IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CHAMBERS

SUIT NO. E152/92

BETWEEN	MAKEDA JAHNESTA MARLEY (An infant by N/F and Mother YVETTE CRICHTON	PLAINTIFF
AND	MUTUAL SECURITY MERCHANT BANK AND TRUST COMPANY LIMITED (Administrator of the Estate of ROBERT NESTA MARLEY, deceased).	DEFENDANT

E.E. Frankson instructed by Messrs Gaynair and Fraser for plaintiff.

David Batts instructed by D. Brandon of Messrs Livingston, Alexander and Levy for defendant.

HARRISON, J. Heard: 9th, 11th & 17th June, 1992

By an originating summons dated 30.4.92 the plaintiff sought an order that the Court direct the defendant to

> "... pay to the plaintiff such sum or sums weekly or monthly for maintenance for Makeda Jahnesta Marley ... as the Court deems fit."

The infant plaintiff was born on the 30th day of May 1981. She is the daughter of the late Robert Nesta Marley, O.M. who died intestate on the 11th day of May 1981. On the 17th day of December, 1991, letters of administration were granted in the said estate. The defendant is the administrator of the estate. The administrator pays to Yvette Crichton, next friend and mother of the plaintiff a monthly amount for the maintenance of the plaintiff. This sum is paid from the interest earned from a capital sum of $500,000 allocated as a portion of the share of the plaintiff, a minor beneficiary. This amount of interest is ascertained and allocated monthly in the currency of this country, converted to the currency of the United States of America and then transmitted to the latter country where the plaintiff and her mother reside. Because of the depreciation of the Jamaican dollar compared to the United States dollar, the amounts remitted for the maintenance of the plaintiff decreased progressively, in proportion.

Yvette Crichton complains that the remittances received are as a consequence "wholly inadequate for the proper maintenance and upbringing of the infant".

For the month of February 1992 the amount remitted for the maintenance of the plaintiff after such conversion was US$322.18. Miss Grichton as a consequence issued the said summons. She referred to the fact that in addition to the allocation of the said $500,000.00,"an agreement for sale of a portion of the estate's assets was approved by the Supreme Court of Judicature of Jamaica on the 20th day of September 1991, and it was ordered that the administrator pay by way of capital distribution to each of the infant beneficiaries the sum of US$995,000.00". She also exhibited a statement of "monthly expenses for 1992" being, household costs "to maintain our family", and amounts for vacation travel that may be incurred by the plaintiff.

Mr. Frankson for plaintiff submitted that the payments for maintenance of the plaintiff are made from the interest earned from an arbitrarily fixed sum of $500,00.00. However the administrator of the estate maintains an account in the Royal Bank of Canada in Miami, United States of America to which account the income derived principally from assets of the estate located outside Jamaica are lodged. From this account certain legal expenses are paid. He argued further that in December 1991 the Supreme Court approved a capital distribution of US$995,000.00 for each of the infant beneficiaries. The administrator has in its hands to the credit of the estate, earning interest, $11,000.000.00 in Jamaica and US$5,000,000.00 in the United States of America. He continued, that the current monthly remittance, for the maintenance of the plaintiff, which in February 1992, was US$322.18 was grossly inadequate. He maintained that the administrator ought to be ordered by the Court to pay the amount requested, US1645.00 per month, from the interest earned on the sum of US$995,000.00 and that there was no necessity to resort to the capital sum of $500,000.00 for the maintenance of the plaintiff. However, the administrator may do so if it is for the benefit and welfare of the plaintiff. He concluded that the Court had an inherent jurisdiction to allow and review maintenance payments - vide Equity and the Law of Trusts by Pettit, 3rd edition, page 348(c) and Ex Parte Chambers [1829] 1 Ross and My 577, 39 English Report, p.221.

Mr. Batts for the administrator/defendant submitted that under a trust, the trustee, unlike a parent in family matters, has a discretion to maintain and the court will not intervene unless that discretion is exercised dishonestly

or he failed to exercise it at all. He argued further that the defendant wisely invested some of the funds in the United States of America and it was not presently advisable or appropriate to increase the maintenance payment. The trustee's discretionary power to maintain the plaintiff arises under the provisions of the Conveyancing Act, section 44, which are "the statutory provisions which relate to maintenance and accumulation of surplus income ..." referred to in section 5(1)(ii) of the Intestates' Estates and Property Charges Act. The administrator has a duty to hold and accumulate and disburse the funds when the infant is of age and the court will not interfere unless the said administrator has acted male fide. Vide In Re Bryant [1894] 1 Chan 324, Re Senior [1936] 3 Chan Div. 198, and also Underhill's, Law relating to Trusts and Trustees, 10th edition, p.412. The trustee he said, has acted bona fide in the best interest of the plaintiff. The needs of the plaintiff have not been shown to be so dire, that the court should interfere and in the circumstances the application should be refused.

Where the administrator of the estate of an intestate holds the estate for the benefit of the infant issue of such intestate - he holds as trustee upon the statutory trust, i.e. "upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits .." for the benefit of such issue - see section 6 of the Intestates' Estate and Property Charges Act.

The said Act is also directive as to the right of maintenance of the said infant issue.

Sec.5(1)(ii) reads,

> "the statutory provisions which relate to maintenance and accumulation of surplus income, shall apply ..."

Curiously, such "statutory provisions" are contained in the Conveyancing Act.

Section 44 of the latter Act reads,

> "(1) Where any property is held by trustee in trust for an infant either for life or for any greater interest, ... the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property, or any part thereof, whether there is any other

> fund applicable for the same purpose, or any other person bound by law to provide for the infant's maintenance or education, or not".
>
> (2) The trustee shall accumulate all the residue of that income ... by investing the same ... and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property ... but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year".

By this latter Act, therefore, the trustees derive the power to provide for the maintenance and education of the infant beneficiary out of the income arising from the investment of such trust funds, "at their sole discretion". Once this discretionary power is exercised however, the court will not interfere unless it is exercised mala fides.

In re Bryant, Bryant v. Hickley [1894] 1 Ch.324, the co-trustees under an express trust for "the maintenance, education or benefit ..." of children of the testator, was requested by the testator's wife trustee, after her re-marriage, to make an allowance out of the testator's residuary estate towards the maintenance of each child. The children were being maintained by their mother. The co-trustees declined to exercise their discretion to make such allowances. It was held that the co-trustees were administering a discretionary trust and having in the bona fide exercise of their discretion refused to make any allowance for maintenance, because they did not consider it necessary then, the court would not intervene to overrule their discretion.

In Re Senior, v. Wood [1936] 3 Ch. Div. 196, the trustee of the will of the testator, was prepared to make an allowance for the maintenance of the children beneficiary from acculations but not to the extent of that applied for on the summons. The children were being maintained by their mother from her own income.

The Court refused to interfere with the exercise of the discretion of the trustee - or to refund to the said mother money expended for maintenance out of her own income.

Trustee are not in loco parentis to infant beneficiaries although they must have regard to the benefit and welfare of the children, in the administering of the trust. However, so long as they do not decline to exercise their discretion or as long as they exercise it bona fide, the court will not interfere - vide Underhill's, Law relating to Trusts and Trustees, 10th edition, page 413.

> "The power being discretionary, the Court will not interfere with the trustees' discretion so long as they exercise it bona fide".

In the instant case, the interest accruing from the invested capital of $500,000.00 on behalf of the plaintiff yeilded incomes for the three months, November and December 1991, and January 1992 of $14,013.69, $13,561.65 and $14,813.70, respectively. For these months, the administrator/trustee/defendant remitted to the plaintiff the sum of $7,390.00 Ja. each month. This sum was the maximum permitted to be sent out of Jamaica by the Bank of Jamaica, under the then existing provisions of the Exchange Control Act. This amount of Jamaican currency when converted yeilded amounts of, US$379.82, US$364.13 and US$337.87, for the said months. This was clearly inadequate in terms of the actual expenses for maintenance of the plaintiff - but there is no absolute discretion, simpliciter, in trustees to maintain. The trustees therefore, had surplus income accumulating.

By letters each dated 6th January 1992 and by letter dated 20.3.92 the mother guardian of the plaintiff wrote to the defendant, pointing out the inadequacy of the amounts remitted for maintenance of the plaintiff, the increase in cost of living and enclosing a budget of monthly costs and expenditure on behalf of the plaintiff. She requested, a monthly amount of US$1645.00 for maintenance, with added amounts for vacation travel.

The defendant, unsolicited, in March 1992, sent to the plaintiff the accumulation of income in hand, namely US$1249.03. The exchange controls were then relaxed. In addition, US$1000.00, at the plaintiff's request was dispatched for dental expenses of the plaintiff - from the capital invested.

A detailed statement from the defendant, accompanying its letters dated, the 10th and the 11th June 1992 to its attorneys shows that between

May 1991 and June 1992, the amounts received for interest from which payments were made created a deficit in the account. Richard Roberts, the General Manager of the defendant in his letter of the 10th day of June, 1992 explained, that the said deficit, was "... due to the fact that we have made payments of US$1000.00 for May and June although interest payments for these months have not yet been received."

It is noted also, that for each of the months of May and June 1992, the defendant remitted to the plaintiff the sum of US$1000.00 for her maintenance. These amounts were in anticipation of the receipt of interest of Ja$23,865.43 and Ja$22,930.00 respectively for these months and those latter amounts being able to purchase at the existing rate of exchange - US$1000.00 for each month.

Mr. Batts for the defendant, in referring to the statement of the plaintiff's monthly expenses for 1992 of US$1645.00 submitted that this court should not take into consideration certain items claimed. This court is of the view, that certain of such items are indeed shared costs that would probably be incurred in any event or to a great extent, whether or not the plaintiff was member of such household. Yvette Crichton herself describes household costs as "... a total amount we have paid in 1991 to maintain our family". Items such as "residence ... electric/heat .. water .. medical insurance .. transportation .. gas/maintenance and .. telephone .." when examined, are not expenses exclusive to the use of the plaintiff and probably would have been incurred in any event by "the family". With these amounts discounted from US1645.00, it leaves a balance of US$1065, which probably is the requisite monthly amount for the plaintiff's maintenance.

Mr. Frankson, had quite candidly admitted to this Court that if the sum of US$1000.00 was being remitted previously, this action would have been obviated.

This court finds that the defendant trustee has been quite flexible, but responsible, in the exercise of its discretion with respect to the maintenance of the plaintiff. The fact that the capital balance remaining invested is now Ja$473,000.00 is evidence that the defendant is not averse to the utilization of capital to benefit the plaintiff - vide paragraph 3 of the

affidavit of Richard Roberts dated 27.5.92. This resort to capital is desirable and in the best interest of the infant.

The court in addition accepts, that the further anticipated allocation of US$995,000.00 to the plaintiff, will provide further income for the benefit of the plaintiff in due course.

The defendant has not failed to exercised its discretion nor has it done so mala fides. The sum of US$1000.00 currently being remitted for the maintenance of the plaintiff is in this court's view adequate and a minimum in the circumstances and a valid exercise of the defendant's discretion. With this the court will not interfere.

Accordingly, the summons is dismissed - with costs to the defendant.

The question of who should bear the costs of this summons arose.

Mr. Batts submitted that where the application to the court was not made by the trustee but by a beneficiary and such application was at variance with the interests of the other beneficiaries the costs should not be borne by the estate but should be paid from the share of the beneficiary making the said application. He relied on the case of Chen vs. Quinen Lee [1967] 10 WIR 222.

Mr. Frankson in reply, stated that this application was not adverse to the interests of the other beneficiaries, in that, if the application had succeeded the other beneficiaries would have profited from the order of the court.

This court is of the view that section 22(2) does not, on its strict wording permit administrator/trustee to resort to capital in payment of maintenance to the infant beneficiaries

> "Sec.44(1) .. the trustees may at their sole discretion, pay ... for or towards the infant's maintenance ... the income of that property.
>
> (2) The trustees shall accumulate ... but ... the trustees may ... apply those accumulations ... as if the same were income arising in the then current year".

This application will facilitate the administrator. Depending on the behaviour pattern of the Jamaican dollar, circumstances may well arise to cause the administrator to have recourse to capital in addition to accumulated income in order to satisfy future maintenance payments to this or any other infant beneficiary. This is a matter that would affect all the infant beneficiaries and therefore would fall within the second class of cases as described by Wooding, C.J. in Chen vs. Quinen-Lee, supra, at page 232

> "(b) ... cases in which it is generally admitted or is apparent from the proceedings, that, although the application is made by one or more of the beneficiaries and not by the trustees, it is made by reason of some difficulty of construction or administration which would have justified an application by the trustee, but has not been made by them because for some reason or other a different course has been deemed more convenient .... the application is regarded as being necessary for the due administration of the trust and so the costs of all parties are considered to have been necessarily incurred for the benefit of the estate as a whole: they are therefore ordered to be taxed as between solicitor and client and to be paid out of the estate".

Accordingly the costs to the defendant shall be borne by the estate and taxed on a solicitor and client basis.

Certificate for counsel.