

Present : Bertram C.J. and Schneider A.J.

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ALWIS v. GUNATILLEKE.

63—D. C. Matara, 2,616.

Lunatic wife—Appointment of some person other than husband as manager of the estate and guardian of the person—Wide powers of the Courts Ordinance, s. 71—Civil Procedure Code, chapter XXXIX.—Court must have proof of lunacy before appointing manager of estate or guardian—Marriage in community of goods—Power of husband in respect of community property.

The Court is entitled, where the circumstances warrant it, to appoint some person other than the husband as the guardian of the person or as the manager of the estate of a wife who is of unsound mind.

For the purpose of appointing a manager of an estate of a lunatic or a guardian of the person, the Court should not presume lunacy from extrinsic circumstances or act on the admission of parties.

THE facts appear from the judgment.

A. St. V. Jayawardene (with him *Weeraratne*), for the appellant.

Arulanandan, for the respondent.

July 28, 1920. BERTRAM C.J.—

This case comes before us under a clause in a will which has already been the subject of judicial interpretation by this Court. The District Court was called upon by the petitioner to appoint a manager of the property of a certain lady who was assumed to be a lunatic. There are good grounds for assuming her to be a lunatic, inasmuch as the will itself recites the fact of her lunacy. She is entitled to certain property under her father's will. The property so conferred upon her is subject to a *fidei commissum*. As she is married to her husband in community, the income of that property falls into the community. That has already been determined by this Court. The bequest is accompanied by a direction that the management of the property so bequeathed shall be in the hands of another member of the family. It is certainly very difficult to reconcile that direction as to the management of the property with the common

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law principle that where there is community of property, the management of the property is vested entirely in the husband. However, this Court has, in fact, decided that this direction as to management does not take the property out of the community. In any case any difficulty on the subject has been removed by the fact that the person in whom the will intended to vest the management has ceased to exist, and that there is no direction in the will for the appointment of any successor in the management. We may take it, therefore, as already declared by this Court, that the income of the lands so bequeathed to the lunatic under the will is community property. In ordinary circumstances, the husband is entitled to the management of it, just as in ordinary circumstances he is entitled to the care of the person of his wife. So much for the legal position under the clause in the will.

There are certain facts to be taken into consideration. The first is the fact of the wife's mental condition. It is assumed, but not proved, that she is a lunatic. As I said, there are good grounds for this assumption. But in proceedings of this kind the law requires proof, and it would be a dangerous thing to allow lunacy to be presumed from extrinsic circumstances or from the admission of parties. Further, it is assumed in the case, but not proved, that the husband has for some time past formed an irregular connection and is living with the other party to that connection, and has illegitimate offspring.

The question comes before us on appeal from an order of the District Judge. The District Judge has appointed the second respondent as guardian of the person of the lunatic. He has also appointed the petitioner as manager of the lunatic's property. The husband now appeals to this Court. In the Court below he did not challenge the appointment of the guardian of the person, but in this Court he takes exception to it as interfering with his natural rights. I do not know whether, under the circumstances, it is necessary to discuss that question. But, as it is clearly connected with the other question, namely, the right of the Court to appoint a person other than the husband as manager, I will say a few words on the subject.

The District Court has very wide powers both under the Civil Procedure Code and under the Courts Ordinance. Under chapter XXXIX. of the Civil Procedure Code, when once it is found that a person is a lunatic, it has power under section 567 to appoint a manager of the lunatic's estate, and also to appoint a guardian of the person. By section 571 it is expressly provided that no manager shall have power to sell or mortgage the estate or any part thereof or to grant a lease of any immovable property for any period exceeding five years without an order of the District Court previously obtained. The succeeding sections give the Court general powers for the control of the manager. Similarly, section 71 of the Courts Ordinance

is expressed in wide terms. It declares that "every Court shall have the care and custody of the persons and estates of all idiots and lunatics and others of insane and non-sane mind resident within its district, with full power to appoint guardians and curators of all such persons and their estates, and to make order for the maintenance of such persons and the proper management of their estates"

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Now, I do not think that the power of the Court as regards either the person or the estate of the lunatic ought to be unnecessarily limited. It is quite true that in common law the husband has extensive rights as regards both. The Court will take these rights into account just as in cases of *habeas corpus* relating to custody of children it will take into account the natural rights of parents. But it is always entitled, where the circumstances warrant it, to appoint some person, other than the husband, as guardian of the person or as manager of the estate of a lunatic wife. In this case, if the circumstances, which are assumed, are proved, the Court will be within its rights in displacing the husband from the guardianship of the person of his wife. So also in regard to the property. Under ordinary circumstances the husband, where there is a marriage in community, has a full right, not only to manage the community property, but to dispose of it. The Court, nevertheless, has power to interfere, if necessary, with the husband's common law power of management and disposal.

The only question which arises in this case is a practical question. The community property is not the property of the wife alone. It is the property of the wife and the husband. It is impossible to appoint a separate manager of the wife's interest in the community property for the simple reason that it is held in common. The husband is in every respect the most convenient person to appoint for the purpose of managing his wife's interest in the property, more particularly in view of the fact that by virtue of his appointment the Court is in a position to keep him under control.

I think, therefore, that the District Judge was not well advised in appointing the petitioner as manager of the estate of the lunatic, and he has undoubtedly gone beyond his powers in the directions which he has given, because he purports to direct the manager to dispose of the whole of the income of the *fidei commissum* property. This is clearly wrong, because the husband is entitled as well as the wife to the enjoyment of this income. I think, therefore, that it is desirable that the District Judge should re-consider the order which he has made, and that the case should go back to him, partly in order that he may take formal evidence of the lunacy of the alleged lunatic, and partly that he may give an opportunity to the husband, if the husband so desires, to contradict the facts, which are assumed in the case, as to the illegitimate connection to which I have previously referred, and, in the third place, with a view to his making

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another order as to the management of the estate. I think the most appropriate person to appoint would be the husband, provided that the order is accompanied by proper safeguards. For this purpose it becomes material to consider the position of a wife married in community.

Mr. Jayawardene has strongly insisted that, although the property is held in community, the husband is entitled absolutely to the enjoyment of the whole of it for his own purposes, and that the wife has no rights at all except to such charitable consideration as her husband may extend to her. I do not take that to be the view of the law. The husband no doubt has most extensive rights, but these rights are conferred upon him as managing partner. In that respect his authority is no doubt absolute. But it is an authority for the purpose of the partnership. The Court will not challenge any act which he has done by virtue of his powers, but if he abuses the powers, it will restrain him from further abuse either by *separatio bonorum* or by an interdict. This clearly indicates that the law recognizes the wife and the husband as both being partners in the community property, and this is indeed implied by the very term in which the relationship is described. In view of these considerations, I think it will be entirely within the power of the District Judge to direct the husband, as manager of the estate, which in this case consists of the revenue of the *fidei commissum* property, that such proportion of that revenue not exceeding half of the whole, as he may think necessary, should be paid to the guardian of the person of the lunatic for the purpose of her maintenance.

I think, too, that it is clear from the general terms of section 71 of the Courts Ordinance, and from the sections of the Civil Procedure Code to which I have referred, that, if the District Judge is apprehensive that the husband might misuse his powers by leasing the revenue of the *fidei commissum* property, he has full powers to restrain him. A formal order does not appear to be necessary in view of the terms of section 571 of the Civil Procedure Code. But that section is not exhaustive, and if the District Judge is of opinion that further directions are necessary, I think that section 71 of the Courts Ordinance will give him all necessary authority for the purpose. In my opinion, therefore, the case should go back to the District Judge for the purpose I have mentioned.

The husband in this case has to a certain extent succeeded, in that he has displaced the petitioner from the management to which he has been appointed by the District Judge. On the other hand, we are making an order which he has contested in the argument, and I think that, in the circumstances of the case, the fairest decision would be that there should be no order as to the costs of this appeal.

SCHNEIDER A.J.—I agree.

Sent back.