Public Trustee determines that management of the estate is not required or a guardian is appointed. It is difficult to reconcile a power of sale with that custodial role.
>
> [17] There is nothing in the *Adult Protection Act* to suggest that the authority of the Public Trustee under s. 13(2) is intended to continue on a long term basis. The person will either cease to need protection and their property will be returned

> to them, or, if incompetent, a guardian will be appointed under the *Incompetent Persons Act*. The position advanced by the Public Trustee appears to suggest that she can act as if she were a guardian without the formalities required for such an appointment and that she can do so indefinitely.

[11] The Chambers judge also dismissed arguments that authority to sell Ms. W.'s home could be founded on *Civil Procedure Rule 71*, or the Public Trustee's claimed status of trustee. He declined to make a vesting order under the *Trustee Act*, R.S.N.S., 1989, c. 479.

[12] The Public Trustee has appealed, listing six discrete issues in her Notice of Appeal. With one exception, they really constitute separate arguments for the same proposition: the Chambers judge erred in concluding that he lacked authority to authorize the sale of Ms. W.'s home.

[13] The Public Trustee also submits that the Chambers judge made a clear and material error in his application of the evidence before him because he doubted that it showed Ms. W. to be incapable of managing her affairs.

[14] The Public Trustee complains that the Chambers judge took too narrow a view of the matter and should have examined all the sources of authority that would have permitted him to grant the order sought, including a vesting order under the *Trustee Act*.

[15] The Public Trustee also points out, as a practical matter, that the Supreme Court has frequently granted such orders in the past and that her management of other estates in similar circumstances has now been placed in doubt and at risk by the Chambers judge's decision. Apparently the Public Trustee has followed a similar practice when managing estates under the authority of s. 59 of the *Hospitals Act*, R.S.N.S., 1989, c. 208 and s. 8A of the *Public Trustee Act*. As will be noted later, the statutory language in those instances does not mirror the language of "management" of property in s. 13 of the *Adult Protection Act* and s. 14A of the *Public Trustee Act*.

[16] The usual practice of the Public Trustee in cases such as this has been to apply to the Supreme Court for an order authorizing sale of the dependent person's property. The Public Trustee typically follows a process similar to that which is authorized under the *Incompetent Persons Act*. Section 10(2) of that *Act* permits a

guardian to seek a licence from the court to sell an incompetent person's real property.

[17] The Chambers judge may have understated the Public Trustee's role by describing it simply as "custodial". Likewise, he may have been optimistic that "short term" situations like this will be resolved in many cases by the appointment of a guardian. The authority claimed by the Public Trustee in this case, and in many similar cases, may well be administratively practical and beneficial to the estates that she manages. Nevertheless, the fundamental question remains: regardless of the care, circumspection and prudence demonstrated by the Public Trustee in such cases, is the practice authorized by the law? With considerable regret, I have concluded that it is not.

[18] For the purposes of this decision, it will be assumed that Ms. W. lacks the capacity to manage her property. But as we shall see, that lack of capacity alone neither triggers the jurisdiction which the Public Trustee invokes in this case, nor justifies the remedy she seeks.

[19] It is convenient to begin with an examination of the statutes which prompted the Public Trustee's involvement in Ms. W.'s affairs and the status which these statutes confer on the Public Trustee.

***Adult Protection Act* and the *Public Trustee Act*:**

[20] Section 13 of the *Adult Protection Act* provides:

> **Public Trustee informed of removal of adult**
>
> **13 (1)** Where an adult is removed from the premises where he resides to another place pursuant to this Act and ***it appears to the Minister that there is an immediate danger of loss of, or damage to, any property of his by reason of his temporary or permanent inability to deal with the property***, and that no other suitable arrangements have been made or are being made for the purpose, ***the Minister shall inform the Public Trustee***.
>
> **Powers of Public Trustee**
>
> **(2)** ***Where the Public Trustee receives information pursuant to subsection (1) and where he is of the opinion that his intervention is appropriate, the Public Trustee may assume immediate management of the***

> ***estate of that person and may take possession of the property of that person and shall safely keep, preserve and protect the same*** until
>
> (a) the Public Trustee determines that it is no longer necessary to manage the estate of the person;
>
> (b) the Supreme Court or a judge thereof has appointed the Public Trustee or another person to be guardian of the estate of the adult in need of protection;
>
> (c) a court finds that the person is not an adult in need of protection; or
>
> (d) the order that a person is an adult in need of protection expires, terminates or is rescinded. R.S., c. 2, s. 13.
>
> [Emphasis added]

The emphasized passages describe what occurred in this case.

[21] As happened here, an order that has expired under s. 13 of the *Adult Protection Act* may be continued under the *Public Trustee Act*:

> **14A** Notwithstanding any other Act, where
>
> (a) the Public Trustee is managing the estate of a patient pursuant to Section 59 of the *Hospitals Act* and the patient is discharged from the hospital;
>
> (b) the Public Trustee is managing the estate of an adult pursuant to Section 13 of the *Adult Protection Act* and either the court finds that the person is not a person in need of protection or ***the order that a person is an adult in need of protection expires,*** terminates or is rescinded; or
>
> (c) the Public Trustee is managing the estate of a person pursuant to Section 8A,
>
> ***the Public Trustee's authority to manage the estate continues*** until
>
> (d) the Public Trustee determines that it is no longer necessary to manage the estate of the person;
>
> (e) the Supreme Court, or a judge thereof, appoints the Public Trustee or another person to be guardian of the estate of the person;
>
> (f) the Public Trustee receives a revocation of the declaration of competency stating that the person is not capable of administering the person's estate issued pursuant to the *Hospitals Act*;
>
> (g) the Public Trustee receives a written medical opinion signed by a physician stating that the physician has performed an assessment of the person's

> competency and that the physician is of the opinion that the person is competent to manage the person's estate; or
>
> (h) a court determines that the person is competent to manage the person's estate and finances,
>
> ***and the Public Trustee shall manage the estate in accordance with this Act***.
> *2008, c. 8, s. 42.* [Emphasis added]

Again, the emphasized passages describe what occurred in this case.

[22] Section 13(2) of the *Adult Protection Act* authorizes the Public Trustee to do three things; assume immediate management of the estate of the person in need of protection, take possession of that person's property and "safely keep, preserve and protect it". There is no explicit authority to sell real property, with or without court approval.

[23] The Chambers judge was satisfied that an interpretation of s. 13(2) of the *Adult Protection Act* – which did not favour the outcome sought by the Public Trustee – was sufficient to dispose of the motion. In particular, he remarked on the need to obtain a licence from the court to sell real property under the *Incompetent Persons Act* and the attendant requirements of that process:

> [18] I am supported in my conclusion that the *Adult Protection Act* confers no power of sale by comparing the language in this legislation with that of the *Incompetent Persons Act*. Sections 11 and 12 of that statute set out the authority of the guardian to manage the incompetent person's estate and sell real property. Those provisions state:
>
> > **Management of estate**
> >
> > 11(1) The guardian shall also manage the estate frugally and without waste and shall apply the profits thereof as far as necessary to the comfortable and suitable maintenance of the incompetent person and that of the family of the incompetent person.
> >
> > (2) If the profits are insufficient, the guardian may sell or mortgage or otherwise charge the personal property upon such terms as the guardian deems proper and may sell or mortgage the real property upon obtaining a licence so to do, and shall apply the proceeds so far as are necessary to the maintenance and support of the incompetent person and his family.

> **Sale of real property**
>
> 12 On a sale taking place under a licence to sell the real property of an incompetent person, the guardian shall execute in the name of the incompetent person the deed thereof, which shall convey such real property to the purchaser either absolutely or by way of mortgage as therein specified, in the same way as if executed by the incompetent person himself when of sound mind.

> [19] The management power found in s. 11 is equivalent to the authority given to the Public Trustee by s. 13(2) of the *Adult Protection Act*. It is clear this does not include the right to sell assets because the legislature felt compelled to include s. 11(2) in the *Incompetent Persons Act* to specifically give this authority. The absence of such a provision in the *Adult Protection Act* demonstrates that there is no implied power of sale arising out of the management of an estate. The *Adult Protection Act* goes further and requires the Public Trustee to keep, preserve and protect the person's estate which appears inconsistent with selling their property.

[24] Before this Court, the Public Trustee did not argue that the powers of management conferred by s. 13(2) of the *Adult Protection Act* – and effectively continued by s. 14A of the *Public Trustee Act* – permitted her to sell Ms. W.'s real property. Rather, she suggested that the power of management allows her to apply to the court, which can approve a sale, based on inherent jurisdiction and statutory authority, as discussed further below.

[25] With respect, these arguments cannot prevail for two basic reasons. First, principles of statutory interpretation do not provide the Public Trustee or the court with the authority to sell Ms. W.'s home. Second, the court's "inherent" jurisdiction regarding trusts and incompetent persons does not permit what the statutes have failed to authorize.

[26] Courts are obliged to interpret legislation, by reading the words of an Act "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Mime'j Seafoods Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2007 NSCA 115, at ¶25. Courts are also to consider related legislation. As Justice Rothstein counselled in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23:

> [117] I acknowledge that the *Real Estate Act*, unlike the successor and related legislation, did not expressly provide for a rebuttable presumption. Nonetheless,

> as *St. Peter's* indicates, the use of the word "deemed" does not always result in a conclusive, non-rebuttable presumption. It is the purpose of the statute that must be examined in order to determine if the presumption is rebuttable. ***The successor and related legislation in this case can assist with interpreting the purpose of deemed reliance in the Real Estate Act***. Lord Mansfield explained this principle in *R. v. Loxdale* (1758), 1 Burr. 445, 97 E.R. 394, observing that "[w]here there are different statutes in pari materia though made at different times, or even expired, . . . ***they shall be taken and construed together*** . . . and ***as explanatory of each other***" (p. 395). Estey J. provided a more modern explanation of this principle, and explained how "sometimes assistance in determining the meaning of [a] statute can be drawn from similar or comparable legislation within the jurisdiction or elsewhere" (*Nova, an Alberta Corp. v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437, at p. 448). [Emphasis added]

[27] It is instructive first to look carefully at the different roles contemplated for the Public Trustee by the *Public Trustee Act*. It is s. 14A of that *Act* which is presently the foundation of the Public Trustee's authority in this matter. She is to "… manage the estate ***in accordance with this Act***", [emphasis added]. As with the power of management under the *Adult Protection Act*, no authority to sell real property is mentioned in the *Public Trustee Act*.

[28] In contrast to management under s. 14A(b), the *Public Trustee Act* (s. 14A(a)) also refers to management by the Public Trustee of a patient's estate in accordance with s. 59 of the *Hospitals Act*. The powers of the Public Trustee under s. 59(2) of that *Act* are an illuminating contrast with the management powers claimed in this case:

> (2) Where there is no guardian to act on behalf of the person in a hospital or a psychiatric facility who is unable to administer his estate and the Public Trustee is of the opinion that his intervention is appropriate, ***the Public Trustee may*** take possession of the property and effects and safely keep, preserve and protect the property and effects of the person in a hospital or a psychiatric facility and ***expend from such property and effects such amount as is necessary to safely keep, preserve and protect the property and effects and for this purpose shall have all authority necessary so to do***. [Emphasis added]

[29] This is the identical language used in s. 8A of the *Public Trustee Act* which describes the authority of the Public Trustee to manage the property of a person placed in continuing care or receiving home care pursuant to a decision under s. 14 of the *Personal Directives Act*, S.N.S. 2008, c. 8. (Note that s. 8A of the *Public*

Trustee Act does not refer to "management"; but that word is used in s. 14A(c) to describe s. 8A). It is not necessary to decide whether the emphasized language in s. 59(2) of the *Hospitals Act* authorizes the Public Trustee to sell a patient's real estate, but it is certainly broader than the language of management in the *Adult Protection Act*, as continued under the *Public Trustee Act*.

[30] Comparisons with other parts of the *Public Trustee Act* also reveal contrasting language that distances the concept of management from a power of sale, or judicial authorization of a sale.

[31] Section 2 of the *Public Trustee Act* defines property as "real and personal property". Sections 11-13 of the *Public Trustee Act* allow the Public Trustee to take possession of the property of a missing person and, "... safely keep, preserve and protect the property and effects pending an order ..." (s. 12(b)). In certain circumstances, the Public Trustee may be appointed trustee of a missing person's property, and may, by order of a judge of the Supreme Court, "... mortgage, lease, sell or otherwise dispose of any of the property." (s. 13(2)). A specific power to sell is given to the Public Trustee if an order is obtained. The conspicuous absence of such language in s. 14(A)(b) with respect to an incompetent person is telling.

[32] Likewise, s. 10(1)(a)(ii) of the *Public Trustee Act* specifically authorizes the Public Trustee to sell real estate valued under $100,000 of an infant held by the Public Trustee as guardian of the infant's estate, in order to fund the child's maintenance or education. In cases where the Public Trustee holds property for an infant valued in excess of $100,000, a court order to sell must be obtained, (s. 10(2)). So the ability to sell is here given to the Public Trustee both with and without court approval. Neither option is available under "management" in s. 14A.

[33] The court should not amend legislation by inserting language that would supply a perceived gap. As the Supreme Court of Canada said in *Friesen v. Canada*, [1995] 3 S.C.R. 103, at ¶27, "It is a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording." Similarly, as Justice Major said in *Zeitel v. Ellscheid*, [1994] 2 S.C.R. 142 at ¶21:

> Recognition of the proper roles of the legislature and the judiciary requires that the courts give effect to the plain meaning of the words of a duly enacted statute.

> ***It is beyond the power of a court to interfere in a carefully crafted legislative scheme merely because it does not approve of the result produced by a statute in a particular case***. [Emphasis added]

[34] Section 4 of the *Public Trustee Act* also contemplates that the Public Trustee may act as a guardian, custodian of property of a missing person, trustee, executor or administrator. None of these capacities is conferred on the Public Trustee in this case by the *Adult Protection Act* or the *Public Trustee Act*. She may acquire the status of guardian by application to the court under s. 5 of the *Public Trustee Act*. She has not done so. Significantly, as the Chambers judge noted, if the Public Trustee applied to become Ms. W.'s guardian under the *Incompetent Persons Act*, she could only sell Ms. W.'s real property by first obtaining a licence from the court.

[35] The Public Trustee's submissions anticipate the outcome of such a licence application without first acquiring the guardianship status that would permit it. This is to avoid a perceived waste of time and resources. In this regard, it is helpful to contrast the s. 14A management power with the summary process under s. 16 of the *Public Trustee Act* by which the Public Trustee can avoid costly probate of a modest estate which does not exceed $25,000 in value.

[36] In certain circumstances, s. 16 of the *Public Trustee Act* permits the Public Trustee to administer small estates without the time and expense of seeking letters of administration from the Probate Court. Analogously, formal guardianship could have been avoided under s. 14A in order to spare time and expense in cases such as this, had the Legislature chosen to provide for that. It has not done so.

[37] Finally, it is notable that s. 14A(e) of the *Public Trustee Act* terminates the Public Trustee's power to manage when:

> (e) the Supreme Court, or a judge thereof, appoints the Public Trustee or another person to be guardian of the estate of the person;

[38] It is difficult to understand how guardianship would be necessary – and would have a terminating effect on management – if the Public Trustee, as manager, already enjoyed the power to apply to the court to sell real property, absent guardianship status.

[39] The plain meaning of s. 14A of the *Public Trustee Act* does not suggest that the Public Trustee, as manager, may seek an order to sell real property. That power is reserved for someone formally approved by the court as a guardian.

Other Statutes:

[40] The Public Trustee proposes that where the evidence establishes that disposal of property is "necessary for the maintenance and support of a person under disability; is in the best interest of a person; and the property is being exposed to waste, dilapidation, or is wholly unproductive", she should be able to apply for an order of/for sale from the court. She submits that an adult in need of protection is protected by the requirements of *Civil Procedure Rule 71.11* regarding the disposition of proceeds and Rule 71.12, which requires a report to the court on the disposal of real property. In addition, the court has general authority to impose additional terms and conditions in any order that may be granted.

[41] The Public Trustee characterizes the *Adult Protection Act* as the "gateway" to draw upon other sources of statutory authority. She faults the Chambers judge for a restrictive interpretation of the authority under the *Public Trustee Act* when he said:

> [21] I agree that when the Public Trustee is managing an estate under the *Adult Protection Act*, they are acting as trustee. However, their authority is limited by the terms of the trust, which is created by that legislation. For the reasons outlined above, those powers do not include the power of sale of real estate.

[42] She then advances an argument based on the many roles which the *Public Trustee Act* permits her to undertake, and in particular those matters referred to in s. 4(3)(g) of that *Act* which allow her to "… act in such other capacity and do such other acts, matters and things as the Public Trustee is authorized or required to do … by the *Civil Procedure Rules*, by order of a judge, by order of the Governor in Council, under this Act, or under any Act."

[43] With respect, this submission describing what the Public Trustee *may* do, does not tell us what the Public Trustee can do in this case. As s. 5 of the *Public Trustee Act* shows, application to the court must first be made before the Public Trustee can assume most of these roles. The Legislature has not provided the Public Trustee with power to sell or apply to the court to authorize a sale of the

property of an incompetent person under the *Public Trustee Act*. Therefore it is unsurprising that there is no mechanism in this statute by which the Public Trustee may do so. The Public Trustee seeks to rely on *Civil Procedure Rule 71* and/or the *Judicature Act*, and/or the *Trustee Act* as that mechanism. For reasons that follow, these arguments must fail.

Civil Procedure Rule 71:

[44] The Public Trustee argues that *Civil Procedure Rule 71* permitted the Chambers judge to authorize the sale of Ms. W.'s home since she was a person under a disability. That Rule provides in part:

> **GUARDIANSHIP**
>
> **Scope of Rule 71**
>
> **71.01 (1)** A person may seek any of the following, in accordance with this Rule:
>
> (a) appointment of a guardian under the *Guardianship Act* for a child;
>
> (b) appointment of a guardian under the *Incompetent Persons Act* for a person who is not capable of managing their affairs;
>
> (c) disposal of property owned by a person who is not capable of managing their affairs;
>
> (d) approval of a contract on behalf of a child without a guardian.
>
> …

[45] *Civil Procedure Rule 71* is prefaced with the title "Guardianship". In contrast, the Public Trustee notes that Rule 71.01(1) provides: "a *person* may seek any of the following in accordance with this Rule … (c) disposal of property owned by a person who is not capable of managing their affairs". But the Court should consider the title "Guardianship" when interpreting the Rules. In *Halifax (Regional Municipality) v. Ofume*, 2003 NSCA 110, Justice Saunders observed:

> [33] In addition, the heading to this rule indicates that the rule sets out the "right" to act in person or through a solicitor. In contrast, the heading to the corresponding Ontario rule reads "Where Solicitor is Required". Ruth Sullivan, in

> *Sullivan and Driedger on the Construction of Statutes*, 4th Ed., Butterworths: Ottawa, 2002, states at p. 305 that :
>
> > ***The view favoured in recent judgments from the Supreme Court of Canada is that for purposes of interpretation headings should be considered part of the legislation and should be read and relied on like any other contextual feature***.
>
> [34] Read in its appropriate context under the heading of "Right to sue or defend in person or by a solicitor", rule 9.08 cannot be said to be an unambiguous bar against non-lawyers representing parties before the court. In my opinion the ambiguity inherent in the permissive language of the rule, as reinforced by the permissive heading, renders the rule incapable of trumping the inherent jurisdiction of the court. [Emphasis added]

[46] The Public Trustee asserts that the power to apply under Rule 71 is not limited to people who are guardians of the person in question. She submits that the ability of anyone to bring such an application, assuming the other criteria in the Rule are met, is "consistent with both the history of this Rule and further with case law respecting the inherent jurisdiction of the Court". She notes that Rule 71 was preceded by Rule 47 of the *Civil Procedure Rules*, 1972 which she submits gave the court a "broad discretion" which Rule 71was not intended to change.

[47] Rule 47 of the 1972 *Civil Procedure Rules* is entitled: "SALES BY THE COURT". The Rule is divided into three subsections. The first is headed "I. Estate of Person Under Disability". The second section (which need not concern us) is headed "II. Foreclosure, Sale and Possession". The third section is headed "III. Sales: General". In the new 2009 *Rules*, these three sections have been separated. As previously indicated, Rule 71 is headed "Guardianship". Rule 72 is entitled "Mortgages" and new Rule 74 deals with "Other Sales by the Court". The balance of Rule 71 incorporates some of what was previously Practice Memorandum No. 10 of the court under the 1972 Rules dealing with guardianship applications under the *Incompetent Persons Act*.

[48] In urging her point that the court enjoyed a "broad discretion" under former Rule 47 to order a sale of property of someone under disability, the Public Trustee relies on this section of former Rule 47:

> **47.03**
>
> (1) Where it appears that,

> (a) a disposal of any property is necessary for the maintenance, support or education of a person under disability, and any infant child, wife or dependant thereof;
>
> (b) the interest of a person under disability, and any infant child, wife or dependant thereof, will be substantially promoted by the disposal because of the property being exposed to waste, dilapidation, or being wholly unproductive;
>
> (c) there is any other reasonable cause for disposal;
>
> the court may make an order for the sale, mortgage, lease or other disposal of the property in such manner, on such terms, and with such restrictions, as it considers just.

[49] But the foregoing must be read in context. Rule 47 begins:

> **Estate of Person Under Disability**
>
> **Application for Sale, Etc**.
>
> **47.01** A person under disability, entitled to any interest in property, may ***by his guardian*** apply to the court for an order to sell, mortgage, lease or otherwise dispose of the property. [Emphasis added]

[50] Similarly, new Rule 71.10 also clarifies that "a ***guardian*** may make a motion for an order for the sale, mortgage, lease, or other disposition of property in the proceeding in which the guardian is appointed …" (emphasis added).

[51] Old Rule 47.01 must be read together with Rule 47.03. In other words, a party applying to sell the property of a person under disability must enjoy the status of a guardian in order to make such an application. Therefore, with respect, Rule 71 and former Rule 47 do not show that the Supreme Court enjoyed a "… long-standing jurisdiction to issue a discretionary order for the sale of real property for the benefit of a person under a disability, at the request of a trustee ***or other person*** who is not a guardian of the person under disability" (Public Trustee's Factum, ¶158 [emphasis added]).

[52] Before finishing with former Rule 47, it is helpful to look at Rule 47.14:

> **Power to order sale, etc., of property**
>
> **47.14** Where it appears necessary or expedient in a proceeding that any property be sold, the court may order the property to be sold and any party, bound by the

> order and having any interest therein, or who is in possession of the property or in receipt of the rents, profits or income thereof, shall, if the court so orders, join in the sale, conveyance or transfer, or deliver up the possession or receipts thereof, to the purchaser or person designated by the court. [E. 31/1]

[53] Rule 47.14 was modelled on former English Rule 31 and does not provide a "stand alone" basis for anyone to apply to the court to sell the property of a person under disability. For example, in *Deloisio v. Dolejs*, (1994), 137 N.S.R. (2d) 368 (N.S.C.A.), Justice Hallett described the relationship between Rule 47 and other statutory jurisdiction granted to the Court:

> [19] In addition, Civil Procedure Rule 47.14 to 47.17 gives a Supreme Court Judge broad power to order sales of property where it appears necessary or expedient and to direct how the sale is to be effected. ***The combined effect of the Partition Act and the Rules gave Justice Carver broad power respecting the sale*** of the property which power he exercised in making the order of February 21st, 1994. The order provided for a reasonable method of ascertaining market value and provided that either party could apply to the court for determination if any offer received was reasonable. [Emphasis added]

Deloisio involved a statutory right under the *Partition Act* to seek a sale of property.

[54] The predecessor to English Rule 31 was considered in *Re Robinson* (1886), 31 Ch.D. 247, where Justice Pearson declined to order a sale (at p. 249):

> … I do not think that the rule gives the Court any power to direct a sale in a case ***in which it had no power to do so previously*** … I think the rule means that the Court may order a sale whenever it is necessary ***for the purposes of the action***, and that it was not intended to enable the Court to sell real estate when otherwise it had no power to do so. [Emphasis added]

[55] Justice Pearson would not order a sale under Rule 31's antecedent but he observed that such an order could be granted if the parties applied under either the *Partition Act* or the *Settled Land Act*. In other words, the court's power of sale was a remedy consequent upon the parties exercising a substantive right. The court's power of sale was not a "freestanding jurisdiction". It is not expanded by the *Civil Procedure Rules*. As Lord Brandon said in *F. v. West Berkshire Health Authority*, [1989] 2 All E.R. 545 at p. 556:

> Rules of court can only, as a matter of law, prescribe the practice and procedure to be followed by the court when it is exercising a jurisdiction which already exists. They cannot confer jurisdiction, and, if they purported to do so, they would be *ultra vires*.

The Judicature Act:

[56] The Public Trustee supplements her argument that the Supreme Court of Nova Scotia had a "long-standing jurisdiction to issue a discretionary order for the sale of real property for the benefit of a person under a disability, at the request of a trustee or other person who is not a guardian of the person under a disability", by reference to the court's jurisdiction under s. 41(g) of the *Judicature Act*, R.S.N.S. 1989, c. 240:

> … the Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided;

No reported case law is offered in support of the proposition that anyone could seek an order of sale from the court of real property owned by a person under disability. Such a power has been expressly rejected by the English courts. In *Re K's Settlement Trusts*, [1969] 1 All E.R. 194, at 199, Justice Megarry (as he then was) approved the following excerpt from *Re Grimmett's Trusts* (1887), 56 L.J. Ch. 419 at p. 428:

> "I do not think that, under the present circumstances, the Court has jurisdiction to deal with the property of the lunatic. The jurisdiction of the Chancery Division to direct the application of the property of a person of unsound mind for his maintenance exists only when either money belonging to him is in Court or there is some action or other proceedings, such as an administration action, pending which gives the Court control over his property …"

[57] Invoking the general jurisdiction of the court does not answer the question of whether the court enjoys a broad power of sale in cases such as this. In fact, as

explained further below, the authority of the court to order a sale of property under its inherent or equitable jurisdiction is relatively limited.

The Trustee Act and Administrative Amendments:

[58] Section 51 of the *Trustee Act*, R.S.N.S., 1989, c. 479 grants authority to the court to assist ***trustees holding property*** by ordering a sale in certain circumstances:

> 51 (1) ***Where in the management or administration of any property vested in trustees***, whether before, on or after the tenth day of April, 1930, ***any sale***, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, ***is in the opinion of the Court or a judge expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the Court or a judge, may by order confer upon the trustees, either generally, or in any particular instance, the necessary power for the purpose***, on such terms and subject to such provisions and conditions, if any, as the Court or a judge may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income. [Emphasis added]

[59] This section first appeared in the 1930 amendments to the *Trustee Act*. It is a virtual copy of the 1925 amendments to the U.K. *Trustee Act* 1925 (Imp.) c. 19; see: *Re O'Brien* (1958), 15 D.L.R. (2d) 484 (N.S.S.C.), at p. 490, per Ilsley, C.J. Section 51 of the *Trustee Act* was an alternative ground for the relief granted in *Nathanson Estate* and *Wright*, discussed further below, (¶95 – 97). But s. 51 does not apply to this case.

[60] The Public Trustee became manager of Ms. W.'s estate by virtue of the *Adult Protection Act* – that status continues by virtue of s. 14A of the *Public Trustee Act*. As we have seen, the power of the court to authorize a sale at the instance of the Public Trustee in her management role is not specifically conferred upon the court by either the *Adult Protection Act* or the *Public Trustee Act*. Nor does the *Trustee Act* assist the Public Trustee because property must be "vested" in the Public Trustee, as the opening words of s. 51 require.

[61] As the discussion below reveals, (¶86) the court's equitable jurisdiction to "amend" a private trust is very limited. Section 51 of the *Trustee Act* ameliorates

that constraint by allowing the court to increase the power of the trustees to better implement the settlor's intention (Donovan Waters in *Waters' Law of Trusts in Canada*, 4th ed (Scarborough: Carswell, 2012) at p. 1370). No such policy could underlie the granting of management powers to the Public Trustee under the *Adult Protection Act* or the *Public Trustee Act*, because the Legislature can always amend those *Acts* to confer whatever powers it thinks fit. The statutory position of the Public Trustee in this case cannot be assimilated to that of a trustee of a private trust, any more than the Legislature can be considered a private settlor of property.

The Trustee Act – Vesting Orders:

[62] The Public Trustee protests that the Chambers judge failed to give reasons for declining to make a vesting order. She specifically cites ss. 31, 32 and 36 of the *Trustee Act*. Those sections provide in part:

> **Appointment of new trustee by Court**
>
> **31 (1)** The Court or a judge may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees or although there is no existing trustee, or although no trustee was appointed in a will containing provisions rendering a trustee necessary to carry them into effect.
>
> …
>
> **Vesting order as to land**
>
> **32** In any of the following cases, namely:
>
> (a) where the Court or a judge appoints or has appointed a new trustee;
>
> (b) where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person
>
> (i) is an incompetent person or person of unsound mind,
>
> (ii) is an infant,
>
> (iii) is out of the jurisdiction of the Court, or
>
> (iv) cannot be found;

(c) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land;

(d) where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead;

(e) where there is no heir or personal representative of a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead or where the heirs or personal representatives of such last mentioned trustee are out of the jurisdiction of the Court;

(f) where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement,

the Court or a judge may make an order, in this Act called a "vesting order", vesting the land in any such person in any such manner and for any such estate as the Court or a judge may direct, or releasing or disposing of the contingent right to such person as the Court or a judge may direct, provided that

(g) where the order is consequential on the appointment of a new trustee, the land shall be vested for such estate as the Court or a judge may direct in the persons who, on the appointment, are the trustees; and

(h) where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person. *R.S., c. 479, s. 32; 2007, c. 23, s. 23.*

…

Deemed trustee or vesting if order for sale or mortgage

36 Where any court or judge gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein as heir, or under the will of a deceased person for payment of whose debts the judgment was given or

> order made, and is a party to the action or proceeding in which the judgment or order is given or made, or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act, and the court or judge may, if it is deemed expedient, make an order vesting the land or any part thereof for such estate, as that court or judge thinks fit, in the purchaser or mortgagee or in any other person. *R.S., c. 479, s. 36*.

[63] The Public Trustee does not cite any cases in support of her argument that these sections authorized the court to formally appoint her as trustee of Ms. W.'s estate or for an order "vesting" Ms. W.'s real property in her so as to facilitate sale of the real estate, (per ¶11 of the supplementary memorandum to the Chambers judge, incorporated by reference in ¶181 of the Public Trustee's factum).

[64] The foregoing sections are designed to alleviate procedural problems in the administration of trusts. They are remedial in nature. These sections are a result of late 19th century legislation in the United Kingdom, and subsequently in the Commonwealth, to address difficulties with the transfer of the assets of private trusts (see, for example, the discussion in *Waters'* at pp. 877-883). They assume the existence of a trust which requires administration. They do not create a trust where none exists. An applicant seeking a court appointment as a trustee must show a substantive right to that status – these sections permit the court to make an appointment, but do not confer a right on any particular applicant to seek an appointment.

[65] That is especially so here because, as discussed further below, the Public Trustee is not administering a private trust, but has managerial obligations flowing from her status as a statutory agent. In this case, we are not contending with inadequate drafting in a private trust which must be augmented by resorting to "inherent", equitable or other statutory jurisdiction to better implement a settlor's intention – an intention that typically cannot be "amended" by the settlor – who may be dead. The situation of the Public Trustee acting under statutory authority is utterly different. The Legislature can amend the authority it confers on the Public Trustee at will, if it considers it necessary or desirable to do so. The Chambers judge did not err in ruling that the vesting sections of the *Trustee Act* are neither appropriate nor applicable to the Public Trustee as a statutory manager of Ms. W.'s property.

Inherent Jurisdiction – Overview:

[66] Much of what underlies the Public Trustee's submissions assumes that the court can supply supposed deficiencies in the relevant legislation in this case. But the court cannot amend legislation or, subject to constitutional constraint, disregard it. Generally speaking, the court's inherent jurisdiction cannot overcome legislative clarity. Such is the case here.

[67] The Public Trustee submits that the Chambers judge took too narrow a view by simply considering the *Adult Protection Act* and the *Public Trustee Act*. However, it is well-settled that the court cannot rely on inherent jurisdiction if the Legislature has clearly addressed the question in issue: *Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al*, [1976] 2 S.C.R. 475 at p. 480; *Ofume, supra* at ¶24,. The references to a power of sale in favour of the Public Trustee elsewhere in the *Public Trustee Act* inexorably lead to the conclusion that the Legislature withheld that power where the Public Trustee manages property under s. 14A of that *Act*. Resort to the Court's inherent jurisdiction to accommodate the absence of a statutory power of sale would collide with the Legislature's obvious choice to withhold that power in this instance.

[68] But even if a statutory analysis would not preclude an appeal to inherent jurisdiction, the Public Trustee's reliance on inherent jurisdiction is misplaced here.

[69] "Inherent jurisdiction" is the occasional refuge of the anxious litigant unsuccessfully searching for precedent. It is a much misused expression. As this Court noted in *Goodwin v. Rodgerson*, 2002 NSCA 137, it has classically been described as procedural in nature:

> [17] The inherent jurisdiction of the court has been described as a vague concept and one difficult to pin down. It is a doctrine which has received little by way of analysis, but there is no question it is a power which a superior trial court enjoys to be used where it is just and equitable to do so. It is a procedural concept and courts must be cautious in exercising the power which should not to be used to effect changes in substantive law.

[70] In *Ocean v. Economical Mutual Insurance Co.*, 2009 NSCA 81, the Court quoted from former Dean of Dalhousie Law School, William Charles:

[73] William H. Charles, Q.C. wrote in an August 2005 paper titled "Inherent Jurisdiction of Nova Scotia Courts", commissioned by the Nova Scotia Law Reform Commission at pp. 7-8:

> . . from the somewhat narrow limits of punishing contempt and controlling abuse of court process the concept of "inherent jurisdiction" has been used to justify, among other things, the variation of trust, the safeguarding of children, the provision of remedies in situations where the statutory provisions do not, to supervise as well as protect and assist inferior courts and tribunals and the filling of gaps in statutes. This ever expanding jurisdiction is bound to create concern among legal observers that courts may think they have "inherent jurisdiction" to order anything necessary to do justice in any proceeding. An examination of the language used by some courts to describe their "inherent jurisdiction" could easily give this impression although the House of Lords has clearly rejected such an open-ended approach.
>
> At the other end of the spectrum is the suggestion by Lord Diplock that:
>
> > "It would, I think be conducive to legal clarity if the use of these two expressions (inherent power and inherent jurisdiction) were confined to the doing by the court of such acts which it needs must have power to do in order to maintain its character as a court of justice."
>
> Part of the reason for what appears to be an ever-broadening scope of the concept of "inherent jurisdiction" is the tendency of some courts to fail to realize the difference between "inherent jurisdiction" and 1) the general jurisdiction of a superior court as a court of common law and equity 2) the exercise of the Crown prerogative *vis a vis* inferior courts and tribunals as well as *parens patriae* regarding children and 3) the maxim "where there is a right there is a remedy" (*ubi ius ibi remedium*).

[71] The Court concluded:

> [77] Inherent jurisdiction does not bestow an unfettered right to do what, in the judge's opinion, is fair as between the parties. A court's resort to its inherent jurisdiction must be employed within a framework of principles relevant to the matter in issue … (citations omitted)

[72] Accordingly, we need to look at specific and contextual examples of the court's exercise of what is sometimes loosely called "inherent jurisdiction."

Inherent Jurisdiction – Incompetent Persons:

[73] The Supreme Court's inherent jurisdiction over incompetent persons is distinct from that applying to trusts. As the Supreme Court of Canada noted in *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, this jurisdiction has a special and ancient history going back at least to the 14th century:

> 32 The origin of the Crown's *parens patriae* jurisdiction over the mentally incompetent, Sir Henry Theobald tells us, is lost in the mists of antiquity; see H. Theobald, *The Law Relating to Lunacy* (1924). *De Prerogativa Regis*, an instrument regarded as a statute that dates from the thirteenth or early fourteenth century, recognized and restricted it, but did not create it. Theobald speculates that "the most probable theory [of its origin] is that either by general assent or by some statute, now lost, the care of persons of unsound mind was by Edw. I taken from the feudal lords, who would naturally take possession of the land of a tenant unable to perform his feudal duties"; see Theobald, *supra*, p. 1.
>
> 33 In the 1540's, the *parens patriae* jurisdiction was transferred from officials in the royal household to the Court of Wards and Liveries, where it remained until that court was wound up in 1660. Thereafter the Crown exercised its jurisdiction through the Lord Chancellor to whom by letters patent under the Sign Manual it granted the care and custody of the persons and the estates of persons of unsound mind so found by inquisition, i.e., an examination to determine soundness or unsoundness of mind.

[74] Importantly, the English courts did not exercise jurisdiction over incompetents by virtue of inherent jurisdiction, but only as delegates of the Chancellor exercising Sign Manual jurisdiction and later under specific legislation.

[75] In the case of Nova Scotia, the governor assumed the Royal jurisdiction over the mentally incompetent: Beamish Murdoch, *Epitome of the Laws of Nova Scotia*, vol. 4 (Halifax: Joseph Howe, 1833) at p. 44.

[76] In 1851, the Legislature provided for the appointment of a guardian of the person and estate of those who were not competent. Such applications were made to the Nova Scotia Supreme Court: *Of the Custody and Estates of Lunatics*, R.S.N.S., 1851, c. 152.

[77] It was not clear whether the Crown's prerogative jurisdiction over incompetent persons or their property was exercised by the superior courts in Nova Scotia prior to Confederation. In *R. v. Martin* (1854), 2 N.S.R. 322 at 324 (N.S.C.A.), C.J. Halliburton affirmed the *Crown's* jurisdiction over the person of an incompetent, but did not claim that jurisdiction for the *court*:

> The Crown as the *parens patriae* is entitled, by its inherent prerogative, to the custody of all insane persons, for the purposes of protecting the community.

[78] Nor do the Nova Scotia *Judicature Acts* specifically refer to jurisdiction over the persons or property of an incompetent or the British Chancellor's Sign Manual jurisdiction (¶73-74 above). This is in contrast to other provinces which specifically refer to this jurisdiction in their *Judicature Acts* (see cases cited by Gerald B. Robertson, *Mental Disability and The Law in Canada*, 2d ed (Toronto: Carswell, 1994) at pp. 8 and 124 – specifically notes 5, 6 and 66, respectively).

[79] But as we have already seen, assuming, without deciding, that the Crown's *parens patriae* jurisdiction regarding incompetent persons has passed to the Nova Scotia Supreme Court, that jurisdiction cannot be exercised to supplant clear legislative intent, (¶33 above).

[80] Even so, the law did not favour sale of an incompetent's property by a guardian. The law's assumption was that the incompetent person may regain capacity so that his property should be changed as little as possible unless necessity required otherwise: *Wood v. British Columbia (Public Trustee)* (1986), 25 D.L.R. (4th) 356 (B.C.C.A.); *Cunningham et al v. Public Trustee (Alberta)*, [1964] 46 D.L.R. (2d) 659 (Alta. C.A.). At ¶11 in *Cunningham* Lord Eldon is quoted from *Ex p Whitbread*:

> The Court does nothing wantonly or unnecessarily to alter the Lunatic's property, but on the contrary takes care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it …

See also cases and discussion in Robertson at pp. 88-90. As Robertson summarized (at p. 89):

> The importance attached to preserving the nature of the estate is reflected in the fact that in most jurisdictions a court-appointed property guardian cannot sell any

> part of the incompetent person's property without the express authorization of the court.

[81] This general policy in favour of preserving the incompetent person's property could give way to a sale if it was in the person's best interests. But even where real property might be sold (i.e., to preserve property of greater value), the court did not act without the involvement of a guardian or committee: see *Re: Sefton* (1898), 2 Ch. 378 (C.A.).

[82] Assuming this jurisdiction might be available in this case, it would be for a guardian or trustee to invoke it. For reasons developed below, the Public Trustee is neither.

"Inherent" Jurisdiction – Trusts:

[83] The Public Trustee says that the court's inherent jurisdiction has always permitted it to authorize the sale of trust assets in appropriate circumstances. As *Waters'* at p. 1363 notes:

> The inherent jurisdiction of the court is based on the principle of aiding the preservation of the settlor's trust and supporting the administration of its terms by the trustees. It is fundamental that the court will not write the trust for the settlor or testator, either in whole or substantial part; the court sees its role as support, not a creator.

[84] It might be preferable here to refer to the court's equitable jurisdiction respecting trusts, (per Lord Diplock's admonition quoted in ¶70 above).

[85] At common law, the court has little power to "amend" a trust. As the House of Lords said in *Chapman v. Chapman*, [1954] 1 All E.R. 798 at 802:

> . . .
>
> The major proposition I state in the words of one of the great masters of equity, Farwell, J. ([1901] 1 Ch. 885) , in *Re Walker* (1):
>
> > "I decline to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible."
>
> It should then be asked what are the exceptions to this rule. They seem to me to be reasonably clearly defined. There is no doubt that the Chancellor (whether by

> virtue of the paternal power or in the execution of a trust, it matters not) had, and exercised, the jurisdiction to change the nature of an infant's property from real to personal estate and vice versa, though this jurisdiction was generally so exercised as to preserve rights of testamentary disposition and of succession. Equally, there is no doubt that, from an early date, the court assumed the power, sometimes for that purpose ignoring the direction of a settlor, to provide maintenance for an infant, and, rarely, for an adult, beneficiary. So, too, the court had power in the administration of trust property to direct that by way of salvage some transaction unauthorized by the trust instrument should be carried out. Nothing is more significant than the repeated assertions by the court that mere expediency was not enough to found the jurisdiction. Lastly, and I can find no other than these four categories, the court had power to sanction a compromise by an infant in a suit to which that infant was a party by next friend or guardian ad litem. This jurisdiction, it may be noted, is exercisable alike in the Queen's Bench Division and the Chancery Division and whether or not the court is in course of executing a trust.

[86] There is an interesting and important history of the relationship between the court's equitable jurisdiction involving private and public (i.e., charitable) trusts and that jurisdiction's augmentation by statute. For example, *Chapman* prompted the U.K. Parliament to pass the *Variation of Trusts Act* 1958, c. 53 copied in Canada, including in Nova Scotia (see *Waters'* at p. 1362). But this history need not be recounted here because the Public Trustee is not a true trustee in this case and her management of Ms. W.'s property is not a true trust.

[87] The Public Trustee made oral submissions that her status as a "trustee" was the "essence" of her submission. In the foregoing excerpt from his decision, (quoted at ¶41 above) the Chambers judge appeared to agree; but that term in this case can only be ascribed to the Public Trustee in a special and restricted sense.

[88] The Public Trustee is not a true trustee of Ms. W.'s estate. Cases discussing guardianship explain why this is so.

[89] In *Re Creelman Estate* (1973), 40 D.L.R. (3d) 306 (N.S.S.C.T.D.), Justice Hart discussed the fiduciary nature of guardianship (at ¶8):

> Guardianships under whatever authority they arise have always been considered by the Courts to be trusts and have therefore come under the scrutiny and control of the Courts of equity …

[90] After citing a passage from *Eversley on Domestic Relations*, he then went on (at ¶9) to quote from the Austin Scott, *The Law on Trusts*, 3rd ed vol. 1 (Boston: Little Brown, 1967) at pp.71-72:

> **A guardian** of the property of a person who is under an incapacity **is a trustee in the broad sense of the term**. He is under a duty to his ward to deal with the property for the latter's benefit. Like a trustee, a guardian is a fiduciary. **He is not, however, a trustee in the strict sense**. **He is entrusted with the possession and management of his ward's property but he does not take title to it.** Actions against third persons with respect to the property are brought in the name of the ward, whereas trustees sue in their own names. The functions of guardians are narrower than those of trustees. A guardian is appointed only if the ward is under an incapacity such as infancy, insanity, and in some states where he is a spendthrift, and continues only during such incapacity. **His duties are fixed by law and are not, as in the case of a trust, dependent upon the manifestation of intention of a former owner of the property**. The relationship of trustee and beneficiary is one which, as has been stated, is an outgrowth of the peculiarity in the Anglo-American system of law of separate courts of law and equity. The idea of guardianship is a much more nearly universal concept.
>
> [Emphasis added]

More recent editions of *Scott on Trusts* are to similar effect.

[91] It is important to notice the distinctions between a trustee and a guardian in the emphasized language of this quotation. They aptly describe the status and role of a statutory agent or appointee like the Public Trustee in this case. She does not act under a private instrument expressing or implementing the intention of a settlor. She does not hold title to real property. Her status is fixed by statute.

[92] This distinction between a trustee proper and a guardian of property was approved by the British Columbia Court of Appeal in *Wood*, which considered *Creelman*. In *Wood*, the Public Trustee had been appointed committee (i.e., guardian) of Mr. Wood's estate under the British Columbia *Patients Property Act*. In summarizing the Public Trustee's position in that case (and relying on others), Gerald Robertson says this at p. 82:

> ***Although it has been suggested that property guardians have always been regarded as trustees, the balance of authority supports the view that they are statutory agents and not trustees***. The main reason for this view is that title to

> the estate remains vested in the mentally incompetent person and is not transferred to the property guardian. Even in jurisdictions in which the guardian is given all the rights, privileges and powers which the incompetent person would have if of sound mind, it has been held that the guardian is still only an agent and not a trustee. [Emphasis added]

[93] The source of a statutory agent's authority is the legislation which appoints him. Again, Robertson, at p. 84:

> In examining the nature and extent of the property guardian's powers, two issues should be distinguished. The first concerns what powers the property guardian possesses; for example, do they include the power to sell the incompetent person's property? This involves looking to the source of the property guardian's powers to see if the particular power exists. If it does, a second issue arises: in what circumstances can the power be exercised? This involves an examination of the principles which govern the exercise of the property guardian's powers.

[94] This has important implications in this case for the Public Trustee's claims to rely upon "inherent" and statutory jurisdiction to authorize a sale of real property.

[95] For example, the Public Trustee relies on the decision of Chief Justice Cowan in *Re Nathanson Estate*, [1971] N.S.J. No. 155 (N.S.S.C.T.D.):

> [21] Even apart from statute, there is an inherent power in the Court to authorize a trustee to sell trust property, in cases where no power of sale is conferred upon the trustee, or even in cases where he is specifically directed not to sell the trust property. See *Scott on Trusts*, 3rd edition, para. 167, Vol. II, pp. 1270-1; para. 190.4, Vol. III, pp. 1565-8; *Halsbury's Laws of England*, 3rd edition, Vol. 38, pp. 1026-7.

[96] The Public Trustee also cites *Wright v. Saunders*, [1994] N.S.J. No. 412 (N.S.C.A.) which refers to *Nathanson Estate.*

[97] Both *Nathanson Estate* and *Wright* were cases of administrative powers in a private trust being augmented under the court's equitable jurisdiction and/or statutory jurisdiction granted by the *Trustee Act*. The Public Trustee here stands in a very different position. She is the manager of Ms. W.'s assets by virtue of acts of the Legislature. Her status as Public Trustee and her specific role as a manager of assets, are creatures of legislation. While her obligations may be described as

fiduciary, flowing from the authority she enjoys under legislation, she is not vested with any real estate and she does not hold Ms. W.'s house "in trust". Accordingly, the Public Trustee cannot resort to inherent or equitable jurisdiction to supplement a trust status that she does not have.

Conclusion:

[98] I have much sympathy with the predicament in which the Public Trustee finds herself – both in this case and in similar cases. The Public Trustee has made a valiant argument to draw upon the court's inherent jurisdiction, together with jurisdiction granted under statute, to permit the sale of Ms. W.'s home. But in my view neither the legislation cited nor the inherent jurisdiction relied upon can assist the Public Trustee in this case. The remedy sought is not within the power of the court to grant. The necessary statutory changes to give the Public Trustee proper authority to sell real property in circumstances such as arise here, are a matter for the Legislature. I would dismiss the appeal.

Bryson, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.