IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. E352 OF 1997

BETWEEN	**SUSAN EVANKO** (Executrix of the Estate of Stephan Jurik)	**CLAIMANT/RESPONDENT**
AND	**DASA YETMAN**	**1st DEFENDANT/1ST APPLICANT**
AND	**ZUSANNA BRECHOVA-SOUCEK**	**2ND DEFENDANT/2ND APPLICANT**
AND	**LARON JURIK**	**3RD DEFENDANT/3RD APPLICANT**

Mrs. Yualande Christopher-Walker, instructed by Yualande Christopher & Co. Attorneys-at-law for the Applicants.

Mr. Demetrie Adams, instructed by Tavares, Finson & Adams Attorneys-at-law for the Respondent

IN CHAMBERS

Heard: 27th March,10th May, & 22ND June 2023

Application for removal of Executrix - duties of an Executrix - fiduciary duties of Executrix Section 7 of the Trustees Attorneys and Executors (Accounts and General) Act - Section 2 of the Mental Health Act - whether Executrix liable for self-dealing - whether Executrix mismanaged the affairs of the Estate - failure to keep proper accounts - Whether beneficiary has capacity to sell his interest in the Estate - Undue influence

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] This matter has a long and checkered history which began in Czechoslovakia and ended on the shores of Negril. The testator Stephan Jurik migrated from

Czechoslovakia to Canada where he acquired Canadian citizenship. In or around 1973 he left Canada and came to Negril where he set up roots. On a visit to the United States of America he met the Claimant, now Respondent Susan Evanko and the two formed an intimate relationship. Having decided that Negril was to be his home, he invited the Claimant to join him there and they lived together in Negril up until the time of his death. He built a hotel referred to as the Blue Cave Castle Hotel which housed a restaurant and a home for the two. He and the Claimant were involved in the management of the hotel and so shared not only an intimate partnership but also a business partnership.

[2] When the deceased left Czechoslovakia he had left behind his two daughters, the 1st and 2nd Defendants herein, Dasa Yetman and Zusanna Brechova-Soucek. Later on, whilst in Jamaica he fathered the 3rd Defendant Laron Jurik formerly known as Loren McEwan with a Jamaican woman. He passed away on April 19, 1996. By virtue of his Last Will and Testament, Ms. Evanko was made the Executrix of his estate. Probate of his Will was granted on May 2, 1997. In his Will he had devised part of the property to the 1st and 2nd Defendants with the 3rd Defendant getting ten percent of the profits. The other part was devised to Ms Evanko also with the 3rd Defendant getting ten percent of the profits. At the time of his death the 3rd Defendant was a minor.

[3] In the year 1997, Ms Evanko filed an originating summons and succeeded in securing orders that she was entitled to a fifty percent share plus an additional 12.5% share in the property with each of the Defendants being entitled to a 12.5% share.

[4] Even the current application has its own history. The Notice of Application for Court Orders was filed almost six years ago on September 6, 2017 by the three Defendants seeking several Orders and Declarations against the Claimant. On September 22, 2022, my brother Batts J made certain orders regarding paragraphs 1-2, 11-19 and 23-24 of the application. The orders at paragraphs 3-10 and 20-21 remain to be determined.

[5] Paragraphs 3-10 concern Declarations regarding Mr Jurik's share of the estate and seeks orders against the Executrix which are as follows:

(i) A Declaration that the transaction for the sale of the 3rd Applicant's 12.5% share in the estate to the Respondent-Executor, is void *ex debito Justitia* and is set aside.

(ii) A Declaration that the 3rd Applicant Laron Jurik's 12.5% share of the estate of Stephan Jurik is valued at Jamaican Eleven Million, Three Hundred and Forty-Nine Thousand, Seven Hundred and Ninety-One Dollars and Thirty-Eight cents (J$11,349,791.38).

(iii) A Declaration that sums consisting of cheque in the amount of Jamaican Four Hundred and Thirty-Eight Thousand, Seven Hundred Dollars (J$438,700.00) and cash of United States One Thousand Dollars (USD$1,000.00) paid to the 3rd Applicant on the 7th May, 2005 is to be treated as an advance payment by the Estate of a portion of the 3rd Applicant's entitlement in the estate and that the advance payment is to be deducted from the 3rd Applicant's 12.5% share on distribution.

(iv) A Declaration that the Executrix is in breach of her duty as Executor by failing to conclude the administration of the estate in a reasonable time or at all, for engaging in self-dealing, failing to keep proper accounts and render in a timely manner a true and just account of the estate's accounts, failing to pass annual account, negligently dealing with the assets of the estate with a view of depleting same and depriving the beneficiaries of their interest, improperly managing the assets of the estate by design and for her personal benefit to the prejudice of the Applicants.

(v) A Declaration that the Applicants have suffered prejudice, loss, injury and made to incur expense on account of the Executrix's breach of her statutory and common law fiduciary duties owed to the Applicants.

(vi) An order that the Respondent be removed as Executor for the purpose of completion of the winding up of the estate and that the 1st Applicant be appointed Administrator for the remainder of the Administration.

(vii) An order that no Executor's fee be paid to the Respondent, Executor or in the alternative, that a reduced fee of 1% of the value of the estate be paid.

(viii) An order that the costs of the Notice of Application filed on the 7th March 2016 for orders for the appointment of the Accountant pursuant to the orders of The Honourable Mr. Justice Brown on the 18th July 2016 and the Application herein be the costs of the Respondent and not the estate.

[6] Paragraphs 20-21 seeks orders concerning the balance of the estate as follows:

i. An order that the Canadian Ten Thousand Five Hundred and Ten Dollars (CAN$10,510.00 previously held in the Czechoslovakia Credit Union in Toronto Canada be paid with interest of 6% per annum from January 1997 to date and distributed to DASA YETMAN (nee JURIK) ZUSANNA BRECHOVA and DAGMAR KLENCOVA and attract interest from 1996 to present at the rate prescribed by the Bank of Jamaica or at any other rate prescribed by the court.

ii. An order that the sum of United States Fifty-Six Thousand, One Hundred and Ninety-Five Dollars and Ninety-Four Cents (US$56,195.94) held by the deceased in the Barnett Bank at the Miami Airport be paid to DASA YETMAN and DAGMAR KLENCOVA less the sum of United States One Thousand Dollars (US$1,000) to be paid to ANSEL TOWNSEND. Further that the amount to be paid shall attract interest from 1996 to present at the rate prescribed by the Bank of Jamaica or at any other rate as prescribed by the court.

APPLICANTS' CLAIM

[7] The Notice of Application is supported by two affidavits filed by Mrs. Dasa Yetman on March 7, 2016 and June 22, 2017, one affidavit from Laron Jurik filed on June 22, 2017 as well as one from Darren Ivers filed April 2, 2019. Mr

Ivers is the husband of the second Defendant who asked to observe proceedings on her behalf because she is not a fluent speaker of the English Language. In Mrs Yetman's affidavit filed March 7, 2016, she asserted that the deceased required that his estate be divided equally amongst the four beneficiaries. She stated that Ms. Evanko convinced the Court that she was entitled to 50% share of her father's estate and the remaining 50% should be shared equally between the four beneficiaries. Mrs. Yetman asserted that since the judgment was handed down, the other beneficiaries have tried to settle their share of the deceased's estate but this has proven futile as Ms. Evanko refused to offer a reasonable sum and continues to undervalue the assets of the estate. Efforts to agree with a chartered account were thwarted when Ms. Evanko decided to use her own auditor to provide a botched up report with inferior figures which they were forced to accept out of frustration. She asserted that Ms. Evanko failed to grant other valuators access to the property so that an independent valuation of the property could be determined.

[8] In her June 22, 2017 affidavit, Mrs. Yetman asserted that under her father's Will, all monies in his Czechoslovak Credit Union, Toronto, Canada bank account were to be distributed to herself and her sister as well as to her aunt Dagmar Klencova. She personally closed the account and paid over the monies to Ms. Evanko to allow her to distribute pursuant to the duties under the deceased's Will, however, to date she has not received any share of the funds which were held in the Toronto account. She also asserted that funds were left at Barnett Bank at the Miami Airport bank account to be divided between herself, her sister, her aunt Dagmar Klencova and Ms. Evanko and as at September 30, 1996, the sum of United States Fifty-Six Thousand, One Hundred and Ninety-Five Dollars and Ninety-Four Cents (USD$56,195.94) was in the account. To date, none of the intended beneficiaries received any funds from the account.

[9] Laron Jurik in his affidavit filed June 22, 2017, asserted that he resided with his father and Ms. Evanko between the ages of 7 to 14 years old until his father's death. He stated that at around fifteen years of age an attorney by the name of Mr. Vernon was appointed to represent him, which was paid for by Ms. Evanko.

He never met the attorney nor spoke with the attorney. He attended the attorney's office only once and was provided with a document to sign by the attorney's secretary. The attorney himself was never present.

[10] Mr Jurik stated that he was removed from school and shortly thereafter sent to live with his mother in England where he joined the British Army. During his time in the army, he was diagnosed with depression for which he was treated with anti-depressants and anti-psychotic medication. When he returned to Jamaica at age 25 years, Ms. Evanko told him she needed assistance in the Court case against his sisters. She also told him that she would assist him with his financial difficulties if he signed papers and took Jamaican Five Hundred Thousand Dollars (J$500,000.00) of his share in his father's estate. He was never told what percentage Jamaican Five Hundred Thousand Dollars (J$500,000.00) would amount to neither was he informed of the percentage of his share of the estate.

[12] He further indicated that the payment consisted of United States One Thousand Dollars (US$1,000.00) in cash and Jamaican Four Hundred and Ten Thousand Dollars (J$410,000.00) by cheque. He accompanied Ms. Evanko to a Justice of the Peace who made him sign some papers before them both however, he was not in any mental state to appreciate its contents.

[13] He indicated that it was not until 2015 that he met Mrs. Yetman's husband in Kingston and was taken to their lawyers where they discussed the history of the matter. He was diagnosed with cancer and his sister paid the vast majority of his medical bills for the treatment and management of the cancer until it was finally in remission. He is now better able to manage his anxieties and affairs without medication.

[14] Mr Jurik stated that the school fee for one of his six children was paid by Ms. Evanko however, she threatened that she would stop paying it if he proceeds with taking her to court. He further asserted that Ms. Evanko has failed for twenty-one years to distribute to him what his father intended despite witnessing his severe hardship.

[15] In the sole affidavit filed by Darren Ivers, he claimed that Mrs. Yetman tried for years to contact Mr. Jurik but was unable to locate him. It was only some time in 2015 that he saw Mr. Jurik in Kingston and informed him that his sister has been trying to locate him. Mr. Ivers asserted that his family has been assisting Mr. Jurik medically and has been paying his rent since he is not able to take care of himself.

RESPONDENT'S CASE

[16] The Respondent relied on three affidavits in support of her claim. In her first affidavit filed June 26, 2017, she asserted that by order of this Honourable Court dated 12th December, 2002 she is entitled to 50% of the partnership and the remaining 50% formed part of the deceased's estate. She further asserted that Mr Jurik was entitled to 12.5% share of the partnership however, he contacted her and made an offer to sell his shares of his own volition through his then attorney Vernon Ricketts and then he executed an agreement to sell his shares and interest to her. Ms. Evanko claimed that although Mr Jurik resided with his mother in Grange Hill when he was enrolled in school during the period 1996-2000, she paid for his schooling and took care of his general wellbeing.

[17] Ms. Evanko asserted that Mrs Yetman illegally obtained all funds from her father's account in Canada before the Grant was issued effectively stopping interest from being earned on the account. She also asserted that the Defendants are aware that from as far back as November 1996, the sum of Canadian Ten Thousand Five Hundred and Ten Dollars and Eighty-Four Cents (CND$10,510.84) was used to pay government duties, legal and other fees associated with obtaining the Grant of Probate and it would not be sufficient to cover the costs and duties.

[18] Ms. Evanko indicated that she attempted to wind up the estate and sent a cheque to the Defendants for their share in the estate however, they always presented some ludicrous figures as to what they thought the property and the Estate valued. She asserted that the 1st Defendant waged a concerted

campaign of personal and legal attacks against the Estate and the business, thus 'frittering' away her father's estate. She further asserted that neither the 1st nor 2nd Defendants lived with or assisted in the deceased's business, however he was hopeful that everyone could all co-exist.

[19] Ms. Evanko claims she is ready, willing and able to comply with the Court's order to purchase the 1st and 2nd Defendants' 25% share in the estate and have made offers which have been refused.

SUBMISSIONS ON BEHALF OF THE APPLICANTS

[20] On behalf the Applicants, Ms. Yualande Christopher submitted that executors have a duty to avoid self-dealing and should not gain a benefit from their position by purchasing assets from the estate. The executor must act only for the benefit of those entitled to it as any act taken to benefit an executor will constitute a breach of duty. Counsel submitted that the Respondent breached her fiduciary duties as Executrix when she purchased Mr Jurik's interest in the estate for a purchase price well below the market value of the shares. Counsel relied on the dictum of Megarry V-C in **Tito v Waddell (No. 2)** [1977] Ch 106 which states:

> ***The self-dealing rule is…. if a trustee sells the trust property to himself, the sale is voidable by any beneficiary ex debito justitiae, however fair the transaction. The rule is a severe one which will apply however honest the circumstances and fair the price. Quoting from Lewin, Newey J emphasised that the self-dealing rule is based not only upon the principle that a trustee cannot be both seller and buyer, but also upon the wider principle that a trustee must not put themselves in a position where there is a conflict or possible conflict between their interest and duty.***

[21] Counsel also relied on **Kane v Ridley-Kane** [1999] Ch 274 where an intestate widow and sole administratrix informally appropriated shares of a private company towards satisfaction of the statutory legacy to which she was beneficially entitled. Her step-son succeeded in setting aside the appropriation. Counsel submitted that the principle is trite and that the one recognised

exception to the rule arises where the executor had been put in a position of conflict between duty and the Will itself. Counsel submitted that the Executrix failed to manage the conflict or exercised any of the options listed in **Public Trustee v Cooper** [2001] WTLR 901, 933-934.

[22] Ms. Christopher further submitted that the Respondent used her superior position as an astute businesswoman and ultimate controller of the estate against the 3rd Applicant. Counsel stated that the Respondent knew the 3rd Applicant could not consent as he lacked the mental capacity to do so and was a minor who lacked the means or method of selecting competent advisors to effect a good bargain for him.

[23] Counsel contended that it is trite that Trustees have an overriding duty to obtain the best price which they can for their beneficiaries. She relied on the principle in **Dance v Goldringham** (1873) AC 902 which states that "the duty of the trustee is to protect the *cestuis que* trust, and to sell the property for the best price that can reasonably be obtained for it." She submitted that it is incumbent on the Court to set aside and declare as void any purported purchase by the Executrix of Mr Jurik's share in the estate and should deduct and consider as an advance the sum already paid from the actual value of his share of the estate.

[24] Ms. Christopher further articulated that the existence of a Will denies the beneficiary of the power to dispose of the asset, therefore the 3rd Applicant was in no legal position to sell his share of the estate. She claimed that the right to sell the asset does not accrue until the asset is transmitted to him. Counsel relied on the case of **Commissioner of Stamp Duties (Queensland) v Livingston** [1964] 3 All ER 692 as well as **Kathleen Morrison et al v Herma Lemond** [1989] 26 JLR 43 which approved the proposition that Mr. Jurik could not have sanctioned a sale of his interest as only the Executrix could have acted.

[25] Counsel submitted that an executor found in breach of his duties is personally liable to the estate. She further submitted that Ms. Evanko had a duty to

distribute the estate in a timely manner, to take care in preserving the deceased's estate and to deal properly with the assets of the estate. She breached her fiduciary duty by (i) intermeddling into accounts (ii) failing to distribute assets (iii) failing to preserve assets (iv) failing to maximise value of assets and (v) demanding commission in excess of the statutory limit. Counsel relied on the following authorities to support her proposition: **Freeman v Fairlie** (1812) 3 Mer 29, 43-44; **Davenport v Stafford** (1851) 51 ER 309; **Buxton v Buxton** (1835) 40 ER 307 and **Clarke v Clarke Trustees** 1925 SC 693.

[26] Counsel submitted that section 7 of the Trustees, Attorneys and Executors (Accounts and General) Act 1904 grants the court a discretion to order that the Executor should forfeit the whole or part of his commission where he takes or receives commission in excess of what is authorized.

RESPONDENT'S SUBMISSIONS

[27] Counsel for the Respondent, Mr. Demetrie Adams relied on Laing J in **Sonia Stanginer-Reid v Robert Lloyd Lee et al** [2016] JMSC Civ 185 to ground his proposition that the legal burden of proof in civil proceedings rests on the party seeking to prove or disprove the facts in issue. He submitted that paragraph 19 of the Judgment of Laing J stated that in assessing the evidence, he would be guided by the observations of Lord Pearce (dissenting) in the House of Lords decision of **Onassis v Vergottis** [1968] 2 Lloyds Rep 403 at page 431]. Lord Pearce noted:

> ***"Credibility involves wider problems than mere demeanour, which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following…. Firstly, is the witness a truthful or untruthful person? Secondly, is he though a truthful person, telling the truth on the issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly, and if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over decision of it with others? Lastly, although the honest witness believe that he heard or saw this or that, is it impossible that it is on a balance of probabilities that he was mistaken?***

> ***On this point it is essential that the balance of probabilities is put correctly into the scales in weighing the credibility of a witness.***
>
> ***All these……compendiously are entailed when a Judge assesses the credibility of a witness, they are all part of one judicial process."***

Counsel submitted that the credibility of the witness should be assessed using the guidance observed by Lord Pearce in **Onassis**.

[28] Counsel relied on **Royal Bank of Scotland plc v Etridge (No. 2)** [2001] 4 All ER 449, **Starson v Swayze** 2003 SCC 32 (CanLII), and **Mitzie Morrison v Philemon Johnson** [2019] JMSC Civ 145 to ground his submissions on undue influence, independent legal advice and capacity to contract. He contended that it was the 3rd Applicant who offered to sell his interest to the Respondent on his visit to Jamaica as he had no intention of returning to the Island as he and his girlfriend were expecting another child and they wanted the money to prepare an apartment in the United Kingdom to accommodate their baby. He submitted that for the 3rd Applicant to assert that "he never met this Attorney" is disingenuous and goes directly to his credibility as exhibits attached to the Affidavit of Susan Evanko in Response to Mr Jurik are contrary to his assertion. Counsel submitted that the 3rd Applicant gave his Attorney instructions, and those instructions were used to draft the documents which were executed. At all material times, the Respondent was represented by Clough Long & Company and she is not able to speak to discussions between the 3rd Applicant and his Attorney-at-law.

[29] Counsel submitted that the 3rd Applicant received independent legal advice which prevented any impropriety in relation to the transaction and suggested that the court should place heavy evidential value on the electronic email which the 3rd Applicant sent to the Respondent in or around May 20, 2015.

[30] Mr. Adams submitted that the 3rd Applicant had not been diagnosed with a disease of the mind which would amount to a mental disorder under the Mental Health Act at the time of signing the documents. He further submitted that since the 3rd Applicant encashed the cheque he received the same day, he clearly understood that he sold interest in the Estate. Counsel asserted that if the 3rd

Applicant was labouring under a disease of the mind, there is no evidence to suggest that the medication which was taken was sufficient to impair his abilities to understand the nature of the documents which he executed. This, Counsel suggested is to be distinguished from the facts in **Mitzie Morrison** though the principle remains the same. He submitted that the 3rd Applicant entered into a valid agreement without duress or undue influence to sell his interest in the Estate and had the mental capacity so to do.

[31] Counsel advanced that it is the Applicants' antagonistic manner towards the Respondent why the Estate is yet to be administered. He averred that it is their actions of making several applications to the court which have caused the delay. He pointed out that the Respondent had a right to seek clarification from the Court regarding her rights as Executrix and the Court of Appeal has approved this approach.

[32] As it relates to the sum of Canadian Ten Thousand, Five Hundred and Ten Canadian Dollars (CAN$10,510.00) in the Czechoslovak Credit Union in Toronto Canada, Counsel submitted that the Applicants are fully aware from letter dated November 13, 1996 from Clough Long & Co, the Respondent's attorneys, to Myers, Fletcher & Gordon, the Applicants' then attorneys, that those sums were used to probate and administer the Estate. As it relates to the sum of United States Fifty-Six Thousand, One Hundred and Ninety-Five Dollars and Ninety-Four cents (US$56,195.94) that was being held at the Barnett Bank at the Miami Airport, Counsel submitted that those sums were used to pay Attorney's fees and other fees associated with winding up the Estate.

ISSUES

1. Whether the transaction for the sale of the 3rd Applicant share in the estate to the Respondent is void ex debito justitiae?
2. Whether the Respondent is in breach of her duty as Executrix and if so, should she be removed?
3. Did the Respondent apply the monies previously held in the overseas bank account towards the probate and administration of the estate and if not, should the proceeds be paid to the named beneficiaries?

Whether the transaction for the sale of the 3rd Applicant's share in the estate to the Respondent is void ex debito justitiae?

[33] In determining the main issue, several other questions arise for me to address which are whether there was self-dealing by the Respondent relative to her duties as Executrix of the estate and whether on the part of the 3rd Applicant he possessed the mental capacity or the capacity to contract or whether he was under some undue influence when he entered into the transaction.

[34] The determination of the issues raised here to some extent turn on the question of credibility, particularly, as it relates to the evidence of Mr Jurik *vis a vis* that of Ms Evanko. The main contention between the parties lies in the circumstances surrounding how Mr Jurik came to dispose of his share in the property. The essence of the challenge to the evidence of Mr Jurik was that he was fully aware of the nature of the transaction and that he had no issue with it for many years. Mr. Jurik during cross-examination continued to deny that he appreciated the full extent of the sale of his share.

[35] It is uncontested that Ms. Evanko did not advise the other beneficiaries of this purchase of Mr Jurik's share which leads me to believe that Ms. Evanko either knew that what she was doing was not entirely above board or was reckless as to whether she was acting in according with her fiduciary duties towards the estate. Although she attempted to distance herself from this transaction in stating that the extent of her involvement with Mr Ricketts is limited to the

payment of her legal fees in her capacity of the Executrix, I am not convinced of that. On this point I find Mr Jurik to be more credible than Ms Evanko. I accept that while he was still a minor, it was she who made the arrangements for Mr. Vernon Ricketts to represent him. I accept that it was she who offered to buy his share in the property and that he did not receive adequate legal advice in doing so. I accept that he signed the documents because he trusted Ms. Evanko and also that he felt pressured so to do. I accept that it was she who took him to sign the Agreement for Sale.

[36] Even on Ms. Evanko's account alone, the uncontroverted fact of her entering into the Agreement for Sale dated May 7, 2008 raises questions regarding self-dealing. Mr Jurik was the named vendor and she was the named purchaser and the subject of the Agreement for Sale was 'the property, share and interest of the Vendor in the estate of Stephan Jurik, deceased as set out in the first Schedule hereto (hereinafter called "the Personalty")'.

[37] I am grateful to counsel for the Applicants for drawing my attention to the seminal principle laid down in the case of **Tito v Waddell** where the principle enunciated by Megarry VC still holds true. It is that "…if a trustee sells the trust property to himself, the sale is voidable by any beneficiary ex debito justitiae however fair the transaction. The rule is a severe one which will apply however fair the transaction or honest the circumstances and fair the price. This principle was also highlighted in the case of **Kane v Radley-Kane** also cited on behalf of the Applicants that "it is a general and highly salutary principle of law that a trustee cannot validly contract with himself and cannot exercise his trust powers to his own advantage".

[38] The rationale for this is that an executor should not be in a position where their personal interests' conflict with the interests of the beneficiaries of the estate. Selling assets to themselves presents itself as a violation of this principle. It is plain to see that on one hand the executor would want the best price for himself whereas the beneficiaries would want the best price for themselves. This is in conflict with the duty of the executor to act in the best interest of the beneficiaries as opposed to her personal interest. The fact that it was stated in

the Agreement for Sale that the vendor is selling the personally to the purchaser in her personal capacity and not as Executrix of the estate does not take away from the principle of self-dealing.

[39] If an executor sells estate property to himself the sale is voidable by any beneficiary however fair the transaction may appear. Any beneficiary would have the right to have the transaction set aside. In this case, there has been no issue taken with the fact that Ms. Evanko did purchase the share of the 3rd Defendant. This is a clear case of self-dealing which would render the contract voidable. The application before me is brought by the beneficiaries seeking to exercise their rights and asking that the transaction be declared void and set aside the transaction. On the basis of there being self-dealing alone, I would be prepared to declare the transaction void and set it aside.

[40] Counsel on behalf of the Respondent focused his submissions on the issue of capacity to contract and undue influence. He advanced that the considerations for the court should be whether the 3rd Defendant possessed the mental capacity to contract and whether he was under any undue influence or duress and whether he had independent legal advice. He asked the Court to find that the evidence demonstrates that he did possess the requisite mental capacity at the time of signing, that there was no duress or undue influence and that he had adequate legal representation. Counsel did not advance any submissions on the issue of self-dealing.

[41] It was suggested that when Mr Jurik sold his interest in the estate, he did not have the capacity to contract as he was suffering from a disease of the mind which amounted to a mental disorder and was not capable of understanding the document he executed. It is alleged that he had a long standing history of mental illness and physical sickness including cancer. It is also alleged that the reason the deceased limited the 3rd Applicant's interest to profits in the business was because he knew full well of his debilitating incapacity.

[41] Mr. Jurik in his affidavit spoke about being diagnosed with depression whilst in England, about having undergone treatment for cancer and that he was medically discharged from the British army having suffered from bipolar disorder and depression. He said he was on anti-depressants and anti-psychotics to treat his mental conditions. He even went on to say that with the medication he was taking at the time he would not have had a clear understanding of the transaction he was entering into.

[42] Section 2 of the Mental Health Act ("the Act") defines 'mental disorder' as follows: - '"mental disorder" means –

> *(a) a substantial disorder of thought, perception, orientation or memory which grossly impairs a person's behaviour, judgment, capacity to recognize reality or ability to meet the demands of life which renders a person to be of unsound mind; or*
>
> *(b) mental retardation where such a condition is associated with abnormally aggressive or seriously irresponsible behaviour, and "mentally disordered" shall be construed accordingly'.*

[43] The Halsbury's Laws of England, 4th Edition, para 1006, states as follows:

> *"A fair contract with a person who was apparently of sound mind, but who in fact was suffering at the time of the contract from such mental disorder as rendered him incapable of entering into the contract, is voidable but not void. If the contract is not to be enforced against him, the person mentally disordered must prove that the other party either knew that he was of unsound mind or knew of such facts as would justify the court in inferring such knowledge. This rule is based on the principle of the common law that a person should not be allowed to stultify and disable himself; no one therefore could plead his own insanity, but his successors or the Crown might. The principle that a person may not stultify himself has been modified and it is now settled law, if the defendant can show that he did not have the capacity to form a contract and that the plaintiff knew it, there is a good defence to an action on the alleged contract.*
>
> *Where a person mentally incapacitated from contracting could not have a contract entered into by him set aside, his successors are also unable to have that contract set aside.*
>
> *Where a person apparently of sound mind, and not known to be otherwise, enters into a contract which is fair and made in good faith, and the parties cannot be put back into their former positions, the obligation will be*

enforceable. Contracts entered into during lucid intervals or before insanity supervened are enforceable."

[44] The definition of mental disorder as provided above specifies that the disorder must be of such a gravity as to grossly impair thoughts and behaviour. It is therefore, not sufficient to simply say that a particular person is suffering from an abnormality of the mind as the condition must be of such a nature that the thought pattern and behaviour of the person has been grossly impaired thereby preventing them from meeting the demands of everyday life.

[45] The case of **Mitzie Morrison** relied on by counsel for the Respondent suggested a two-pronged approach that is whether the person concerned is capable of understanding what he does by executing the deed in question, when its general purpose has been fully explained to him and secondly that the degree of understanding required in respect of the execution of any instrument is relative to the particular transaction.

[46] It is trite that he who asserts must prove. It therefore goes without saying that the 3rd Applicant has a duty to satisfy this court that he was suffering from a mental disorder at the time he entered into the transaction for sale of his share. However, he did not present any medical evidence to support the fact that he has or had a mental condition and the effect of it on his capacity. Without that the Court would not be placed in a position to say he was suffering from some incapacity of the mind that would render him incapable of entering into a contract.

[47] The next consideration is whether duress or undue influence has been proven. Mr Jurik alluded to being forced but has not substantiated this by any evidence necessary to prove duress. However, the circumstances under which he purportedly sold his interest in the property would also have to be considered in the context of whether he was unduly influenced to do so. The case of **Royal Bank of Scotland plc** relied on by the Respondent was applied in the Jamaican Privy Council decision of **National Commercial Bank (Jamaica) Ltd**

v Hew & Ors [2003] 63 WIR 183. At paragraph 29 Lord Millett sets out the significance of undue influence and accords to it this meaning:

> *"Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them. As Lord Nicholls of Birkenhead observed in Royal Bank of Scotland plc v Etridge (No 2) [2002] 2AC 773 at p 794-5:*
>
> *"Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. It arises out of a relationship between two persons where one has acquired over the other a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage." Thus the doctrine involves two elements. First, there must be a relationship capable of giving rise to the necessary influence, and secondly, the influence generated by the relationship must have been abused.*

[48] It is clear to me that Mr Jurik at the time of entering into this transaction was in a vulnerable position for a number of reasons. He was young, he was suffering from some bipolar disease, he saw Ms. Evanko as a sort of mother figure. He had found himself in an impecunious state and this was within the knowledge of Ms Evanko.

[49] Under these circumstances, I find that the two elements of undue influence existed at the time. There was in fact a relationship capable of giving rise to the necessary influence and secondly, I am of the view that the influence generated by the relationship was abused. I therefore accept that at the time Mr Jurik entered into this transaction he was operating under the undue influence of Ms Evanko. This presents another basis for which I would be prepared to rule the contract for the sale of the shares to be void.

[50] Having found that the transaction for the sale of the 3rd Applicant's share is set aside, he would therefore be entitled to a 12.5% share of the estate and the sums he previously received should be treated as an advance payment which is to be deducted from his share on distribution.

Whether the Respondent is in breach of her duties as Executrix, mismanaged the affairs of the Estate and should be removed?

[51] The Applicants have accused the Respondent of several breaches in the execution of her duties as Executrix of the estate. Among the breaches are engaging in self-dealing, failing to conclude the administration of the estate in a reasonable time or at all, failing to keep proper accounts, negligently dealing with the assets with a view to depleting same and depriving the beneficiaries of their interest and improper management of the estate. Proof of any one of the acts would render her in breach of her duties as Executrix and could result in a determination that she should be removed as Executrix of the estate.

[52] This is not the first time an application has been made in the Supreme Court for Ms Evanko to be removed as Executrix. On the previous occasion the application failed. Both the Supreme Court and the Court of Appeal considered the law on removal of an executor and found that the test was not satisfied for her removal. This resulted in the Court of Appeal decision of **Dasa Yetman and Zusanna Brechova-Soucek v Susan Evanko** SCCA #39/98 dated July 6, 1999 in which, Langrin JA with whom the rest of panel agreed stated "*that the general rule for the removal of a trustee is that his acts or omission must be such as to endanger the trust property or to show a want of honesty or want of proper capacity to execute the duties or a want of reasonable fidelity***.**"

[53] The Court of Appeal did not find that Ms. Evanko's actions were such that she should be removed as Executrix as it was decided that there was no misconduct on her part in carrying out her duties. It is important to note that the issues now being raised regarding the sale of the share to Mr Jurik and self-dealing had not been raised at that point. Langrin JA highlighted that: "*the conscience of a court of equity would not permit her to continue if there was any misconduct on her part. It is trite law that an Executrix is clothed with a fiduciary character in relation to the beneficiaries under the Will and if the Executrix obtains a personal advantage at their expense, she holds it as a constructive trustee for them.*"

[54] What stands out in that judgment is that the test for removal of an executor seems to have changed over the years. The more recent cases have refrained from the use of the word 'misconduct' and have more focused on the failure to act within the context of the fiduciary relationship and mismanagement of the affairs of the estate.

[55] The question of the fiduciary nature of the relationship between an executor and beneficiaries is therefore one that must be examined to determine whether there was in fact a breach. The decision of Simmons J (as she then was) in **Howard Jacas (Executor estate of Sylbert Jacas, deceased) Bryan Jacas and Bryan Jacas (attorney of Thelma Jacas)** [2014] JMSC CIV 190 is instructive. At paragraph 23-24 she set out the duty of an executor. She stated:

> ***"[23] The duty of an executor is to administer the testator's property and to carry into effect the terms of the will. In Re Stewart; Smith and another v Price and others 5 ITELR 622 at 630, Laurenson J in his examination of the role of an executor stated: - "An executor is the person appointed by a testator or testatrix to administer his or her property and carry out the provisions of the will. To this end the executor has certain specific statutory and common law duties and powers, namely to:***
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> ***• Bury the deceased;***
>
> ***• Make an inventory of assets;***
>
> ***• Pay all duties, testamentary expenses and debts;***
>
> ***• Pay legacies;***
>
> ***• Distribute the residue to the persons entitled; and***
>
> ***• Keep accounts.***
>
> ***The learned author, G Nevill, in Maxton (ed) Nevill's Law of Trusts, Wills and Administration in New Zealand (8th edn, 1985) notes at ch 20, p 407:***
>
> ***'But before proceeding to discuss the technicalities of the duties it seems opportune to mention that in the case where a will has been left, many of the duties here set out are really facets of the one primary duty of an executor, to propound and maintain the will by which he has been appointed. Let others attack that document if they wish. It is not for him to aid and abet them in their design of rewriting the testator's directions a little nearer to their heart's desire. It is not for him unwarrantedly to thwart them.'***

> ***The obligation to perform these duties arises within the special fiduciary relationship which exists between a trustee as a fiduciary to whom property is entrusted, and the beneficiaries entitled to that property. The most obvious element of that relationship is the requirement imposed in equity that the trustee will deal with those assets with the utmost probity which, in turn, requires that the trustee will not on any account allow him or her to have or acquire any personal interest in those assets without the express and informed consent of the beneficiary. There is, in addition, a further aspect to an executor's fiduciary responsibilities, namely a duty to act even-handedly between the beneficiaries. It is within this area of responsibility that the obligation not to unwarrantedly thwart claims arises".***
>
> ***[24] An executor's title is derived from the will and he may pay or release debts as well as get in and receive the testator's estate even before probate is granted. He holds the assets of the estate for the sole purpose of carrying out his duties and functions and is therefore in a fiduciary position in relation to those assets and may be held liable if he is negligent or reckless in his management of the estate. It is for this reason that he is bound by his oath to "faithfully collect, get in and administer according to law all the real and personal estate of the deceased" and to "render a just and true account of" his "executorship whenever* required by law so to do".**

[56] A special fiduciary relationship exists between an executor and the beneficiaries of an estate. If the executor fails to carry out his functions in the prescribed manner, or is negligent in his execution, he may be held personally liable to the beneficiaries of the estate.

[57] In the case **Basil Louis Hugh Lambie and anor v Marva Lambie and another** [2014] JMSC Civ 44, E Brown J (as he then was), in examining the basis for removing an executor at paragraph 72 highlighted that:

> ***"It is trite that it is incumbent upon a personal representative to discharge three functions in relation to the estate of the deceased. First, the personal representative is to pay the just debts and testamentary expenses of the deceased. Secondly, the personal representative is to collect and realise the assets of the deceased. Thirdly, an executor or administrator is to distribute the assets of the estate. There can be no effective management of the estate without the proper collection and realization of the assets of the deceased, which must of necessity include their protection from diverse claims."***

[58] In determining whether there were breaches on the part of Ms Evanko, all the circumstances of the case must therefore be examined. The evidence of Mrs. Yetman *vis a vis* that of Ms Evanko on this issue must be given consideration. When Mrs Yetman was questioned as to whether she challenged Ms Evanko in court in relation to her duties as executor she agreed that she did, however she did not agree that Ms. Evanko's inability to conclude her duties as executor was because of the difficulties with her nor did she agree that Ms Evanko's inability to carry out her duties as Executrix was because of the outstanding issue with the transaction with Laron's share. However, when asked if she would agree that Ms. Evanko has been unable to complete her duties as an Executrix of the Estate because she previously refused to accept the value of the Blue Cave Castle property she answered yes but indicated that that was because it was not a true value at that time.

[59] Ms. Evanko in cross-examination accepted that the net revenue of the estate was some Jamaican Two Hundred and Forty-Six Million, Six Hundred and Ninety-Three Thousand, Nine Hundred and Thirty-Five Dollars (J$246,693,935.00) between 1996 and 2016 and the profit was Jamaican Two Hundred and Thirty Million, Two Hundred and Fifty-One Thousand, Two Hundred and Twenty-Eight Dollars (J$230,251,228.00) although she does not believe taxes were included in that figure. Regardless of whether or not taxes were included, that is still not an insignificant sum of money but yet no evidence was shown as to what became of these sums and if and how any of the beneficiaries benefited from it. She spoke about the rental value of the property being United States Forty-Eight Thousand Dollars (US$48,000.00) per year and agreed that it was rented from 2003 to 2005 which would amount to United States Ninety-Six Thousand Dollars (US$96,000.00) but despite that profit and potential income the estate has nothing today. Although she accepted that between 2003 and 2005 she would have collected United States Ninety-Six Thousand Dollars (US$96,000.00) and that it would mean that Mr Jurik's share would amount to some United States Twenty-Four Thousand Dollars (US$24,000.00) but yet he only received United States Fifteen Thousand Dollars (US$15,000.00) in total. She insisted that a valuation report was done

in relation to his share but was unable to provide evidence of the valuation. With respect to the monies in the account, the amount for the United States Fifty-Six Thousand, One Hundred and Ninety-Five Dollars and Ninety-Four Cents (US$56,195.94) and Canadian Ten Thousand, Five Hundred and Ten Dollars (CAN$10,510.00) she did not provide a receipt to show how this was used up. It would appear from her evidence that the only expenditure she can substantiate through receipts was that paid for legal fees. It is also accepted that she had used money towards Mr Jurik's education and other aspects of his life. It is also accepted by her that although she has lived on the property since the death of the testator no rental sum was paid by her.

[60] In all these circumstances is she in breach? I have already found that Ms Evanko engaged in self-dealing and unduly influenced Mr Jurik, a beneficiary of the estate. The very fact of the self-dealing would be a breach of her duty as executor as it is in direct conflict with the duties of a fiduciary. As Executrix, she holds the assets of the estate for the sole purpose of carrying out her duties and functions and is therefore in a fiduciary position in relation to these assets. Her actions demonstrate a lack of fidelity in relation to how she dealt with Mr. Jurik's share of the property. Not only did those actions operate as a disadvantage to Mr Jurik but they also had an impact on the other beneficiaries.

[61] Counsel for the Applicants' relied on the principle in **Dance v Goldringham** that provides that trustees have an overriding duty to obtain the best price that can reasonably be obtained for the beneficiaries is well founded. There is no evidence that Ms Evanko did this and so in acting as she did, it was not only Mr Jurik that would have been prejudiced but also the other beneficiaries as they did not have a say in the sale of the property nor were they given the opportunity to consider or to exercise any options they may have had. Ms. Evanko had the obligation to deal with the estate assets with the utmost probity which required that she should not allow herself to have or acquire any personal interest in the assets without the expressed or informed consent of the beneficiaries. It is evident that Ms Evanko did not have the consent of the 1st and 2nd Applicants to deal with this share of the property in the way she did or at all. I am of the

view that no proper valuation was obtained from a reputable, qualified and independent valuator. I find there is merit in Ms Christopher's contention that in ascribing a nominal value to Mr. Jurik's share, the Respondent failed to take into account his entitlement to a share in the working capital of the partnership or lease proceeds.

[62] The Applicants have also accused the Respondent of failing to conclude the administration in a reasonable time or at all. The primary duty of an executor is to distribute the estate and to do so in a timely manner. It is now twenty-seven years post the death of Stephan Jurik and as Executrix, Ms. Evanko has not completed her duties. I have considered the evidence of Ms Evanko in her outline of the steps taken by her to carry out her duties as Executrix which included seeking clarification from the Court in relation to her rights as executor and beneficiary under the Last Will and Testament of Stephan Jurik; residing at the Blue Cave Castle hotel and maintaining the property; leasing the business and using these sums to maintain the property of the Estate with the information being provided to the auditors; engaging the services of Oliver Lotha & Company to conduct an audit of the partnership for the period 1996-2005; and abiding by the orders of the Court and providing the auditors with all the necessary documentation in order to prepare the report. She has sought to cast the blame for the delay on the Applicants but it was she who was tasked with taking all steps to do her duties as Executrix and not the beneficiaries. The very length of time she has taken to do so and the manner in which she has gone about it suggests a lack of due diligence.

[63] It is agreed that she sent a cheque in the sum of One Million, Five Hundred and Ninety-Five Thousand, Five Hundred and Seventy-Six Jamaican Dollars (J$1,595,576.00) to the 1st and 2nd Defendants' attorneys on their behalf as well as that she caused an Accounts of Estate to be prepared by Oliver Lotha & Co who found that the three Defendants were entitled to Jamaican Seven Hundred and Ninety-Seven Thousand, Seven Hundred and Eighty-Eight Dollars (J$797,788.00) respectively for their share. It is to be noted that this Accounts only spanned a nine-year period from 1996 to 2005. It is a fact that the first and second Defendants refused to accept this Account as well as the cheque sent

but this was because they were of the view that the report was “botched” and the cheque was not an accurate representation of their share. However, they did not seek to counter the accounting with any of her own. It would therefore not be fair to say that Ms. Evanko did not attempt to do any accounting. The question is whether she kept any proper accounts.

[64] Proper accounting would have been necessary to provide information as to the manner in which the administration of the property has been carried out and how any income derived is utilized. She would have been expected to do annual accounts which she has failed to do. She also admitted that she failed to open a bank account for the estate, despite the substantial value of the estate. She has not accounted to the Applicants for all the income generated by the estate and the profit gained over the years. I am therefore of the view that she failed in her duty to keep proper accounts and to render in a timely manner a true and just account of the estate.

[65] The court ordered accounts prepared by Dawgen Accountants has demonstrated that:

a. The estate comprises only a 1971 Mercedes Benz motor car, the Blue cave Castle Property, the 50% working capital from the now dissolved partnership between the deceased and the Respondent and Notional Lease, representing a sort of minimum rent which the Respondent ought to have charged her company for the lease of the estate property for 18 years;
b. Blue Castle has a current total value of $90,798,331.00;
c. Current working capital is valued at $7,017,894.00;
d. Notional Lease has a value of US$975,574.00 or J$60,884,780;
e. Laron Jurik’s share of 12.5% of the estate is valued at $11,394,791.38;
f. The motor vehicle assets of the estate have all depreciated in value but had the values of $8,000,000, $40,000.00 and $400,000.00 respectively in December 1996
g. Up until July 31, 2016, legal fees of $9,614,173.00 have been incurred.

[66] The executor has a duty not to waste the assets, to take reasonable care in preserving the deceased's estate and to deal properly with the assets of the deceased's estate. The executor also has a duty to take reasonable steps to maintain the value of the estate and its assets. A failure to do so amounts to *devastavit* in law. This principle is found in Roger Kerridge, Parry & Clark the Law of Succession (10th edn, Sweet & Maxwell 1996) 494-498 and Anthony Mellows, The Law of Succession (2nd edn, Buttersworth 973) 424-428.

[67] There is no indication from Ms Evanko that she took adequate steps to generate income from the property. It is noted that although the property could have been leased for the sum of United States Forty-Eight Thousand Dollars (US$48,000.00) yearly, she only leased it for two years.

[68] I am of the view that the steps taken by her to generate income for the property were woefully inadequate and not pursued with the kind of diligence expected from someone with the interest of the estate at heart. This along with the fact that she lived there rent free was to the prejudice of the other beneficiaries under circumstances where they did not consent. By occupying the estate rent free and by not taking steps to lease the property for even the notional lease as suggested by the auditor to enable the estate to generate some rental income for the beneficiaries is another breach of her duty. It is clear to me that she has been dilatory in her duties and her conduct has endangered the trust property and contributed to its depletion. The depreciation of the property demonstrates mismanagement of the estate by Ms. Evanko, a failure to preserve, protect and properly administer the property or at the very least that she was negligent in carrying out her duties as executor.

[69] In **Letterstedt v Broers and another** [1881-85] All ER Rep 882, Lord Blackburn established that the court may remove a personal representative where his conduct does not accord with the welfare of the beneficiaries in that it puts the property comprised in the deceased's estate at risk or in danger. One such situation in which this will usually occur is where the personal representative has a conflict of interest. The reason for this is readily apparent in that if the personal representative takes a course of conduct which is in her

personal interest but is against the estate, there will no doubt be a conflict of interest as in those circumstances, he or she will have competing positions that will impair his or her judgment and ability to adequately protect the interests of the estate.

[70] I have accepted on a balance of probabilities that the Respondent violated her duties as Executrix by engaging in self-dealing and breaching her fiduciary duties as Executrix, failing to preserve, protect and properly administer the assets of the estate, failing to keep proper accounts, in the mismanagement of the affairs of the estate and failing to conclude the administration of the estate within a reasonable time, therefore the question as to whether she should be removed as Executrix has to be addressed.

[71] In **Chevaughn Taurean Lawton (Suing by his Mother and Next Friend) v Irene Collins (the Executor of the Estate of Keith Anthony Lawton otherwise called Keith Lawton, deceased)** [2021] JMSC Civ 191, the Court ordered that the personal representative should be removed on the basis that between the death of her son Keith Lawton and the intervention of the Administrator General's Department, the income from the property was being used to support her grandchildren and the medical bills of another son who had died from kidney failure. The Court opined that it is clear from this evidence that the income from the estate was being used to support persons who, although they were family members, were not beneficiaries of the estate and it could not seriously be argued that this was in the interest of the beneficiaries.

[72] The actions of Ms. Evanko in breaching her duties as an Executrix meet the standard for her to be removed as Executrix. The next question is who would be the suitable person to appoint as administrator. The 1st Defendant Mrs Dasa Yetman has asked to be put in that position. She has demonstrated that she has the interest of the estate at heart and has already taken some steps towards dealing with it. Neither of the other Defendants have made any request to take on this role. I therefore find her to be the most suitable person to take on the role of administratrix of the estate.

[73] It is not fair to accord the payment of the accountant to Ms Evanko in her personal capacity as it operated to the benefit of all of the parties. The accountant should therefore be paid from the estate. In terms of payment to Ms. Evanko, I have considered the provisions of section 7 of the Trustees, Attorneys and Executors (Accounts and General) Act 1904 which gives the court a discretion to order the executor to forfeit the whole or part of his commission. The fact that she has failed to do her duties as executor, I am of the view that she should not be paid the usual 6% commission and that only a nominal fee should be paid to her. That position is also strengthened by the fact that she has failed to pay any rental sums for the twenty-seven years and has lived on the property post the death of the testator and so has benefited from that. She has also not fully accounted for the profits made from the estate. I am therefore of the view that she should be paid a reduced fee of 1% of the value of the estate.

Did the Claimant apply the monies previously held overseas towards the probate and administration of the estate and if not, should the proceeds be paid to the named beneficiaries?

[74] The uncontested evidence is that the monies in the Czechoslovak Credit Union, Toronto Canada bank account and in the Barnett Bank accounts at the Miami Airport were accessed and given to Ms. Evanko so that she could distribute it to the beneficiaries in accordance with the provisions of the Will. Ms Evanko has indicated that those funds were used to pay fees associated with the probating of the estate and legal fees however she has not provided direct proof of these funds having been used in this way. It would have been incumbent on her to prove this. Those funds were handed over to her for the very purpose of distributing them to the rightful beneficiaries. There were other funds that could have been channelled towards the payment of legal fees. Moreover, these were funds that the testator intended to benefit the beneficiaries to include not only the Applicants here but also his sister. To use those fund to pay legal fees without permission from the other beneficiaries where the estate was generating some profit which could be channelled towards that would be an

improper use of these funds and would also constitute a breach of her duties to the beneficiaries.

[75] Those sums should be paid to the beneficiaries in accordance with the provisions of the Will.

[76] My Orders are as follows:

1. That the transaction for the sale of Laron Jurik's, the 3rd Applicant's 12.5% share in the estate of Stephan Jurik, to the Respondent-Executor, is void ex debito justitiae and is set aside;

2. That Laron Jurik, the 3rd Applicant's 12.5% share of the estate of Stephan Jurik is valued at Jamaican Six Million, Six Hundred and Sixty-Seven Thousand Two Hundred and Fifty-Five Dollars and Eighty-Seven Cents ($6,667,255.87)

3. That the sums consisting of cheque in the amount of Four Hundred and Thirty-Eight Thousand Seven Hundred Jamaican Dollars (J$438,700.00) and cash of One Thousand United States Dollars (US$1000.00) paid to Laron Jurik the 3rd Applicant on the 7th May 2005 is to be treated as an advance payment by the Estate of a portion of the 3rd Applicant's entitlement in the estate and that the advance payment is to be deducted from the 3rd Applicant's 12.5% share on distribution.

4. That the Respondent Susan Evanko, Executrix of the Estate of Stephan Jurik is in breach of her duty as Executor by failing to conclude the administration of the estate in a reasonable time or at all, for engaging in self-dealing, failing to keep proper accounts and render in a timely manner a true and just account of the estate's accounts, failing to pass annual account, negligently dealing with the assets of the estate with a view of depleting same and depriving the beneficiaries of their interest, improperly managing the assets of the estate and for her personal benefit to the prejudice of the Applicants.

5. That the Applicants have suffered prejudice, loss, injury and made to incur expense on account of the Executrix's breach of her statutory and common law fiduciary duties owed to the Applicants.

6. That the Respondent be removed as Executor for the purpose of completion of the winding up of the estate and that the 1st Applicant be appointed the Administrator for the remainder of the Administration.

7. That the Respondent be paid a nominal fee of 1% of the value of the estate as executor's fee.

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Stephane Jackson Haisley
Pusine Judge