IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 0027 OF 2014 ASCJ

BETWEEN	KJ	PLAINTIFF
AND	MC	DEFENDANT

AND BY WAY OF COUNTERCLAIM

BETWEEN	MC	PLAINTIFF BY COUNTERCLAIM
AND	KJ NC LMc	DEFENDANTS BY COUNTERCLAIM

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 4TH AND 12TH DAY OF SEPTEMBER, 2014 AND 24TH OCTOBER, 2014

APPEARANCES: Mr. James Kennedy of Samson and McGrath for the Plaintiff, (KJ).

Mr. Hector Robinson and Mr. Christopher Levers of Mourant Ozannes for the defendant, MC.

Disputed will – minor beneficiaries – whether court should appoint independent guardian ad litem.

JUDGMENT

1. These proceedings instituted by KJ, relate to the estate of DJ ("the deceased"), a wealthy businessman who resided and had substantial properties both in the Cayman Islands and in Florida, U.S.A., and who died on 23 November 2013 at his home in Grand Cayman.

2. The deceased was a widower at the time of his death. His wife had predeceased him on 30 May 2010. He is survived by two adult sons, the plaintiff KJ (now 47) and DJ Jr. (now 46) and by his sister, the defendant MC. The deceased is also survived by his two minor children, BJ and AJ, twins, now age nine.

3. MC has been appointed both by this Court (per order of Williams J. on the 23rd December 2013 and 29th January 2014 and by the Florida Court, as the guardian of BJ and AJ who are both now in her custody, care and control. They reside with her and her husband in Florida, a circumstance which has also been approved by the Orders of Williams J.

4. Save for the proceeds of a very valuable insurance policy, BJ and AJ will, indisputably, be the only heirs to the estate of the deceased.

5. There are nonetheless, already joined in these proceedings and in Florida, disputes over the deceased's estate which I must now briefly describe.

6. The proceeds of the insurance policy are the subject of the DJ Irrevocable Trust No. 2 dated 24 July 1992 ("the Insurance Trust"), of which the beneficiaries are stated to be the descendants of KJ and DJ Jr. That came about by an amendment to the Insurance Trust executed when the deceased was still alive and by which he sought to remove KJ and DJ Jr. and substitute them as beneficiaries of the Insurance Trust with their children. The Insurance Trust is said to have a value of about 8 million dollars payable under two life insurance policies on the life of the deceased.

7. KJ has filed a complaint in the Florida Court by which he challenges the amendment to the Insurance Trust, alleging that the amendment is invalid due to fraud in its execution; that is: that his signature on the instrument was forged.

8. MC is named as a defendant to that complaint in her personal capacity and as successor trustee of the Insurance Trust. BJ and AJ are also named as defendants, as are KJ's own children who are among the substitute beneficiaries.

9. There are further contentious proceedings before this and the Florida Courts.

10. By petition dated 6 December 2013, MC applied to the Florida Court to have the deceased's will dated 1 June 2012 (the "2012 Will") admitted to probate ("the Florida Probate Action"). The 2012 Will would appoint MC as personal representative with her son Justin to fill that role, if she were unable or failed to act. The 2012 Will would dispose of the entirety of the proceeds and assets of the deceased's estate wherever they may be, save for the proceeds of the Insurance Trust.

11. By Counter-Petition and Answer in the Florida Probate action, KJ challenges the validity of the 2012 Will. In KJ's Answer, the basis for his challenge is a document which he has propounded before the Courts here and in Florida as being the Cayman Will of the deceased ("the Cayman Will"); the Will which is itself the subject of the present action in which KJ seeks to have it admitted to probate by this Court and in which its validity is challenged by MC. She alleges that the Cayman Will is a forgery.

12. On 1 July 2014, during the course of KJ's deposition in the Florida Probate Action, KJ's counsel, Mr. Michael Sasso, after consultation with him, stipulated on the record that KJ is no longer seeking to have the Cayman Will admitted to probate in Florida.

13. Despite that history in the Florida Probate Action, KJ still advocates for the validity of the Cayman Will in these proceedings.

14. The Cayman Will purports to bequeath the Deceased's Cayman property to BJ and AJ (in keeping with the 2012 Will) but (contrary to the 2012 Will) purports to vest guardianship of BJ and AJ during their minorities in KJ.

15. Significantly also, the Cayman Will purports to appoint KJ as executor.

16. Thus, if granted probate, the Cayman Will would vest the control of the Cayman assets in KJ for the benefit of BJ and AJ, even while their guardianship and so the determination of their welfare and needs wherever they may be, would also be vested in him.

17. It therefore became important that the validity of the Cayman Will be pronounced upon by this Court and so it was not surprising that MC instituted proceedings by way of counterclaim in this action for the determination of that issue.

18. However, by her later summons filed on 26 August 2014, she now seeks to take a different tack. First, she seeks to discontinue her counterclaim by which she sought a declaration that the Cayman Will is a forgery and invalid. She also would then seek an order granting to her letters of administration (with the Cayman Will annexed) of all the estate of the deceased within the Cayman Islands, in her capacity as Court-appointed guardian of BJ and AJ as the ultimate residuary legatees and devises of the deceased's entire estate.

19. This, although not a form of relief that would require the Court to declare the Cayman Will to be an invalid forgery, would nonetheless involve the Court in setting aside the important provisions of the Cayman Will which purport to appoint KJ as executor and guardian of BJ and AJ.

20. KJ, through Mr. Kennedy, has registered his firm opposition to the granting of such orders to MC.

21. Against that background, I declined to hear MC's summons when it first came on for hearing on 4th September 2014. I then expressed my concern that I should be trying those issues raised on her summons without an independent guardian ad litem being appointed to represent the interests of BJ and AJ.

22. While MC has been appointed both by this and the Florida Courts as their guardian, it does not necessarily follow that she would be the most suitable person to represent their interests on the issues which arise for determination in respect of the Cayman Will or, for that matter, in the Florida Probate Action on issues arising in relation to the 2012 Will or the Insurance Trust.

23. In both sets of proceedings here and in Florida, she has been joined as a party in her personal capacity and personal allegations have been raised against her by KJ (and in Florida by his brother DJ Jr. as well).

24. However unwarranted those allegations may be found to be, and apart from anything else, it is foreshadowed in these proceedings before me that MC will seek orders for the indemnity of very large amounts of costs and expenses (some USD2 million so far), said to have been met by her personally on behalf of the Estate in relation to the various court proceedings here and in Florida.

25. While she disclaims her entitlement to administrative fees in Florida (and would do so if appointed as she proposes in Cayman), so long as a potential claim for such large amounts of costs is outstanding, it cannot be said that she is an entirely disinterested party so far as these and the other proceedings are concerned.

26. I am also concerned whether MC – in seeking the form of "compromise" of these proceedings that her 4th September summons implies and involving as it would this Court in accepting the Cayman Will for those purposes despite the allegations of forgery, should be allowed to represent the interests of the minors in these proceedings.

27. To put the issue another way: if the Cayman Will having been doubted by her allegations, is now to be relied upon to support MC's application for letters of administration with the Cayman Will annexed, should this Court not insist that the minors are separately represented by an independent guardian ad litem in the context of these proceedings, rather than by MC herself?

28. In these rather exceptional circumstances, I am satisfied that an independent guardian ad litem should be appointed. Having considered the matter in the light of written submissions both on behalf of KJ and MC by their attorneys, I am also satisfied that the requirements of the applicable Grand Court Rules for such an appointment are met.

29. As to those requirements, in the first place, it is indisputable that BJ and AJ are interested parties in these proceedings: they are the only beneficiaries of the Cayman Estate which the Cayman Will purports to affect and its other provisions would affect their guardianship.

30. It is therefore axiomatic that they should be represented in these proceedings and so Order 80 Rule 2 of the Grand Court Rules is engaged.

31. GCR O.80 r.2 provides:

"(1) A person under disability (that is: a person who is a child or a patient) may not bring, or make a claim in any proceedings except by his next friend and may not defend, make a counterclaim or intervene in any proceedings, or appear in any proceedings under a judgment or order, notice of which has been served on him; except by his guardian ad litem.

(2) Subject to the provisions of these Rules, anything which in the ordinary conduct of any proceedings is required or authorised by a provision of these Rules to be done by a party to the proceedings shall or may, if the party is a person under disability, be done by his next friend or guardian ad litem.

(3) A next friend or guardian ad litem of a person under disability must act by an attorney."

32. In these proceedings until now, it may be said that MC – as the Court-appointed guardian of BJ and AJ – has been entitled to and has been acting as their guardian ad litem as well. Certainly, there has been no limitation upon her appointment that would go to the contrary and pursuant to GCR O.80 r. 3 (6) (c), (which would recognise a copy of the order appointing her under the Children Law) she would ordinarily be regarded as the appropriate person to act as the guardian ad litem in proceedings of this kind affecting the minors in her charge. That being so, O.80 r3 (1) and (3) are engaged. They provide respectively that:

"3(1) Except as provided by paragraph (3) or (4) or by rule 6, an order appointing a person next friend or guardian ad litem of a person under disability is not necessary.

....

(4) Where a person has been or is next friend or guardian ad litem of a person under disability in any proceedings no other person shall be entitled to act as such friend or guardian as the case may be, of the person under disability in those proceedings unless the Court makes an order appointing him such friend or guardian in substitution of the person previously acting in that capacity."

33. Thus, in effect, it is advised by rules 3(1) and (4) that an appointment as guardian ad litem will not ordinarily be necessary where there is already appointed a guardian for the person under disability. But these rules do not negate the broad and well-established discretion in the Court to make another appointment. See the Notes to the Rules of the Supreme Court RSC 1999 Ed. at 80/3/8; where several of the cases recognising the discretion are discussed and a wide range of reasons for making a different appointment are recognized. The cases cited include Woolf v Pemberton (1877) 6 Ch. D. 19 where, although the natural father was preferred for appointment, the existence of the wide discretion in the court to appoint someone else was acknowledged.

34. Here, although she has been appointed guardian of BJ and AJ by the Court and her attorneys on her behalf have submitted that MC has no personal interest in the

outcome of the litigation that would be adverse to their interests, I have already expressed the reasons for my concern that an independent guardian ad litem should be appointed to represent the interests of the minors, as those interests might be affected by the Cayman Will which has been impugned.

35. An appointment of an independent guardian ad litem does not imply that MC either does not intend or is incapable of fulfilling her obligations nor do the rules require that that be shown to be the case. The fact that she seeks to withdraw her opposition to the validity of the Cayman Will does not imply this either. Indeed, she has sworn in her affidavit filed in Court that the only reason she has withdrawn her opposition is due to her concern about the impact that costly litigation would have on the estate; although this concern, she accepts, would be ameliorated if this Court does not grant partisan costs in these proceedings.

36. While I feel obliged to note that I have no reason to doubt this stated position of MC, the fact of the matter is that the application to be decided by her summons is one which now runs counter to her earlier position by which she raised a very serious allegation of forgery by way of her challenge to the Cayman Will. It is this circumstance that most clearly advises that the Court should have the involvement of an independent guardian ad litem on behalf of the minors, when considering whether it should accede to MC's application.

Written Consent

37. A further requirement of GCR O.80 r.3(6)(a) is that a written consent to be guardian ad litem must be filed in Court by the proposed guardian ad litem before the appointment can be made.

38. In this regard, I am advised by Mr. Robinson that a suitable person has been identified and has expressed his willingness to accept appointment. This is an experienced local attorney, Mr. Derek Jones of HSM Chambers.

39. I am prepared to recognise the suitability of Mr. Jones for appointment provided his written consent is filed pursuant to O.80 r.3(6)(a); implicitly of course acknowledging that he would be under no conflict of interest in accepting appointment.

40. As guardian ad litem, he will be expected to assist the Court in representing the interests of the minors with certain technical legal problems presented by MC's application as it relates to the impugned Cayman Will.

41. Primary among these and despite MC understandable concern to avoid expensive litigation, will be the question whether this Court can accept, for the purposes of the grant of letters of administration with Will annexed, a document which has been impugned as to its validity, without that question being first resolved.

42. There is also an immediately apparent jurisdictional issue to be resolved, viz: can a grant be made where the Cayman Will purports to name KJ as executor, in light of section 3(8) of the Succession Law? That subsection provides:

> *"Where a deceased person has left a will in which no executor is named, the Court shall make a grant of letter of administration with the will annexed"*

43. Section 32 of the Probate and Administration Rules (2008 Revision) may also arise for consideration, as might the discretion recognised as existing in the Court by Teague and Ashdown v Wharton (1871) 2 P & D 360, to pass over a named executor under old English legislation.

44. These matters will have to be considered in the light also of sections 8 and 9 of the Succession Law.

45. The question also arose before me whether, in light of the requirement of GCR O.80 r.2(3) that a guardian ad litem of a person under disability must act by an attorney, an attorney who is appointed can act by and for himself.

46. A similar problem was presented in In Re Cotorro Trust 1996 CILR 227 where this court appointed an experienced but unrelated local attorney to act as guardian ad litem of minor beneficiaries, notwithstanding the participation in the litigation of their natural parents and other close relations.

47. This Court accepted that in most circumstances it would be appropriate – as anticipated by the principles developed at common law in respect of Order 80 proceedings – to appoint as guardian ad litem a person who is "*a relation, connection or friend of the family and not a mere volunteer*", explaining the reasoning for that principle (at page 231) as:

> *"Those characteristics of a guardian ad litem are important for the obvious reason that the personal circumstances of the infant may need to be considered by the guardian in his conduct of the action...."*

48. However, presented then with the deeply divisive acrimony that prevailed between the adult relatives operating to render any of them unsuitable for appointment, an appointment was not made from within their ranks. Instead, an experienced local attorney was appointed in the dual capacity of guardian ad litem and attorney.

49. This was also practicable as it was found that the issue between the parties was one relating to "*the construction of the (trust) deed, of the amendments (to it) and for the consequential directions to the trustee (and would) involve only matters of law.*"

50. So too, as discussed above, will the issues in this case in large measure involve questions of law. And, to the extent that questions of fact might arise for the resolution of the disputed authenticity of the Cayman Will, they will arise only forensically and so appropriately within the purview of one who is trained in the law.

51. Considered from the point of view of the four factors identified in the case law as advising against an appointment to the dual roles, I take the same view here as I did of the matter in *In Re Cot*orro where those factors were discussed.

52. Citing *Loorham v Loorham* (1948) 65 W.N. (N.S.W.) 98 the four factors were identified thus (at p.232).

> *"There are four good reasons why a solicitor should not be appointed to the dual positions of guardian and solicitor for a minor: (1) a guardian cannot appear in person, and a solicitor cannot retain himself; (2) the guardian should be in a position to change his solicitor; (3) he should be in a position to question his solicitor's bill of costs; and (4) he should not be in a position where his interest might possibly conflict with his duty."*

53. I do not regard any of those factors as operating to doubt the prudence of the dual appointment in the circumstances of this case.

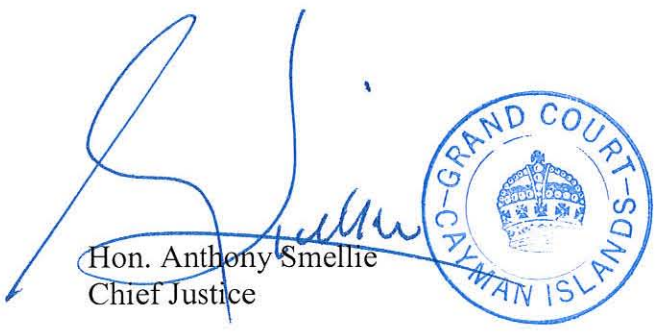
54. The first of course, itself begs the question of the suitability of an appointment. All I need say about that here is that the guardian ad litem is being appointed by the Court and chosen for the appointment especially because he is an experienced attorney.

55. As to the second, the discrete issues identified above as to be resolved in respect of the Cayman Will are not complex or such as probably to give rise to protracted litigation. A non-lawyer appointed as guardian ad litem would hardly likely have seen the need to change attorney during the course of these proceedings.

56. As to the third factor, here I intend to set the rate of fees for the guardian ad litem by agreement and MC and KJ will be at liberty to ask that the guardian ad litem's fees are submitted for taxation.

57. As to the fourth, the same considerations that would address concerns raised by the third factor also apply here – the only possible area of conflict that could arise would be over whether the proceedings may be protracted in order improperly to generate more fees. This is a factor which will also be diminished where, as here, the proceedings will be under close case management scrutiny by a judge.

58. With all the foregoing considerations in mind, I regard the appointment of an experienced local attorney as guardian ad litem, to be appropriate in these proceedings and am prepared to so order once the required consent has been filed.



Hon. Anthony Smellie
Chief Justice

November 24, 2014