

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Nova Scotia (Public Trustee) v. I.W., 2013 NSSC 134

**Date:** 20130429

**Docket:** Hfx No. 412943

**Registry:** Halifax

**Between:**

The Public Trustee (a corporation sole as constituted by the  
*Public Trustee Act*, Chapter 379, Revised Statutes of Nova  
Scotia, 1989)

Applicant

v.

I. W.

Respondent

**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

**Judge:** The Honourable Justice Michael J. Wood

**Heard:** March 19, 2013 (in Chambers), in Halifax, Nova Scotia

**Written Decision:** April 29, 2013

**Counsel:** Shannon Ingraham-Christie, for the Applicant  
No one appeared for the Respondent

**By the Court:**

[1] On March 19, 2013, the Public Trustee made an application in Chambers to authorize the sale of property owned by I. M.W.. As grounds for the order, the Public Trustee relied on s. 13 of the *Adult Protection Act*, RSNS 1989, c. 2, *Civil Procedure Rule 71* and s. 4 of the *Public Trustee Act*, RSNS 1989, c. 379. I did not grant the order and advised the Public Trustee that I would provide written reasons, which I am now doing.

**BACKGROUND**

[2] Based upon the evidence filed and representations of counsel for the Public Trustee, it appears that I. M.W. is seventy-six years of age and is the joint owner of property located at Westmount, Nova Scotia, with C. W.. Although they are married, Ms. W. and Mr. W. have been living separate and apart for approximately fourteen years.

[3] In July, 2012, the Minister of Health and Wellness obtained an interim order of this Court declaring Ms. W. to be an adult in need of protection, pursuant to the *Adult Protection Act*. She was taken into care and currently resides at a long term care facility in Sydney. The interim order expired in the fall of 2012 and was not extended.

[4] On August 14, 2012, the Minister of Health and Wellness provided notice to the Public Trustee, in accordance with s. 13(1) of the *Adult Protection Act*, which states:

**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.

[5] In response to that notice, the Public Trustee determined that her intervention was appropriate and assumed management of Ms. W.'s estate pursuant to s. 13(2) of the *Act*.

[6] According to the affidavit filed by the Public Trustee, Ms. W.'s monthly income is sufficient to pay her accommodation fees at the care facility where she resides and leave a surplus of approximately \$300.00 each month. She also has approximately \$6,000.00 in savings.

[7] Counsel for the Public Trustee indicated that the total equity in the Westmount property, after payment of encumbrances and sale expenses, is approximately \$15,000.00. Ms. W. is also a joint owner of the former matrimonial home in which Mr. W. now resides. Although no appraisal information was filed, counsel advised that this property is worth approximately \$65,000.00, and has no encumbrances.

[8] Mr. W. apparently wanted to sell the Westmount property and obtain his share of the equity. The Public Trustee agreed that the property should be sold and arranged for appraisal reports which indicated a value between \$58,000.00 and \$65,000.00. The property was listed for sale in December, 2012, at an asking price of \$68,900.00. In January, 2013, an agreement of purchase and sale was entered into to sell the property for \$60,000.00. That agreement had been scheduled to close on March 20, 2013.

[9] As part of the materials filed in support of the application, the Public Trustee provided a Geriatric Medicine Followup Report prepared in October, 2012. After reciting the clinical observations, the author sets out their impression as follows:

IMPRESSION:

This is a 75-year-old woman who definitively has some vascular cognitive impairment, dementia. I do believe this has been happening over a longer period of time; however, because she was living alone nobody was able to see that. Later on her condition was out of control. She was skipping medication and she was probably in a full-blown delirium.

In my opinion she cannot live by herself and definitively she would need supervision. She is still very angry and she is slowly settling down. Probably she would never make peace that she is in a nursing home.

[10] The report then goes on to make some recommendations with respect to adjustments in her medication.

[11] In response to my inquiries concerning Ms. W.'s family, counsel for the Public Trustee indicated that the sale of the property was supported by one of Ms. W.'s two daughters. The other daughter was described as being estranged and opposed to the sale on the basis that she had been promised that she could reside in the property. This daughter had taken no steps to advance that claim.

## **ANALYSIS**

[12] This application raises the issue of the authority of the Public Trustee to sell property when acting pursuant to the *Adult Protection Act*. Section 13(2) of that legislation describes the powers of the Public Trustee as follows:

### **Powers of Public Trustee**

**13(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.

[13] The position of the Public Trustee is that the power to manage the estate of Ms. W. carries with it the authority to sell real estate, even though there is no

express statement to that effect in the legislation. In addition, she argues that preserving and protecting the assets of Ms. W. includes the ability to sell her interest in the Westmount property so that it does not deteriorate. In this case, there was no evidence that the property had, in fact, been damaged, or that there was any imminent risk of harm to it. In her submissions, counsel for the Public Trustee advised that it was a burden and inconvenience on family members to visit the house and ensure that it was secured and heated.

[14] It is important to consider the powers of the Public Trustee in the context of the purpose of the *Adult Protection Act*, which is set out in s. 2:

**Purpose of the Act**

2 The purpose of this Act is to provide a means whereby adults who lack the ability to care and fend for themselves can be protected from abuse and neglect by providing them with access to services which will enhance their ability to care and fend for themselves or which will protect them from abuse or neglect.

[15] When the Minister receives a report that a person is an adult in need of protection, he may cause an assessment to be made by a medical practitioner. Following that assessment, the Minister may apply to court for an order declaring the person to be in need of protection and, if appropriate, authorizing the Minister to provide services to that person. It is important to note that pursuant to s. 9(5), the order expires six months after it is made, although it may be renewed for a further six months.

[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.

[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.

[20] Section 4 of the *Public Trustee Act* sets out the general powers of the Public Trustee. Section 4(1)(c) deals with their status as a trustee and provides:

**Powers of Public Trustee**

4(1) The Public Trustee may perform the duties of, and be, a

....

(c) trustee

(i) of the estate of a person or of a deceased person if appointed by order of a court,

(ii) either alone or jointly with any other person or persons to carry out a trust where he is appointed for that purpose

(A) by or in accordance with the instrument creating the trust,

(B) after the creation of the trust with the consent of the majority of the persons beneficially interested in the trust who are for the time being of age and capable in law of giving a valid consent, or

(C) by order of a court;

[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.

[22] *Civil Procedure Rule 71*, which is also relied upon by the Public Trustee, is entitled "Guardianship". *Rule 71.10* deals with disposition of property and states:

### **Motion or application for disposition of property**

**71.10** 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.

[23] This provision deals with the sale of property by a guardian and cannot be extended to the Public Trustee acting under the management authority given by the *Adult Protection Act*.

[24] In this case, there is not enough information to determine whether Ms. W. is incompetent and if a guardian ought to be appointed. The medical report from last fall does not really address the issue. If the Public Trustee or some family member wishes to make an application under the *Incompetent Persons Act*, they will have to file appropriate medical evidence and provide notice to Ms. W.'s family members. With the *Adult Protection Act*, it is not necessary that the court be satisfied that the person is incompetent, but only that they need protection. In addition, there is no requirement under that legislation to notify family members that an order is being sought or has been granted.

[25] One of the submissions of the Public Trustee was that the costs of a guardianship application should be avoided in order to leave more money in Ms. W.'s estate. In my view, this financial consideration is not relevant in deciding whether a power of sale exists when managing assets under the *Adult Protection Act*. Undoubtedly, there are many circumstances where the cost of a guardianship is a potential hardship for a family. I suspect in the majority of those cases, there are no *Adult Protection Act* concerns and so no opportunity to involve the Public Trustee through that statutory regime.

[26] If the Public Trustee is correct it would mean that where an adult is in need of protection and the Minister of Health and Wellness steps in it could lead to the liquidation of that person's assets without the necessity of incurring the costs of a formal guardianship. For all other families that option would not be available and a guardian would have to be appointed under the *Incompetent Persons Act* in order to sell the person's property. It is difficult to see the rationale for making such a distinction.



[27] The *Incompetent Persons Act* sets out a process for management of the affairs of an incompetent individual. There are a number of requirements to ensure the fairness of the process and that any affected persons receive notice. The court has a supervisory role over the guardian and the administration of the estate. The legislature did not intend to create an informal guardianship procedure with a resulting power of sale when it enacted s. 13 of the *Adult Protection Act*.

[28] I have concluded that the Public Trustee does not have the authority to sell Ms. W.'s real estate on the basis of the evidence and applicable statutory provisions and, for this reason, I have dismissed the application.

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Wood, J.