

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 39/98

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN DASA YETMAN DEFENDANTS/APPELLANTS
ZUSANNA BRECHOVA-SOUCEK

AND SUSAN EVANKO PLAINTIFF/RESPONDENT

Dennis Goffe, Q.C., Jermaine Simms and Dave Garcia,
instructed by Myers, Fletcher & Gordon, for the appellants

R. N. A. Henriques, Q.C. and Kerl Brown, instructed by
Clough, Long & Co., for the respondent

December 16-18, 1998; March 22, 23 and July 6, 1999

RATTRAY, P.:

Having read in draft the judgment of Langrin, J.A., I entirely agree with
his reasoning and conclusion.

BINGHAM, J.A.:

I have read in draft the judgment prepared in this matter by Langrin,
J.A. I agree with the reasoning and the conclusions therein that the appeal
be dismissed.

The appeal, in so far as it sought to deal with the important question as to the circumstances in which a personal representative appointed to administer a deceased person's estate ought to be removed, requires at least some brief comment on my part.

As I understand the issues arising in this appeal, the appellants have not sought to challenge the manner in which the executrix has carried out her functions in administering the estate of the deceased. The appellants' challenge is directed at the questions the answers to which the respondent has, in my view, validly sought the guidance of the court in interpreting the clauses in the partnership agreement as they relate to her entitlement therein, when examined against the clauses in the Will in so far as they conflict with that agreement. This being so, the only basis on which the respondent could be removed as executrix would have to satisfy the test propounded by the respondent before us, viz., "her acts or omission must be such as to endanger the ... property or to show a want of honesty or want of proper capacity to execute the duties or a want of reasonable fidelity."

As the uncontroverted evidence before the learned judge below contained in the respondent's affidavit established, the respondent in the discharge of her duties as the executrix/trustee carrying on the administration of the estate has done so in a manner which had clearly benefitted the estate in the interest of all the beneficiaries.

LANGRIN, J.A.

This is an appeal by the appellants against the order of Smith J made on the 3rd April, 1998 whereby the learned Judge dismissed the appellants' summons which sought to remove the respondent as Executrix of the estate of Stephan Jurik. The respondent was the common law wife of the deceased, Stephan Jurik and the appellants are the daughters of the deceased.

It is desirable to state so much of the facts as is necessary in order to discuss the judgment in the case. In December, 1976 on a visit to Jamaica the respondent met the deceased who was a Canadian artist visiting Jamaica. He indicated that he had bought a parcel of land in Negril on which he wanted to build a wood shelter where he would stay during his winter visits to Jamaica. In June 1977 the deceased visited the respondent in New York and invited her to go to Jamaica. They fell in love and after much discussion agreed that they would work in partnership to develop and operate the said property in Negril as a restaurant and eventually a hotel and they would both contribute towards the venture. The construction of a castle started in 1981 and was completed in 1984.

A partnership agreement was entered into on February 3, 1984 between the deceased and the respondent. Clause 3 and 4 of the Partnership Agreement states as follows:

"3. The Partners shall immediately after the signing of this Agreement pay into an account to be opened in the name of the Partnership at National Commercial Bank Jamaica Ltd., Negril Branch the sum of ONE THOUSAND DOLLARS (\$1,000.00) each, which sum together with all other moneys from time to time received and paid into the Bank Account on the Partnership shall form the capital of the said Firm, with the First and Second Partners entitled to One-half of the net profit.

4. That the building in which the aforesaid business is operated as well as other chattels is provided by the First Partner at a cost of Twenty Five Thousand Dollars and the equipment valued at Fifteen Thousand Dollars is provided by the Second Partner, however the gains and profits of the said business, shall belong to

the partners as to one-half share to each partner, and they shall bear all losses in the same proportion".

The deceased made a Will on 27th May, 1991 and died on 19th April, 1996. Probate was granted to the respondent on May 2, 1997 who was also a residuary legatee of the Will of the deceased.

On October 3, 1997 an Originating Summons was filed by the respondent Executrix in her own behalf and as Executrix of the estate of Stephen Jurik. Under the Summons the respondent sought the Court's intervention to interpret the Partnership Agreement between the respondent and deceased as also the Will of the deceased. It is convenient to set out the questions and consequential orders sought by the respondent.

- "1. (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 Ewan of Grange Hill, Westmoreland.

The buildings to the West Side - Guest House, Kitchen and Office to go to Susan Evanko and Loren McEwan receiving ten percent (10%) of the profit 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 a 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 beneficiaries of 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 Zusanna 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 said Stephan Jurik, deceased, in the said partnership;

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

The appellants by summons dated 13th February, 1998 filed by Myers Fletcher and Gordon sought the following orders:

- (1) That the plaintiff Susan Evanko be removed as Executrix of the estate of Stephan Jurik, deceased.
- (2) That Scotia Bank Jamaica Trust Merchant Bank Ltd. be appointed the executor of the estate of the said Stephan Jurik.

The affidavit of Dasa Yetman in support of the summons stated categorically that the issues raised in the originating summons are inconsistent with her role as executrix; in that she is challenging the right of her deceased father to dispose of his property in the manner stated in his

Will. Also that the respondent had said in her affidavit that prior to her father's death she was entitled in her own right to half the value of the said property and the said business and its assets.

There are two questions raised in this appeal. First whether the order of Smith J was wrong in dismissing the Appellants/Defendants summons which sought to remove the Respondent/Plaintiff as Executrix of the Estate of Stephan Jurik. Second, assuming the order ought to be reversed, whether Scotia Bank (Jamaica) Trust and Merchant Bank Ltd. be appointed executor of the estate.

In dealing with the first question the court must have regard to the principles on which the court must act in the removal of an executor. It is trite law that the learned trial Judge had a discretion to exercise and this court will not interfere unless the learned trial Judge acted on a wrong principle of law.

A court in removing a trustee must have regard to the question whether his removal will promote or impede the administration of the trust. The very purpose of the removal is that the trust may be better carried into execution.

Mr. Goffe, Q.C. on behalf of the appellants contends that the respondent sought to assert a right to part of the estate and at the same time sought to remain executrix of the estate. He argued that as executrix, the respondent's duty is to preserve the estate and to carry out the wishes of the testator. There is therefore a conflict between the personal interest of the executrix and the interest of the beneficiaries. He argues that she could not claim an interest in the estate as owner and remain in the position of executrix.

He further submitted that the respondent's continuance as executrix would prevent the estate being properly administered and would not be in the interest of the other beneficiaries - the appellants. The removal of the executrix would free her to pursue her claim single-handedly and without any conflict of interest whatsoever.

Mr. Goffe, Q.C. relied on several authorities but it is only necessary to mention two of them.

Weinstein v Weinstein et al [1996] British Colombia C.A. Lexis 2649

Mildred Weinstein died on December 3, 1992. In her Will which was admitted to Probate on 21st October, 1993, she named her husband, George Weinstein, as executor and trustee. George Weinstein was left with the life estate and on his passing the estate was to go to their sons Phillip and Arthur. Phillip, the appellant was also a specific beneficiary under the Will. Hollinrake J.A. citing the case of *Conroy vs Stokes* [1952] 4 DLR 1224 (BCCA) at pg. 24 had this to say:

"A beneficiary is entitled to protection of his interests by the trustees' faithful performance of his duties. Actual misconduct usually will be cause to remove a trustee. However, not every neglect of duty or mistake will result in removal. The key question is whether there is or has been endangerment of trust property, whether through a lack of honesty, lack of capacity or lack of reasonable fidelity:"

The learned Judge after finding the particular facts in the case which consisted of a failure to disburse loan allegedly made to Arthur Weinstein and to list items of substantial value in estate documents an actual or reasonably perceived conflict of interest with respect to the settlement and payment by the estate of a substantial revenue claim as well as a failure to give information to the appellant and carry out his duties in a timely fashion said at pg. 25:

"While the Court is always reluctant to interfere with a judgment of a Supreme Court judge on what is basically an issue of fact leading to the exercise of a discretion, I am satisfied that the impugned conduct of the executor is of such a magnitude that the law obliges the conclusion that he must be removed as executor and trustee. (emphasis supplied).

Collier v Calbert [1996] Court of Appeal (Civil Division) Lexis 28. (Chancery) judgment delivered July 22, 1996.

The executor had made a claim to the bulk of the estate and was relying on a partnership agreement and other non-testamentary instructions given him by the deceased before her death

to prove his claim. While his delay in administering the estate was a major factor in his removal, another factor was the conflict of interest. Millett L.J had this to say at pg. 29:

"Turning to the submissions raised before us, the first matter is the conflict of interest, It is said that that was not decisive; there were other ways of dealing with the conflict of interest which would have allowed Calvert to pursue his claims against the estate and appointing someone else, for example the plaintiff to represent the estate in the litigation. That is true, but it was never suggested to the judge. Moreover, it does not meet the criticism of Mr. Calvert that he had taken no steps in seven years to create a situation in which the claims could properly be resolved. As executor it was his responsibility to ensure that the claim was resolved properly and to take steps, if necessary, to apply to the court for the appointment of an administrator ad litem to represent the estate so that he could remain executor and yet pursue his claim against the estate. He did nothing for seven years and, in my judgment, the judge cannot be blamed for thinking that the right course was to remove Mr. Calvert altogether so that the estate could be properly administered".

It is demonstrably clear that the facts in the instant case are materially different from these cases since the executrix has gone to court seeking an interpretation of both the Will and the Partnership Agreement. How can there be any justifiable complaint about an executrix who has done the very thing which the law requires to be done? The principles to be applied in considering the removal of a trustee were discussed in *Letterstedt v Broers* [1884] 9 App. Cas. 371. Their Lordships stated at pg. 387:

"In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle... that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent in details often of great nicety".

Further at pg. 389 it was enunciated thus:

"It is quite true that the friction or hostility between trustees and the immediate possession of the Trust Estate is not of itself a reason for the removal of the Trustees.

But where the hostility is grounded on the mode in which the Trust has been administered... it is certainly not to be disregarded."

The appellants have not sought to bring their objection to the executrix on the ground of the administration of the trust but rather that she has no right to challenge or seek the court's intervention in construing the Will and the Partnership Agreement on her own behalf and as executrix. The acrimonious relationships alleged by the appellants is not a sufficient ground to warrant the removal of the executrix.

Mr. Henriques Q.C. submitted correctly that the general rule for 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.

It is significant to observe that the respondent has already distributed all the estate except the portion that relates to the Partnership Agreement.

It is abundantly clear that the testator did intentionally place the executrix in this position since she was appointed sole executrix under the Will of Stephan Jurik. Smith J correctly considered this situation and was guided by the decisions in *Re: Mulholland's Will Trust Bryan and Others v Westminster Bank Ltd.* [1949] 1 All E.R. 460. Wynn-Parry J. said at 463 A:

"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* [1874] L.R. 7 H.L. 318 and, *Hordern v Hordern* [1910] A.C. 465".

The Partnership Agreement clearly indicates that there was an acknowledged contract between the testator and the executrix. The decision in *Re: Mullholland's Will Trusts et al*

The central and essential fact is that there is no misconduct on the part of the executrix in carrying out her duties. 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. It is for this reason the executrix has come to court on the Originating Summons seeking the Court's advice.

On a proper analysis of the law and the facts it is shown that Smith J. acted correctly and came to the right conclusion both in fact and principle.

Accordingly, the appeal is dismissed with costs to the respondent to be agreed or taxed.

(supra) considered this same issue and Wynn-Parry J. in the same decision referred to *Vyse v Foster* at pg.463 where Lord Cairns L. C had stated:

"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 would take with regard to the fulfilment of the contract".

Before leaving this matter it is important for me to say that this Court is entitled to take into account the affidavit evidence of the executrix that she has continued to operate and manage the hotel in the manner as she has always done when the deceased was alive. In fact the profits earned by the hotel since the death of the deceased have increased in 1996 by approximately 40% and in 1997 approximately 97%. Due to her personal attention to each guest many of those guests return each year.

I am in full agreement with the learned Queen's Counsel, Mr. Henriques when he says that the appointment of the Scotia Bank Trust and Merchant Ltd. 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 an unreasonable reduction of the testator's estate.

I do not think it matters if the executrix claims an interest which is clearly stated in the Partnership Agreement or any interest which the executrix perceives is her legitimate interest. It is the rule of law which overtakes the intention of the testator and which the executrix has so rightly sought the Court's intervention.