

IN THE SUPREME COURT OF BELIZE, A.D. 2015

Action No: 17 of 2015

In the Matter of a Petition by AB and CD, sons, for an Order for an Inquisition as to whether EF, is of unsound mind and incapable of managing himself and his affairs.

And

In the Matter of S.4 of the Unsoundness of Mind Act, Chapter 122 of the Laws of Belize.

BETWEEN

AB **1st PETITIONER**

CD **2nd PETITIONER**

AND

EF **RESPONDENT**

Keywords: Unsoundness of Mind Act; Person of Unsound Mind; Mental Condition; Neurological conditions; Dementia; Application for Order to direct an inquisition; Incapability of Managing Self and Affairs; Burden and Standard of Proof of an application for an order directing an inquisition.

Before the Honourable Mr. Justice Courtney A. Abel

Hearing Dates: 29th June 2015
27th July 2015
16th September 2015
17th September 2015
9th October 2015.

Appearances:

Mrs Audrey Matura-Shepherd for the Petitioners

Mr Eamon Courtenay SC, and with him Ms. Iliana Swift for the Respondent

JUDGMENT
Delivered on the 9th day of October 2015

Introduction

- [1] This is an application under s.4 of the Unsoundness of Mind Act, Chapter 122 of the Laws of Belize. This provision has apparently not been judicially considered by the Supreme Court of Belize.
- [2] The present application is for an order directing an inquisition as to whether EF, the Respondent, an 84 year old resident of Belize, and who clearly has dementia and possibly other mental ailments, is of unsound mind and incapable of managing himself and his affairs. The Respondent's situation is complicated by a history of alcohol abuse.
- [3] This court was petitioned on the 27th May 2015 by two of his children, sons resident in Belize, and supported by one of his grandchildren, and the affidavit evidence of a general neurosurgeon¹. The petition is opposed by the Respondent's wife, GH Gabriel, and supported by the affidavit evidence of a Neurologist². The Petition apparently resulted from a meeting convened of the Respondent's children, a grandchild and former spouse.
- [4] The application has been bitterly contested by the lay witnesses on opposing sides and all of whom were subject to cross-examination, and the underlying motivation of which seems to be connected with control of the business and financial affairs of the Respondent over which the opposing parties are at odds and which are the subject of separate and different proceedings.

Issues

- [5] What is the applicable law and standard of proof required for the court to be satisfied to order the inquisition?

¹ Of Dr. Andre Joel Cervantes sworn to and filed on the 29th June 2015 and who was present and cross-examined in court.

² Dr John Sosa sworn to on the 24th June 2015 and filed on the 25th June 2015.

- [6] Whether there is sufficient evidence before this court to satisfy it that there should be an inquisition to determine whether the Respondent, EF, is of unsound mind and incapable of managing himself and his affairs?

Background

- [7] The Respondent was born on 17th May 1931 and is the father of four (4) children, of whom two, who are not parties to the present proceedings, are not resident in Belize (being residents of Canada) and none of whom are the children of the Respondent's present wife.
- [8] The Petitioners lived with the Respondent up to 2003 and has been in touch with him up until late 2014 or early 2015.
- [9] The Respondent has been married to his present wife, GH, with whom he has been living since 12th December 2012.
- [10] The Respondent has a history of chronic alcoholism which has complicated other medical problems with which he has been diagnosed.
- [11] In 1999 the Respondent was diagnosed with unusual brain activity which may then have been thought to be irreversible, and as a recovering alcoholic, dramatic changes were observed in his behavior with the result that he was taken to see a neurosurgeon, one Dr. Joel Cervantes.
- [12] Dr. Cervantes, a self- employed medical doctor with specialist training in Neuro-Surgery and Spine Surgery, gives medical treatment and performs surgeries on the brain, spine and nerves and apparently can determine whether a patient suffers from dementia.
- [13] Dr. Cervantes treated the Respondent from about 2010 until June 2014 when the Respondent's family members took him to see Dr. Cervantes.
- [14] In or about 2011 Dr. Cervantes diagnosed the Respondent with several neurological conditions and as a result of those conditions prescribed medical treatment for him.

[15] By letter dated 8th March 2014, at the request of the Respondent's then wife, GH, Dr. Cervantes wrote a letter addressed "To Whom It May Concern" in the following terms:

"RE: EF, Male, 82 years,

D.O.B. May 17th 1931

This serves to certify that Mr. EF ofhas been my patient since 2011. EF was diagnosed with Binswanger's Disease. This is a brain condition that is also called subcortical leukoencephalopathy. EF initially responded well to medical treatment but due to his continuous consumption of moderate to large quantities of alcohol he is now presenting significant loss of memory, intellectual functions and mood swings. His last visit was on the 7th September 2013. On that date an additional clinical diagnosis of Korsakoff's syndrome was integrated.

Due to non-compliance to medical treatment he was discharged from my care on the same date.

I also made it clear to his family members present that as of that last visitation date he was no longer able to make conscious decisions for himself."

[16] Thus Dr Cervantes is confirming that in 2013 the Respondent was diagnosed with Binswanger's Disease and Korsakoff 's syndrome which was worsening because of his consumption of alcohol contrary to medical advice. Doubt has been sought to be cast on the evidence as to whether it was Dr. Cervantes who initially diagnosed the Respondent with Binswanger's Disease and Korsakoff 's syndrome.

[17] Binswanger's Disease, according to Dr. Cervantes, is a disease of the brain which results from widespread, microscopic areas of damage to the deep layers of white matter in the brain. The damage is the result of the thickening and narrowing of arteries (commonly known as "hardening of the arteries") that feed the subcortical areas of the brain. It is apparently a systemic degenerative process that affects

blood vessels throughout the body resulting in a chronic and inadequate supply of oxygenated blood to the brain, causing death of brain tissue and shrinkage of the brain which increases with age and is compounded by alcoholism and other conditions. The result of this progressive process, it has been opined by Dr Cervantes, is gradual memory loss, loss of intellectual functions and inability to perform basic cognitive functions.

- [18] According to Dr. Cervantes, Dementia, of which Korsakoff's Syndrome is a form, is caused by abuse of alcohol and chronic loss of vitamin B-1 (thiamine). Dementia results from an ever worsening non-reversible degeneration of the part of the brain which is responsible for thoughts, memories, actions and personality. It can be slowed down but not stopped. When brain cells die in the affected area it results in cognitive impairment characterized as dementia which does not allow the person to live a normal day to day life and the person is unable to remember basic information and inhibits the person carrying out reasoning processes, normally leading to loss in ability to manage themselves and their affairs, especially those requiring some level of complexity.
- [19] Dr. Cervantes testified that the precursory stage of Dementia is reversible depending on the degree of alcohol consumption and subsequent deficiency of B-1, which has resulted; but Korsakoff's syndrome dementia is apparently not reversible.
- [20] Dr. Cervantes continued to see and treat the Respondent until June 2014 when the Respondent failed to comply with and breached certain protocols which Dr. Cervantes had prescribed and had caused him concern (as the neurological condition with which the Respondent had been diagnosed requires strict compliance and which is critical, as what is at stake is severe memory loss and irreversible brain damage to the point of mental incompetence).
- [21] By letter dated 27th May 2014, again at the request of the Respondent's wife, Dr. Cervantes wrote a more thorough letter of competency of the Respondent. For some unknown reason this letter was not placed before this court and therefore this court did not have the benefit of it.

[22] By email dated 6th June 2014 the Respondent's wife wrote to Dr. Cervantes in the following terms:

"Dr. Cervantes,

.....

Thank you for your very thorough and explanatory letter regarding [EF's] medical condition, Please keep all medical records, information, etc. confidential except to either [EF] or myself. If any records are to be left at Evergreen Pharmacy, please place them in a sealed envelope. I also, if any of [EF's] family members have communications with you, please do not divulge any info, nor write letters for them as to [EF's] mental health. The letter of incompetency written by you on March 8, 2014 came as quite a shock to us, especially when revealed to me by the chief immigration officer at the border near Chetumal instead of from you personally. I'm afraid that this situation with [EF's] son, might progress to legal situation. WE DO NOT WISH TO PUT YOU IN A POSITION WHERE YOU MIGHT HAVE TO APPEAR IN COURT. Your passion is healing, and we respect that greatly. So, we have tried to relieve you of some of the pressure.

We have obtained letters of competency on [EF's] mental capabilities (present time) from two other qualified physicians. Of course, they are not as familiar with [EF] as you are, but they are competent none the less. We figured that with three doctor's evaluations, it would take the pressure off any of you individually. Let's hope this strategy works.

We hope that you agree, and will still work with us for [EF's] medical needs.

That being said, I have a request.

We feel that your letter written on May 27th, is missing two important items.

1. *Time of admittance into rehab – the letter states the 1st quarter of 2014. Unfortunately the first letter of incompetency was also written during the 1st quarter, and date of release, April 16th.*

2. *Your letters fails to state that [EF] was seen by you as an outpatient twice after completion or rehab, and, at that time, you stated that you considered [EF] competent. Would you please include a statement to that effect. I believe the dates for these appts.. were may 3rd and May 17th)*

3. *Please respond as soon as you are able; preferably by Monday or Tuesday (the 7th or 8th June).*

Thank you,”

[23] By email dated 18th June 2014, Dr. Cervantes, responded politely and professionally to this letter as follows:

“With respect to including the dates for which [EF] was institutionalised (admitted and discharged) that would not be a problem.

This matter will most likely end up in court. My document is clear that [EF] will have to undergo an updated array of tests for me to analyze them and reach an objective conclusion as to his level of competence. I must clarify that [EF] has not completed rehabilitation as it is still an ongoing process. I respect the fact that other physicians are willing to give a professional opinion on the matter in whatever way they have gone about evaluating [EF]. I abide by due diligence and need to keep focused and objective in this matter. I cannot, have not and will not take sides. Am really busy as is with my work. If called to court I will just have to assist.

Keep me posted please.

Thanks, “

- [24] It is undisputed that the Respondent has some form of dementia which, along with the Respondent's age and his history of alcoholism, has contributed to the deterioration of his cognitive functions, but it is in dispute as between the experts as to whether he has Binswanger's Disease or Korsakoff's Syndrome and indeed the full extent of his mental competence.
- [25] Dr John Sosa, is a Doctor specialising in Neurology, and who testified on behalf the Respondent. The Respondent has been his patient since 5th June 2014, and Dr Sosa has opined that the diagnosis of Binswanger's Disease or Korsakoff's Syndrome is incomplete, and further that the Respondent is mentally competent and is able to make personal, financial and legal decisions.
- [26] Dr. Sosa, by letter dated 5th June 2014, a day before the email from the Respondent's wife to Dr. Cervantes, stated as follows:

“Re: [EF]

83 Years

This very good gentleman has been evaluated in our clinic. He has been seen by his treating doctor over the past few years. This is his first visit to this clinic. He is accompanied by his wife.

He gives a history of chronic alcoholism and of being treated for dementia. He has been off alcohol use for the past 2 months.

On examination he has no apparent gait abnormality. His physical exploration shows a gentleman of real age matching his chronological age. VS are within normal limits. His cardiovascular system is within normal limits.

Neurological exam shows mental status with a MMSE of 23/30. Cranial nerves are intact; muscle strength and tone are within normal limits for age, sensory and coordination are adequate at this time. There are no tremors.

Comment: patient with diagnosed dementia in treatment. He is capable at this time of making personal financial and legal decisions. Best Regards”

- [27] This opinion was based on a brain CT scan on the 24th June 2014 and Dr. Sosa has continuously observed the Respondent since then.
- [28] Subsequently Dr. Sosa confirmed his expressed opinion by a further letter dated 28th November 2014 (in which he stated that the Respondent “presents mild cognitive problems” and “is able to make decisions independently”).
- [29] By a more detailed letter dated 18th June 2015, Dr. Sosa, after referring to the CT scan, which observed “*significant diffuse cortico-subcortical cerebral atrophy*”, and continued observation of the Respondent, ruled out Binswanger’s Disease or Korsakoff’s Syndrome, but recommended psychological tests of the Respondent’s memory and other abilities. Dr. Sosa also stated that the Respondent needed further observation to see whether his condition stabilizes or worsens without alcohol, at which point the form of dementia (such as Alzheimer’s disease) may then be diagnosed. An anxiety disorder secondary to personal family stressors which had mildly deteriorated the Respondent’s cognitive function was also diagnosed.
- [30] According to Dr. Sosa in re-examination, persons with Korsakoff’s Syndrome can improve.
- [31] As already noted the evidence given by the Respondent’s children and one of his grandchildren, on their father’s mental condition and competence, starkly conflicted with the evidence given by his wife as well as the care which is provided to him by his present wife.
- [32] There is clearly a rift between the lay witnesses on two sides of the present Petition, to say the least, which includes the circumstances and possible, insinuated or speculated, ulterior motivations of the Respondent’s wife for the marriage and indeed for the present opposition to the Petition. It is not possible to resolve the conflicting and divergent evidence before this court as to their perceived views of the Respondent’s mental condition, his ability to care for himself and his affairs,

and the existing state and contributors to his alcohol consumption, and as such no attempt will be made to do so – as it is not necessary.

[33] The Respondent, who was present at all the hearings of the present application, did not himself give evidence in the case, so the opportunity was not afforded Counsel for the Petitioners nor indeed the court to examine nor form any view from direct observation about the Respondent’s state of mind or other mental, cognitive or physical capabilities. Any representations or demands which the Respondent made were done entirely through his Counsel.

[34] The Respondent, through his Counsel waived his right to demand an inquiry before a jury.

What is the applicable law and standard of proof required for the court to be satisfied to order the inquisition?

The Law

[35] The law applicable to the present dispute is governed by the Unsoundness of Mind Act³ (“the Act”).

[36] Section 4 of the Act provides that the Supreme Court:

“...may upon application by order direct an inquisition whether a person is of unsound mind and incapable of managing himself and his affairs.”

[37] It is undisputed that the burden of proof is clearly on the Petitioner as the person who has initiated the proceedings, but a question of law arises. what is the standard of proof? The latter issue I will deal with later.

[38] A ‘person of unsound mind’ is defined by the Act to be “*a person inflicted with a total or partial defect of the reason, or the perturbation thereof to such a degree that he is incapable of managing himself or his affairs*”⁴.

³ Chapter 122, Revised Edition 2000, Laws of Belize.

⁴ See Section 2 of the Act.

- [39] Both at the hearing of the application and of the inquisition itself, the subject of an application and inquisition has the right, unless found incompetent to form and express a wish for an inquisition⁵, to demand an inquiry by a jury⁶.
- [40] If an inquisition is ordered under the Act the Supreme Court may or may not make an order for the custody of persons of unsound mind so found⁷; and the inquisition itself, whether with or without a jury, may be conducted by a Judge, Registrar or other person appointed for that purpose⁸, but where a jury trial is ordered it is held in its civil jurisdiction as a civil action⁹.
- [41] Under the Act¹⁰, where the Supreme Court orders an inquisition before a jury or the Registrar or other person conducting the inquisition who certifies that an inquisition before a jury is expedient, the question at issue, being whether the person alleged to be of unsound mind is of unsound mind and incapable of managing himself or his affairs, and that issue shall be tried before a judge and jury in the court sitting in its civil jurisdiction.
- [42] Section 12(1) of the Act provides:

“the inquisition shall be confined to the question whether or not the person alleged to be of unsound mind is at the time of the inquisition of unsound mind and incapable of managing himself or his affairs, and no demeanor or state of mind at any time being more than two year before the time of the inquisition shall be receivable in proof of unsoundness of mind, or on the trial of any traverse of an inquisition, unless the person executing the inquisition otherwise directs.”

⁵ See Section 5 of the Act.

⁶ See Section 4 of the Act which applies where the person who is alleged to be of unsound mind is within the jurisdiction and Section 10 of the Act which applies where the person is not within the jurisdiction and requires that the inquisition shall be before a jury.

⁷ See Section 3 of the Act. Such an order may not be made where a person found to be of unsound mind is capable of managing himself and is not dangerous to himself or to others.

⁸ See Section 6

⁹ See Section 8 of the Act.

¹⁰ See Section 8

- [43] At the inquisition, the court may make order for the management of the estates of persons of unsound mind¹¹.
- [44] In **Re Cathcart**¹² the Court of Appeal of England had to consider the result of an actual inquisition, rather than, as in the present case, an application to determine whether an inquisition should take place. The result found was that the subject of the inquisition was at the time of inquisition of sound mind and incapable of managing herself and her affairs but the further issue for determination was who should bear the costs of the inquisition.
- [45] It is to be borne in mind, as an aside, that this case was heard before a lot of the major advances in psychology were made and at a time when now out-moded language or terms prevailed, which would not at the present time be considered acceptable. Such terms include “lunacy” and “lunatic”, and even in the present context “insane” and “insanity” were used and applied to persons of unsound mind.
- [46] Nevertheless Lindley LJ, the presiding judge in **Re Cathcart**, made the most illuminating following observations as to the nature of inquisitions, which may or may not be of interest and of relevance to the present proceedings:

“(1) It is obvious that no proceedings in lunacy can be justifiably taken against any one who is not reasonably supposed to be of unsound mind. A person may be unfit to manage himself or his affairs from various causes other than unsoundness of mind – e.g., various forms of illness, bodily injuries, old age, &c. But, however unfit, unless insanity can be discovered, proceedings by inquisition ought not to be had recourse to.

(2) If insanity is believed to exist, still proceedings by inquisition ought not to be had recourse to unless the supposed lunatic has shewn himself to be incapable of managing himself and his affairs. I regard this as a distinct head of inquiry. The line which separates sane from insane person is very difficult to draw; and, although in

¹¹ See Section 14 of the Act.

¹² [1892] 1 Ch. 466 at page 471.

most cases of inquiry it may be easy enough to say to which class the alleged lunatic belongs, in some cases it is very difficult. Unless a person's insanity is so marked and of such a nature that he is not able to manage himself and his affairs, he ought not to be found lunatic; and unless there is considerable evidence of his inability, no inquiry ought to be set on foot. "Inability to manage either himself or his affairs" is inability to manage both, Sects. 94 and 98 of the Act remove any ambiguity in the use of the word "and" instead of "or" in sect. 90 in the phrase "managing himself and his affairs." Whether a scientific expert would say that no person can be of unsound mind and still be capable of managing himself or his affairs, I do not know; but the Legislature has proceeded upon the assumption that a person may possibly be of unsound mind and may yet be capable of managing himself and his affairs. Hence the importance of attending to this matter in addition to the first.

(3) Assuming that there are ground for supposing a person to be insane, and to be incapable of managing himself or his affairs, it does not follow that there is any occasion to institute proceedings by inquisition against him. It is necessary to consider his position, and what management is wanted in his particular case, and whether his friends and relatives are bestowing such care and management as are required. A person who is insane, but who is living at home and is carefully and judiciously looked after may well be left alone; whilst an insane person in a different position, even if harmless to himself and others, may require protection which can only be afforded through the medium of an inquiry. A very difficult question arises, especially in the early stages of insanity, when medical supervision and treatment will probably lead to recovery, and when its absence may result in permanent illness. What ought to be done in such case. If the patient cannot be brought to see the necessity for, and will not submit to, temporary supervision and

enforced quiet and removal from all those excitements and surroundings which aggravate his illness? In such a case – a very common one – it cannot be said that an inquiry is necessarily improper; it may be essential if the progress of the disease is to be stopped. In considering the reasonableness of taking hostile legal proceedings against an alleged lunatic, it is very material to ascertain whether he could or couldn't be brought to realise his own position and submit himself to the care of others.”

- [47] In the more recent case of **Whysall v Whysall**¹³, a matrimonial proceedings case where a wife was seeking to prove a ground of divorce that her husband was incurably of unsound mind, properly called insanity, the trial judge, Phillimore J, expressed the following opinion as to the degree of insanity which had to be found:

“If a practical test of the degree is required, I think it is to be found in the phrase used in section 90 of the Lunacy Act – “incapable of managing himself and his affairs” – provided it is remember that “affairs” include the problems of society and of married life, and that the test of ability to manage affairs is that to be required of the reasonable man. The elderly gentleman who is no longer capable of dealing with the problems of a “take-over bid” is not, in my judgment, to be condemned on that account as “of unsound mind”.

Submissions of Counsel for the opposing sides

- [48] Counsel for the Petitioners did not produce to the court any relevant authority to assist the court in its interpretation of its statutory duty and discretion in making its determination under the Act.
- [49] Counsel for the Petitioners however submits that the court has to determine if there is a prima facie case bringing into question the mental capacity of the Respondent.

¹³ [1960] P. 52

[50] Learned Counsel for the Respondent submits that in exercising its jurisdiction the court should act with utmost caution and be slow to order an inquisition with the paramount consideration being the well-being of the Respondent.

[51] Learned Counsel for the Respondent very helpfully supplied and relied on the case of **In Re Cathcart**¹⁴, from and upon which he submits the following principles may be distilled:

- i. The Petitioner must provide evidence to be reasonably believed that a person is mentally unsound in order to justify an order for inquisition and mere old age or illness is not sufficient.
- ii. Further, that unless there is ‘considerable evidence’ of the Respondent’s inability, no inquiry or inquisition ought to be set on foot and that no such evidence exists in the present case.
- iii. That evidence of mere insanity is not sufficient to order an inquisition, the Petitioner must also provide evidence that the person is unable to care for himself and manage his affairs; and
- iv. If there are grounds for believing a person is mentally unsound and incapable of managing himself and his affairs, but the person is being cared for and assisted, there is likely to be no need to order an inquisition.

Determination of the Court on the Law and standard of proof

[52] I have carefully considered the arguments and authorities submitted by Counsel for the Petitioners and Respondent.

[53] I agree with Counsel for the Respondent that the Petitioner must provide some cogent evidence, tending to prove that a person is mentally unsound, in order for the court on the present application, to consider making an order directing an inquisition whether a person, in this case the Respondent, is of unsound mind and satisfies the other statutory requirements of Section 4(1). Once the court is so satisfied then the court can go on to consider whether the Respondent has also

¹⁴ [1892] 1 Ch. 466 at page 471.

provided cogent evidence, tending to prove that a person is incapable of managing himself and his affairs. No doubt such considerations may be simultaneous but the court should consider them separately.

[54] Upon the court being so satisfied then an initial prima facie case would have been established and the evidential burden would then shift to the Respondent to disprove the Petitioner's case, bearing in mind that it is always for the Petitioners to prove their case on a balance of probabilities.

[55] In the final analysis, before the court can, by order, direct an inquisition as to whether a person is of unsound mind and incapable of managing himself and his affairs, the court in deciding whether to make such an order ought to be at least satisfied that the evidence, whether lay or expert, has, prima facie, sufficient basis in fact. To constitute sufficient basis for making an order for inquisition, the evidence must be sufficiently serious and/or be potentially credible of a serious nature of such unsoundness of mind and incapability, as in all the circumstances of the case, to warrant an investigation of a judge and/or jury.

[56] I accept the submissions of Counsel for the Respondent that in making such an order for an inquisition mere old age or illness is not sufficient.

[57] I do not however accept the submissions of learned Counsel for the Respondent that unless there is 'considerable evidence' of the Respondent's inability (or I would suggest incapability) that no inquiry or inquisition ought to be set on foot. The need for considerable evidence is in my view too high a standard given the fact that at this stage the court is not in fact conducting the inquisition or a full blown inquiry into the situation. The court is merely engaged in an exercise to determine whether sufficient evidence exists to subject the Respondent to the serious proceedings, an inquisition, with such possible serious consequences for and to him or his affairs.

[58] I also accept the submissions of Counsel for the Respondent that evidence of mere insanity is not sufficient to order an inquisition. The court must be satisfied that there is sufficient evidence presented by the Petitioner that the Respondent is unable to care for himself and manage his affairs, and I might add in the context of the

present case that others may not be in a position to take advantage of the Respondent.

- [59] I do not accept, as submitted by Leaned Counsel for the Respondent that if there are grounds for believing a person is mentally unsound and incapable of managing himself and his affairs , and the person is being cared for and assisted, there is likely to be no need to order an inquisition. The facts may well be such, and which possibly arises in the present case, as presented to this court by the Petitioners, that there is a risk that the Respondent may be taken advantage of and in which circumstance the court will have to determine if there is sufficient evidence to justify ordering an inquisition. Such cases are fact sensitive and may give rise to the possibility, if not likelihood, that an inquisition ought to be ordered and should therefore be considered carefully and sensitively by the court without any preconceptions.
- [60] In my view the matrimonial case of **Whysall v Whysall**, relied on by Learned Counsel for the Respondent, is not of much assistance, where the trial judge used a section of the Lunacy Act as a “.. a practical test” of “incapable of managing himself and his affairs”. The court concluded that “affairs” include the problems of society and of married life, and that the test of ability to manage affairs is that to be required of the reasonable man, using the example of an “elderly gentleman who is no longer capable of dealing with the problems of a “take-over bid” not, in his judgment, being condemned on that account as “of unsound mind”.
- [61] In my view the possibility of condemnation in matrimonial proceedings, as in the case of **Whysall v Whysall**, is not analogous to the consideration of an application, at present before this court, as to whether an application should be granted of an order directing an inquisition.
- [62] It may well be necessary at the inquisition to consider the Respondent’s position, and what management is required in his particular case, and whether his spouse, friends and relatives are bestowing such care and management as are required and adequately provides for such care and protection of the Respondent and his affairs.

[63] Obviously a person who is of unsound mind, but who is living at home and is carefully and judiciously looked after, may well be left alone. But a person in a different position (not being carefully and judiciously being looked after), even if harmless to himself and others, may require protection, which can only be enquired into and if found necessary, afforded through the medium of an inquisition.

Whether there is sufficient evidence before this court to satisfy it that there should be an inquisition to determine whether the Respondent, is of unsound mind and incapable of managing himself and his affairs?

[64] Based on the evidence presented to this court, learned Counsel for the Respondent submits that such lay and expert evidence is either irrelevant (as being more than two years before the inquisition) and merely establish at best that the Respondent has minor memory issues and tends to consume a lot of alcohol and therefore is insufficient to suspect that the Respondent is of unsound mind. Learned Counsel for the Respondent also submits that neither has the Petitioners proved that the Respondent is incapable of managing himself.

[65] Learned Counsel for the Respondent very eloquently and carefully directed the court's attention to the lay and expert evidence of mental unsoundness and incapability of the Respondent managing himself and his affairs and sought to support his submission by pointing out the deficiencies of such evidence.

[66] In particular learned Counsel for the Respondent sought to show that the evidence of Dr Andre Joel Cervantes's diagnosis was not sufficiently contemporaneous with the present application (that it did not occur within 2 years prior to the filing of the Petition and therefore was outdated and inadmissible) while Dr. Sosa's evidence was more recent, relevant and admissible.

[67] With all due respect to learned Counsel for the Respondent's forensic efforts I am not satisfied that he has sufficiently discredited the unshaken evidence which, in this court's view, could be reasonably believed, which is reasonably cogent evidence, provided by the Respondent's long standing medical doctor, Dr. Cervantes.

- [68] It may be recalled that Dr. Cervantes stated that due to the Respondent's continuous consumption of moderate to large quantities of alcohol he is or may now be presenting significant loss of memory, intellectual functions and mood swings; and that as of his last visit on the 7th September 2013 he was diagnosed with Binswanger's Disease with the additional clinical diagnosis of Korsakoff's syndrome (both of which were explained in great detail to the court); and that due to his non-compliance to medical treatment he was discharged from his care on the 7th September 2013. Also, that Dr. Cervantes made it clear to his family members present that as of that last visitation date, he was no longer able to make conscious decisions for himself. All of such evidence in my view tends to prove that the Respondent is mentally unsound and is incapable of managing himself and his affairs. This was all confirmed in a letter to the Respondent's wife dated 8th March 2014 at which date this was clearly this doctor's settled opinion.
- [69] Dr. Cervantes continued to see and treat the Respondent until June 2014 when the Respondent failed to comply with and again breached certain protocols and as a result of which he terminated his doctor patient relationship with the Respondent.
- [70] It is also of some concern to this court that the letter dated 27th May 2014, written by Dr. Cervantes, again at the request of the Respondent's wife, a more thorough letter of competency of the Respondent, was not presented to this court.
- [71] All of the above is compounded by the email dated 6th June 2014 from the Respondent's wife to Dr. Cervantes which, to say the least, suggests that she was engaged in what may be termed 'doctor-shopping': seeking a medical letter of competency from a doctor other than Dr. Cervantes, to present to a court a more favourable view of the Respondent's diagnosis of competence.
- [72] Also in the present context it is to be noted that the evidence is uncontested that the Respondent is indeed suffering from dementia albeit of an unspecified and unclear extent, even while accepting, as I do, that Dr. Sosa has opined that the Respondent is capable at the present time, of making personal, financial and legal decisions. This court has observed, with interest, that Dr. Sosa relevantly recommends nevertheless that psychological tests of the Respondent's memory and abilities; and

also noted that further observation of the Respondent needs to be carried out to see if his dementia stabilizes or worsens without alcohol, before a final diagnosis could be made.

[73] This court has not had the opportunity to examine the Respondent and nor was the Respondent a witness in the case and therefore subjected to any form of examination. This court has therefore had to, and was content, to rely on the expert medical evidence presented before it.

[74] Even disregarding the evidence of the lay witnesses, which frankly I would not entirely do even after taking into account that they may have their own axe to grind, I am indeed satisfied that the opinion evidence of Dr. Cervantes, has prima facie sufficient basis in fact which is of a sufficiently serious nature and is sufficiently and actually (and not merely potentially) credible and serious evidence, as supplying evidence and material of the Respondent's unsoundness of mind and of his incapability in the management of himself and his affairs, and in all the circumstances of the case, to warrant an investigation of a judge etc., and/or jury, that I should, and I so order and direct an inquisition into such circumstances.

[75] Such an inquisition would obviously have to comply with the Act and will not necessarily be confined to the evidence which was before this court. I would certainly expect that more up-to date and complete medical evidence might be supplied to the inquisition, with the possibility, if that is permissible, that a court expert may be appointed or be appointed on the instructions of someone who is independent of the Respondent's wife and there primarily to protect the Respondent's interest alone.

[76] I am very grateful to Counsel on both sides for their assistance in this case.

Costs

[77] On the question of costs it seems to me that as this is necessarily a preliminary order and that costs of this application will be reserved to the final determination after the inquisition has been held which I have therefore ordered.

Disposition

- [78] For the reasons given above, this court orders and directs that an inquisition takes place by the Registrar as to whether Mr. EF is of unsound mind and incapable of managing himself and his affairs.
- [79] Mr. EF is required to attend at such convenient time and place as the Registrar may appoint for the hearing of the inquisition.
- [80] Costs of this application will be reserved to the final determination after the inquisition has been held.
- [81] By consent of the parties Mr. EF is required to attend before Dr. Michael Medina at his office within 14 days from the date hereof.
- [82] Also by consent of the parties this Petition is adjourned to 23rd November 2015 at 2.00 pm

The Hon Mr Justice Courtney A. Abel