

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/00571

IN THE MATTER OF the Trust created by Will dated the 15th March 1999 in respect of the property of Ilonka Sargent Roker ("The Will Trust")

AND IN THE MATTER OF Section 83 of the Trustees Act Chapter 176 of the Statute Laws of the Commonwealth of The Bahamas

BETWEEN

DOMINIC ALLOYSIUS SEYMOUR

DON DIEGO SARGENT

Plaintiffs

AND

DARIUS AUGUSTINE WILLIS

(In his capacity as the Sole Executor and Trustee of the Trust established under a Will dated the 15th March 1999 and made by the late Ilonka Sargent Roker)

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Kevin Farrington for the Plaintiffs
Bobbi Cooke-McIver for the Defendant

30 November 2020

DECISION

WINDER J.

1. This is my brief decision on the Plaintiffs' application for committal of the Defendant and for the appointment of a judicial trustee over the estate of the late Ilonka Sargent Roker.
2. The parties are all siblings and are the grandchildren of the deceased. They are the beneficiaries under the will of the deceased. Whilst the estate was left to the three siblings, the Defendant was appointed the sole executor of the estate and trustee of the residue of the estate for the benefit of them all until the Plaintiffs attained the age of majority.
3. The deceased died on 1 March 2009. Grant of Probate was issued to the Defendant since 27 October 2009 however the Defendant has not distributed the estate as directed. These proceedings were commenced in May 2017 seeking to compel the Defendant to convey certain properties named in the will to them, for accounting and inquiries and for such other relief as the Court deems just in the circumstances.
4. On 9 July 2018 and 1 October 2018 I made an order for accounting and for the transfer of certain properties to the Plaintiffs. The Plaintiffs assert that there has been noncompliance with these orders, specifically the order to render an account by the Defendant. They seek the Defendant's committal and the removal of the Defendant.
5. The Defendant has acknowledged his breach of the strict terms of the orders and has filed numerous affidavits to partially account and to explain his circumstances and the difficulties experienced by him over the past 11 years.
6. The Plaintiff has applied by Summons pursuant to Section 3(1) of the Judicial Trustees for the appointment of a judicial trustee. Section 3(1) of the Judicial Trustee Act provides:
 - (1) Where application is made to the court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the court may, in its discretion, appoint a person (in this Act called a judicial trustee), to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees.
 - (2) The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act.

7. In **Kemp v. Kemp (Executor of the Estate of the late Audley Kemp Sr.) - [2014] 2 BHS J. No. 12** the Court stated as follows:

8 The problem of the dilatory personal representative and the usefulness of the Judicial Trustees Act was examined in the case of **Goodman and another v. Goodman and another [2013] 2 All E. R. 490**. At paragraph [9] of the judgment, Newery J. referred to the second report, of the Law Reform Committee, [of the Chancery Division] published in 1982 which dealt with the powers and duties of trustees (Cmnd 8733). Part VII of the report noted that 'the dilatory personal representative' was a serious problem and went on to describe the remedy under the Judicial Trustees Act at para 7.14:

"The object of this statute is to provide a middle course in cases where the administration of the estate by the ordinary trustees has broken down and it is not desired to put the estate to the expense of a full administration. We are not aware of any case where this remedy has been adopted and found unsatisfactory."

9 The learned Editors of **William Mortimer and Summvil on Execution, Administration and Probate (10th Ed.)** in referring to disputes in administration at paragraph 60-14 commented -

"If the administration has come to a standstill because relations between the personal representatives have broken down, or relations between the representatives and the beneficiaries have broken down, the court will ordinarily remove the personal representative and appoint new ones to enable the administration to be completed. It is not necessary to establish wrongdoing or fault by the personal representative to obtain his removal. If, for whatever reason (such as clash of personalities, or the lack of confidence in the personal representative by the beneficiaries even if unjustified) it has become impossible or difficult for the administration to be completed by an existing personal representative, then an order for his removal will usually be made." (emphasis added)

10 The Respondents argue that it is a drastic step for the Court to remove an executor chosen by a testator in the absence of allegations of dishonest or willful misconduct and merely on the ground of delay. The case of **Isaac and others v. Isaac [2005] All ER (D) 379** was advanced in support of the proposition. In that case the court refused to remove a trustee on the basis that there was "no case of positive misconduct made out against the defendant, nor was there any maintainable allegation of want of honesty, capacity, or reasonable fidelity."

11 In **Isaac and other v. Isaac, Park J.** relied heavily on the writings of the learned authors of Lewin on Trusts. According to Lewin on Trusts, para 34,

"the court has an inherent jurisdiction in executing the trusts to remove a trustee, even though his consent or co-operation is not forthcoming. It is, however, quite a drastic step for the court to take, and in my judgment should only be taken in a clear case."

12 Further at para 13-46 of Lewin on Trusts:

"The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour. In cases of positive misconduct the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such a course. Subject to the above general guiding principle, the act or omission 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 want of reasonable fidelity."

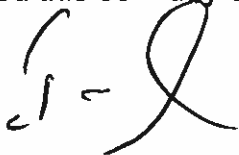
8. Having considered the matter I am satisfied that much of the difficulties in this matter stems from the familial relations in this action. I find that the estate has been meandering for the past ten years with no real progress or plan in place to deal with the winding up of the estate. The Defendant seems paralyzed and appears to be ill equipped or unable to deal with the issues, which arise in this estate. I find that *it has become impossible or difficult for the administration to be completed by the existing executor* and there exists in the Defendant a *want of proper capacity to execute the duties*.
9. As the Court did in **Kemp**, I also adopt the reasoning of Madam Justice Rhonda Bain in the case of **Smith and others (In their capacity as Executors of the Estate of Brenda Lowe-Bode a.k.a. Bodie, deceased) v. Newbold-Mitchell CLE/PRO 1483 of 2001 & 729 of 2002**, at paragraph 5 where she stated,

"an independent executor/s will be in a position to ensure that decisions that are taken are in the interest of the beneficiaries as a whole. I am conscious that the appointment of an independent executor will add to the expense of administering the estate but it may have the effect of reducing the potential for future litigation over the conduct of the estate. An independent executor would also reduce the hostility between the children of Ortlund H. Bodie and may finally resolve the outstanding actions against the estate."
10. I am satisfied that the most appropriate course to ensure the proper administration of the estate of Ilonka Sargent Roker and in the interest of all of the beneficiaries

and the claims raised in the Originating Summons, is to remove the Defendant as executor and replace him with a suitably qualified professional who can take an independent view of the administration of the estate. This is particularly important in light of the apparent family conflicts and constraints acknowledged by the Defendant.

11. In the circumstances I order that a Judicial Trustee replace the Defendant as executor and trustee of the estate of Ilonka Sargent Roker. The parties are to make submissions within the next 21 days as to the appropriate appointee to replace the Defendant as well as the appropriate terms of the order for handing over of the estate to the judicial trustee.
12. In light of my decision with respect to the appointment of a judicial trustee I make no order for committal as I am not entirely satisfied that the default, which undoubtedly occurred, was willful and therefore contemptuous.
13. The Plaintiffs shall be entitled to their reasonable costs out of the estate.

Dated this 30th day of April 2021

A handwritten signature in black ink, appearing to read 'I. R. Winder', written in a cursive style.

Ian R. Winder

Justice