N/M 58

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN PROBATE AND ADMINISTRATION

SUITE NO. P. 187 of 2002

IN THE ESTATE Louise Haughton
Late of Brandon Hill, Montego Bay
In the parish of St. James, housewife,
Deceased, testate

BETWEEN	SYLBERN HAUGHTON	APPLICANT
A N D	PEARL HAUGHTON-CASSELLS	RESPONDENT
A N D	GEORGE H. HAUGHTON	RESPONDENT

Mr. Herbert Rose for Applicant

No Appearance for the Respondent

Originating Summons

Heard: May 21, 31st 2002 and June 28th 2002

DAYE J. (Ag.)

This summons was issued on the 20th February, 2002 by Sylbern Haughton who is one of the beneficiaries under his late mother's Will. The applicant, Sylbern Haughton seeks the assistance of the court in interpreting and making a declaration regarding his late mother's Will because he contends that his interest under the Will is affected by the manner in which the personal representatives have

administered her estate. The applicant is permitted to apply to the court by virtue of Sec. 531 of the Judicature (Civil Procedure Code) Act. This section provides as follows:

> "Any person claiming to be interested under a deed, will or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested".

Specifically, the applicant is seeking a determination of the meaning and effect of clause **4.1.** of the Will of his late mother Louise Haughton. Louise Haughton executed her Last Will and Testament on the 15th January, 1996 and by clause 4 gave several legacies to her children and grandchildren respectively. In his affidavit supporting his originating summons, the applicant exhibits a copy of Louise Haughton's Will, which was admitted to probate on the 3rd March, 1999. Therefore, although the applicant seeks a determination only of clause **4.1.** that affects him personally he is inviting the court to take the whole Will into consideration including the other provisions of clause 4. Indeed, counsel for the applicant in advancing his interpretation of the Will on behalf of his client, approached the issue

by looking at the entire Will in order to ascertain the intention of the testatrix Louise Haughton in respect of clause **4.1.**

This means that the court will of necessity examine all the provisions of the Will. It is a relatively short Will containing only four provisions. Clause 4., the provision in issue provides as follows:

"4. **I GIVE AND DEVISE** the following interest in property situated at 42 Meadowbrook Avenue, Kingston 19 in the parish of Saint Andrew;

1. To my son Sylbern Haughton 10% of the value of the said property;

2. To my grandson Andrew Haughton the sum of One Hundred Thousand Dollars ($100,000.00);

3. To my grand-daughter Dorothy Haughton the Sum of Fifty Thousand Dollars ($50,000.00);

4. To my daughter Pearl Haughton-Cassells 60% of the remaining balance on the said property.

5. To my son George Haughton 40% of the remaining balance on the said property.

6. To my daughter Pearl Haughton-Cassells all my household items and personal belongings

I have a few observations about this Will. They are as follows:

(a) Pearle Haughton-Cassells and George Haughton, daughter and son of the Testatrix were appointed executors and Trustees of their mother's Will (cl.2),

(b) The Will is silent as to any direction to the executors and trustees to pay the funeral, testamentary expenses and debts of the testatrix,

(c) No express power of sale is conferred on the executors and trustees,

(d) There is no residuary clause contained in the Will,

(e) Pearl Haughton-Cassells and George Haughton are also beneficiaries under the testatrix's Will.

Sylbern Haughton take issue with performance of the duties of Pearle Haughton-Cassells and George Haughton as executors and or trustees of his mother's estate. Exhibited to his affidavit supporting his summons was a draft statement of account presented to him by the executors for the sale of 42 Meadowbrook Avenue, Kingston 19, St. Andrew. This account was prepared by the firm of Attorneys-at-Law, Knight, Pickersgill, Dowding and Samuels who appeared to have carriage of sale of this property on behalf of the executors. This property was the principal asset of the testatrix's estate. The relevant portion of the statement of the account is outlined hereunder.

"Re: Sale of No. 42 Meadowbrook Avenue, St. Andrew

Sale Price	$5,500,000,00

. . .

. . .

. . .

Total Expenses	$1,891,445.37	
Net Proceeds of Sale	$3,608,554.63	
	$5,500,000.00	$5,500,000.00
Amount due to Sylbern Haughton		
in satisfaction of bequest under Will		
(10% of value of property)	$550,000.00	
5% commissioned sale price	$275,000.00	
	$825,000.00	
Less Sylbern's Haughton share of		
expenses relating to the sale of the		
premises (10% of total expenses	$189,144.54	
Balance due to Sylbern	$635,255.46	

The total expenses in the Statement of Account consisted of such main items of expenditure as: Transfer Tax, stamp duty, fees to Titles Office, Attorneys-at-Law costs and 5% commission to Sylbern Haughton. The applicant challenges the deduction of $189,144.54 from his ten percent (10%) of the value of the 42 Meadowbrook

Avenue, Kingston 19 given to him by clause 4.1. He contends that on a proper interpretation of clause 4.1. of Testatrix's Will he is entitled to ten percent (10%) of the gross value of the property. In other words, the applicant is saying that his legacy ought not to be charged with any of the expenses connected to the estate.

Counsel for the applicant Mr. H. Rose, in furtherance of the applicant's claim, submitted that the proper and correct approach to an interpretation of cl. 4 of the Will is to ascertain the intention of the testatrix at the time the Will was made. He contends the testatrix's intention is clear and unambiguous from the tenor of the Will. Further, he insisted that having regard to how the testatrix disposed of her property in cl. 4, viz. firstly; 10% of the real estate to her son the applicant, two pecuniary legacies to her grandson and grand-daughter and the remainder of the property to her other son and daughter to share 40 percent to 60 percent, it means the testatrix intended that the applicant should receive ten percent (10%) of the gross value of the estate and not the net value of the estate.

The issue, which arises, is whether the cost and expenses of transferring the specific legacy of ten per cent (10%) of the value of 42 Meadowbrook Avenue, Kingston 19 to the applicant Sylbern

Haughton should fall on his legacy or on the other legatees or solely on the general estate of the deceased. In this hearing I adopt and apply the definition of 'legatee' used in sec 2(1) The Transfer Tax Act, 1971. It provides that " 'legatee' includes any person taking under a devise or other testamentary disposition . . . whether he takes beneficially or as a trustee, . . ."

The general principle as to who is responsible for the cost of testamentary and administration expenses was outlined in 16 Halsbury's Law of England (3rd ed., p. 355, para. 686 and 687, 689) as follows:

> "686. It is often important to decide whether costs and expenses incurred by a personal representative are properly payable out of the estate as testamentary and administration expense or should be borne by the legatee or devisee or person entitled on intestacy out of their respective interest. The general principle is that the estate must bear the expenses incident to the proper performance of the duties of the personal representative but not the expenses involved in the execution of trusts which arises after the estate has been administered or an assent given".
>
> "687 The general cost of administering the estate is testamentary expenses. The estate must bear the cost of obtaining the grant, collecting and preserving the assets, discharging the debts and distributing the balance . . ."
>
> "689 . . . estate duty payable on property, including realty, which does not pass, for the purposes of estate duty, to the executor as such is not such an expense,

i.e. [testamentary] . . ."

The early authority of Peter v. Stirling (1878) 10 Ch D. 279 is illustrative of the type of expense that an executor should pay out of the general estate of the deceased and what expense the legatee ought not to pay. Malins, V.C. stated thus as page 282 (supra):

> "It is perfectly clear that, whatever are the expenses of getting the assets in Victoria, whether they are the expenses of calling them in, or selling property, or paying duty to the government, they are all deductions to be made as expenses of the estate to be paid out of the estate generally; and that which remains after paying all the debts of the testator, remains as assets of the testator and goes to pay the legacies in full, and there is no obligation on the legatees to pay part of those expenses".

The Judge was referring to the expenses that an executor incurred in getting some of a deceased property from overseas to England. In particular the property overseas in this case was liable to a duty, which was regarded as a debt of the testator. In another case In Re Fitz Patrick (deceased) Bennett and Another v. Bennett (1951) 2 ALL E.R. 949 the testator had to contemplate incurring expenses to obtain the testator's property from overseas to England. The question arose whether the cost of transporting the chattels to England and of insuring them in transit ought to be borne by the residuary estate or by the specific legatee. Harman J. pointed out:

> "It was not the duty of the executor to go to Monaco . . . and obtain these chattels and bring them back here. All they needed to do was to assent, which they must be taken to have been done. The executor having assented, the specific legatee must go and get the chattels. If an assenting executor having become a trustee, incur expenses at the request of the specific legatee he is entitled to be indemnified as a trustee is always so entitled . . ."

This rule indicates the separate functions and duties of an executor viz a' viz a trustee. The capacity in which the executor acts or can act is directly related to what expenses is attributable to the general estate of the testator or to the legatee. It becomes necessary then to ascertain the duties and functions that the common law imposes on an executor. Jessel M.R. in Sharp v Lush (1879) 10 Ch. D. 468 at 470 asked the question:

> " . . . What is the proper performance of the duty? of an executor?".

He went on to answer in these terms:

(a) "It is ascertaining the debts and liabilities due from the testator's estate.

(b) payment of such debts and liabilities.

(c) The legal and proper distribution of the estate among the persons entitled.

(d) Obtain the assistance of a court of equity to decide for him any question [if he is unable to decide] and the cost of such suit is allowable.

(e) He is liable to pay funeral expenses as a first charge on the estate.

(f) He is liable to pay any rent due as a debt arising from the testator's estate.

(g) To take care of specific legacies . . . It is his duty not to assent to the payment of them until he ascertains there are sufficient asset".

(h) To take out probate and pay these costs (In Re Elementary Education Acts, 1870 and 1873 (1909) 1 ch. 5 5.

The duties itemized from (a) to (h) and the expenses connected to them are described as testamentary expenses and costs of administration. When the executor incurs any of these expenses it is to be paid out of the general estate.

The court had to determine what was the nature of expenses incurred for payment of estate duty. The answer to that question would also determine who should pay this expense. Swinfen Eady J in dealing with this issue, inter alia, or on an Originating Summons re Spencer Cooper, Poe v Spencer Cooper [1908] 1 ch. 130 said that estate duty payable in respect of real estate is not a testamentary

expense. By implication the court was ruling that estate duty ought not to be paid out of the general estate. The learned judge went on to expressly state in his judgment what was the rule as to who was responsible for the expenses of estate duty. He said the following:

> "The executor is not made accountable by the Finance Act 1894, . . . for the duty on the real estate . . . that in all cases where the duty becomes payable for which the executor is not accountable the duty must be paid ultimately by the person beneficially entitled in proportion to their shares."

He concluded finally that:

> "The result is that the primary burden on devisees of land (whether devised in trust for sale or not) in respect of estate duty on land is not removed by a direction to pay testamentary expense"

The rule in this case was followed In re Rosenthali Schwarz v. Bernstein and Anor. 116 S.J. 666

Estate duty is a tax payable in England and was introduced by legislation there in 1894. Estate duty is not payable in Jamaica. However, the Transfer Tax Act, 1971, introduced the transfer tax in Jamaica for any transfer of real estate (sec. 3 of Act). No transfer tax is payable in respect of the transfer of property by any personal representative to a legatee (sec. 5 (2) of Act).

The estate duty in England is analogues to transfer tax in the jurisdiction of Jamaica. The authorities therefore governing the payments of estate duty in England are applicable to Jamaica.

The payment of the expenses of transfer tax as also stamp duty could arise as a cost of transfer in the process of administering an estate. These issues arose In re Grosvenor and Grosvenor v. Grosvenor (1916) 2 Ch. 375 where the specific legacies in question were railway shares and company shares. The question was whether the cost of transferring the specific legacies including the stamp duty fell on those legacies or the residue.

The court held the trustees who were also executors must have assented to the gift of twenty shares to themselves. After assent they were entitled to the shares as trustees and not as executors. The cost of transfer incurred were costs in carrying into effect the trust of the twenty shares and not costs of the general administration of the estate. The costs should be borne by the property in respect of which they were incurred and not by the estate generally. Further the court pointed out that the costs of transfer and stamp duty are costs and expenses which the separate legatee must pay in order to complete

their title to their specific property, which after assent the executors holds as trustee for the beneficiary and not as executors.

The rules of the law that fix the costs and expenses of estate duty, cost of transfer and stamp duty on the legatee rather than as the general estate of the testator could sometimes come into conflict and be at odds with the testator's desire and intention to give a beneficiary a gift of a certain value. Sir Wilfred Green M.R., raised and provided an answer to this conflict In re Owens [1941] 1 Ch. 17 at 19. He discussed the issue in these terms.

> "Where a testator gives a legacy, and provides in the usual form that it should be paid out of the proceeds of sale of his estate, one would expect him not to intend that the legacy should be cut down by being forced to contribute to the estate duty payable in respect of his real estate, nevertheless, these matters are highly technical. Any provision which touches upon taxation is necessarily of such a character and, however much one might wish to smooth the path of the testators by finding a way round this particular trap, it is not open to the court to do so".

I therefore hold, taking into consideration the principles of the authorities discussed that:

i) The proceeds of the sale of 42 Meadowbrook Avenue, Kingston 19 were the principal asset of the estate of the testatrix Louise Haughton.

ii) This asset remained essentially real estate,

iii) The beneficial interest of Sylbern Haughton Under clause 4 of the Will was part of the real estate,

iv) The applicant's interest is subject, to the extent of his share, to the costs and expenses of transfer tax, stamp duty and all costs of transfer necessary to secure him his interest,

v) The executors of the Will Pearl Haughton-Cassells and George H. Haughton although there was no express power of sale in the Will, hold the proceeds of the sale of 42 Meadowbrook Avenue, Kingston 19 as trustees and not as executors. In fact sections 5(1) of The Real Property Representative Act 1903 [J] imposes a trust on all representatives of a deceased person who hold the real estate. The Act also preserves the common law rules

of the payment of different types of expenses by the estate and the legatee. Sec. 5(3) of the Act.

vi) The draft Statement of Account was therefore submitted to the executors in their capacity as trustees.

vii) The expenses itemized therein were not expenses the respondents were responsible for as executors, neither were the expenses to be deducted from the general estate,

viii) They are expenses to be borne by legatees according to their respective shares.

Accordingly this is the court's Declaration:

> That on a proper interpretation of Clause 4(1) of the Will of Louise Haughton dated January 15, 1996, housewife, deceased, testate the beneficiary Sylbern Haughton is not entitled to the full total of the legacy granted to him without deductions for any expenses incurred to perfect his interest. Sylbern Haughton's beneficial interest is liable for the payment of the expenses of transfer tax, stamp duty and all costs of transfer.