

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.352 OF 1997

BETWEEN	SUSAN EVANKO (On her own behalf and as Executrix of the Estate of STEPHAN JURIK)	PLAINTIFF
A N D	DASA YETMAN	1ST DEFENDANT
A N D	ZUSANNA BRECHOVA-SOUCEK	2ND DEFENDANT

Mr. Goffe Q.C. for Defendants/Applicants, with him Mr. Patrick McDonald instructed by Mr. S. Shelton of Myers, Fletcher & Gordon.

Mr. R. Henriques Q.C. for Plaintiff/Respondent, with him Miss Kerry Brown instructed by Clough, Long & Company. *l*

HEARD: 19th March and 3rd April, 1998.

SMITH, J.

Before me is a summons filed on behalf of the Defendants seeking the following Orders:

1. That the plaintiff, Susan Evanco, be removed as executrix of the estate of Stephan Jurik, deceased, of Blue Cave Castle, Negril in the parish of Westmoreland.
2. That Scotia Bank Jamaica Trust and Merchant Bank Limited be appointed the executor of the estate of the said Stephan Jurik, deceased, and be permitted to charge remuneration for its services according to its usual scales of remuneration.

The plaintiff was the common law wife of the deceased Stephan Jurik. The defendants are his daughters.

The deceased Stephan Jurik died on the 19th April 1996. He left a Will dated the 27th May 1991. The Plaintiff/Respondent Susan Evanco is the sole executrix. Probate of the Will was granted on the 2nd of May 1997. The deceased left property known as Blue Cave Castle in Negril to three beneficiaries - the parties in these proceedings.

On the 3rd October 1997 the Plaintiff/Respondent filed an Originating Summons on her own behalf and on behalf of the Estate

seeking the determination of the following questions; and consequential Declarations and/or Orders:

1. questions:

- (A) Whether there was a partnership between the Plaintiff and Stephan Jurik, deceased, in the building and operation of a hotel, known as "Blue Cave Castle", and/or a restaurant, known as Sweet Bite Cafe" on premises at Negril aforesaid registered at Volume 1042 Folio 247 of the Register Book of Titles;
- (B) Whether the said premises and/or a 1971 Mercedes Benz motor car formed part of the assets of the said partnership;
- (C) Whether the said partnership has been dissolved by the death of the said Stephan Jurik, deceased;
- (D) Whether the Plaintiff is entitled to a half share in the said premises and the said motor car;
- (E) Whether the said Stephan Jurik, deceased, was competent to dispose of only his half share of the said premises and motor car in his Will.
- (F) Whether the following provisions in the said Will is void for uncertainty:

"The main building which is to the East side of the property which I own at Negril, Westmoreland which includes the Residence and garage to go to DASA JURIK AND ZUSANNA BRECHOVA as joint tenants. They are to give ten percent (10%) of their profits from the operation of the said property as the case may be to Loren McEwan of Grange Hill, Westmoreland.

The Building to the West Side - Guest House, Kitchen and Office to go to SUSAN EVANKO and LOREN MCEWAN receiving ten percent (10%) of profits coming from the operation of the said property, as the case may be.

In case of a sale of the entire property by the beneficiaries the surviving beneficiaries are to share the proceeds of sale equally among themselves. Further, that in case of the sale of the entire property first option is to be given to the respective beneficiaries. There must be no sale of a part of the property unless it is among the beneficiaries or their survivors.

There must be no dividing boundary between the property - West and East.

All contents in each property (West and East) to remain intact to operate the businesses subject to SUSAN EVANKO removing her personal effects from the Main Building."

- (G) If the answer to the preceding question is in the affirmative, whether the properties mentioned therein fall into residue under the said Will.
- (H) Whether the following provision of the said Will is void as there has been an outright bequest of his interest in the said the motor vehicles to the 1st and 2nd Defendants:

"Any existing motor vehicles registered in my name is to go to DASA JURIK and SUSANNA BRECHOVA and in case of sale of the said motor vehicles LOREN MCEWAN to receive one third (1/3) from the proceeds of sale."

2. Consequential Orders:

- (a) That accounts of the said partnership be taken;
- (b) That the Plaintiff purchases the half share of the said Stephan Jurik, deceased, in the said partnership;

3. Such other relief as to this Honourable Court may seem just.

The filing of this Originating Summons prompted the Defendants/Applicants to file the summons that is now before me.

Mr. Goffe for the Defendants/Applicants submitted that the

issue for the courts determination may be put in the form of the following question: Can an executor properly assert his right to remain executor and simultaneously assert that he owned a part of the property which the testator has devised to other persons?

He contended that as executrix Miss Evanco's duty is to preserve the estate and to carry out the wishes of the testator. She cannot in her capacity as executrix seek to diminish the estate by asserting that the testator had no legal right to dispose of part of the property because it was partially owned by her. She can only do that on her own behalf, he urged. He argued that this is a clear case of conflict of interests. Mr. Goffe referred to Letterstedt v. Broers and Another (1884) 9 A.C. 371 at 385-7 and submitted that the continuance of Miss Evanco as executrix would prevent the estate being properly administered and would not be in the interests of the other beneficiaries - the defendants/applicants.

Mr. Henriques for the plaintiff/respondent submitted that the general rule for the removal of a trustee is that his acts or omissions must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties or a want of reasonable fidelity see Letterstedt v. Boers (supra) at p.386.

Counsel for the plaintiff/respondent contends that this is not a case of conflict of interests. Essentially the summons seeks to interpret two documents - the Will and the partnership agreement. The plaintiff/respondent is herself a beneficiary. She has distributed all assets except those which are the subject matter of the Originating Summons. There was a partnership agreement between the testator and the plaintiff and the plaintiff is asking the Court to interpret the Will and the agreement and to say what are the assets and to whom they belong.

He also contends that to appoint another trustee would incur further costs. This, he claims, will not be in the interest of the beneficiaries. He disagrees with the proposition of the defendants that one cannot remain an executor and at the same time asserts a claim to property which the testator has devised to another. If this were so, he argues, then the equitable doctrine of election would not operate in law.

The legal issue to be determined is whether or not the assertion of the executrix, Miss Evanco, of her interest in the property which has been devised to the other beneficiaries constitutes a conflict of interests sufficient to warrant her removal from the executorship position.

Halsbury's Laws of England 4th Edition at paragraph 800, entitled Avoidance of Conflict between trustee's interest and duty states that "a trustee must not intentionally place himself in a position in which his interest may conflict with his duty. Therefore he must not enter into engagements in which he has or can have a personal interest which conflicts or possibly may conflict with the interests of those whom he is bound to protect." Reference is made in this regard to Re Thomson, Thomson v. Allen (1930) 1 Ch. 203 where the executor, after the testator's death, set up a business competing with that which the testator had bequeathed to him.

But what is the situation in cases such as the one presently before the court in which the executrix did not intentionally place herself in a position where her interest may conflict with her duty?

In Re Mulholland's Will Trusts, Bryan and Others v. Westminster Bank Limited (1949) 1 All E.R.460 Wynn-Parry J. said at 463A:

"The principle which emerges is that the existence of the fiduciary relationship creates an inability in the trustee to contract in regard to the trust property. The case as I read it, does not touch the position arising where the contract in question has been brought into existence before the fiduciary relationship. That in such a case the trustee is not precluded by the subsequent fiduciary relationship from asserting his rights under the pre-existing contract emerges clearly from such cases as Vyse v. Foster, Hordern v. Hordern"

In Vyse v. Foster (1874) L.R. 7 H.L.318 Lord Cairns said (332):

"My Lords in point of fact the testator appointed as one of his executors one of his partners, Mr. Henry Vyse. I apprehend it to have been perfectly clear that the testator could not, by appointing one of his

partners as his executor, annul that partnership contract which he had deliberately entered into. I cannot admit that it was necessary to disclaim the executorship in order to save his contract. In the view, at least, of a Court of Equity, I apprehend that the contract remained in full vigour, even although there might from the peculiar position of the executor as a surviving partner be reasons for watching narrowly the course which he would take with regard to the fulfilment of the contract."

The case of Arthur Hordern and Another v. Samuel Hordern and Another (1910) A.C.465 is of interest. It deals with the law of Partnership and a provision for purchase by survivor of share of deceased partner. Of particular interest is the fact that the surviving partner was the sole executor of the deceased.

In considering the conflict between duty and interest Lord Shaw of Dunfermline said (475):

"It is no doubt true that the conflict between duty and interest may arise but it is also true that that conflict is brought about entirely by the action of the late Mr. Anthony Hordern who appointed Mr. Samuel Hordern his executor in full knowledge that he would have to exercise on survivance the rights, and come under the obligations, stipulated in regard to the surviving partner by the articles of association. The idea that, in consequence of that possible conflict, Mr. Samuel's duty was to decline the trust reposed in him by his brother is out of the question."

(emphasis mine)

DaCosta v. Warburton and Kenny (1971) 12 J.L.R. 520 supports the contention that an executrix who is also a beneficiary can bring an action before the court to determine the extent of her rights in property which the testator devised to other beneficiaries without surrendering her executorship. In that case the testator made certain bequests to his wife whom he appointed executrix.

The testator's grandchildren were also beneficiaries. The will was duly proved and probate thereof issued to his widow who

later sought by way of originating summons the determination of certain questions. She brought the summons in her capacity as executrix as well as in her personal capacity. It was contended on her behalf that the testator's intention was to give her an estate in fee simple and that the devise to the grandchildren (the defendants) was null and of no effect. The question of conflict of her interest with her duty did not arise.

The authorities considered illustrate the principle that "although the existence of a fiduciary relationship creates an inability in the trustee to contract in regard to the trust property, when the contract has been brought into existence before the fiduciary relationship, the trustee is not precluded from asserting his/her rights under the pre-existing contract."

Accordingly I would answer the question posed by Mr. Goffe in the affirmative.

Of course there are other factors which normally would militate against the removal of the executrix in this case, viz:

1. The appointment of the Scotia Bank Jamaica Trust and Merchant Bank Limited as executor will of necessity involve large sums of money being taken out of the estate for the institution's remuneration. Indirectly this would constitute a frittering away of the estate which the testator did not intend.
2. Halsbury's Laws of England 4th Edition at paragraph 736 states that in all cases of appointment by the Court of a new trustee the court must have regard for the wishes of the creator of the trust if expressed in or to be inferred from the instrument creating the trust and to the question whether the appointment will promote or impede the execution of the trust and will not appoint a trustee with a view to advancing the interests of some of the beneficiaries in opposition to those of others - *Re Tempest* (1866) 1 Ch. App. 485. The testator must have had every confidence and trust in the plaintiff to appoint her as sole executrix.
3. There must be a rationale for the provision in law that executors can be beneficiaries

even though it is anticipated that there would be instances when executors in this dual capacity would want to assert their right.

4. Finally there are alternative ways by which the court may exercise control over a trustee. For example in cases of friction the proper course is to invoke the inherent jurisdiction of the court over trustees in an action commenced by writ for administration or execution of the trusts - See Underhill and Hayton on Trusts and Trustees 15th Edition p.743.

Conclusion

Summons dated 13th of February, 1998 is dismissed. Costs of this application to the Plaintiff/Respondent to be taxed if not agreed.