

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
P1023 of 2001

IN THE MATTER OF THE
ESTATE OF FREDERICK
BARNET BROWN deceased; and
of an application for the
directions of the Court under
section 39 of the Administrator
General's Act

IN CHAMBERS

Ernest Davis for the trustees
Sonja Anderson for the Administrator General of Jamaica

August 3, 2006 and January 15, 2007

APPLICATION TO REMOVE TRUSTEES AND APPOINT ADMINISTRATOR GENERAL
AS SOLE TRUSTEE AND APPLICATION TO CHANGE PURPOSE OF TRUST

SYKES J.

1. These are two applications by the Administrator General to have (a) herself appointed as the sole trustee and (b) a variation of the trust established by the will of Frederick Barnet Brown. Both applications are being resisted by the existing trustees. The Administrator General says, in support of her first application, that the current trustees are guilty of non-performance and have not discharged their responsibilities under the trust instrument. She alleges, in support of her second, that times have changed since the establishment of the trust, consequently the purposes of the trust need to be changed to meet the needs of modern society. I have declined to make either of the applications. Let me give a brief history of the trust and applications made prior to these two.
2. Mr. Brown was a very religious man. He appeared to have been reasonably successful in business. By his last will and testament dated May 14, 1918, after making several bequests to his family and provision for the maintenance of a missionary in North China (one Miss Paula Reitter, living in Ling Ming Kwan, South Chih-Li Mission, North China and her successors known as the China Missionary on behalf of Frederick

Barnet Brown) he made provision for the establishment of the Winnifred Rest Home. The home was to be established after the life interest of his wife came to an end.

3. Clause 17 of the will sets out the purpose of the trust. It reads:
The Winnifred Rest Home shall be used and kept up and maintained for the purpose of a Rest Home for Missionary Workers, Teachers and respectable poor persons, where they can come for a limited time to rest, such time to be in each case decided on by the Board of Trustees of the "The Winnifred Rest Home", hereinafter appointed, such persons to have change and rest and board, washing and usual home comforts included, and for this purpose the Board of Trustees of the "The Winnifred Rest Home" are to employ a reliable man and his wife and such other assistance as may to them from time to time seem necessary to look after the property, houses, furniture, live and dead stock and the boarding and general welfare and comfort of the inmates of such Home that may be in the same from time to time.

4. The composition of the Board of Trustees is stated in clause 18 which states:
I hereby nominate and appoint as the Board of Trustees of "The Winnifred Rest Home"
 1. *The Trustees of this my will and the Survivor of them and his heirs and the Trustees from time to time being.*
 2. *The Wesleyan Minister in charge of the Manchioneal Wesleyan Methodist Station for the time being and his Successors in Office.*
 3. *The Baptist Minister in Charge of the Bell Castle Station for the time being and his Successors in Office.*
 4. *The Minister of the Society of Friends in charge of Sea Side Church in the No. 1 Division of the parish of Portland in this Island and his wife (if any) for the time being and his and her Successors in Office.*
 5. *The Society of Friends Lady Missionary residing at Prospect in the Town of Port Antonio in Portland as Chief Executive Officer of the Salvation Army stationed in Kingston for the time being and their respective Successors in Office.*

5. Clause 19 provides:
The Trustees for the time being of this my will shall from time to time keep a record of their doings and transactions and account to the Board of Trustees of "The Winnifred Rest Home" every six months as to what income is left in their hand after deducting the annuity to my sister and the salary of Miss Paula Reitter and her Successors and shall to the extent of the funds shown to be in their hands honor (sic) the drafts made on them from time to time by the Board of Trustees of "The Winnifred Rest Home" for the upkeep of and carrying on the said Home in (sic) manner herein before provided.

6. Clause 21 reads:

The Board of Trustees of "The Winnifred Rest Home" shall call a meeting at least twice per year in the months of January and July at "the Home" and shall have power to make and revoke rules and regulations for the governing of the said Home and the number of inmates to be admitted from time to time and the time for which such inmates may be allowed to remain there, and the admission of, or rejection of persons, and for paying the travelling expenses in Jamaica of any person or persons coming to or going from the said Home, the votes of the majority of the Trustees present at such meetings provided that not less than five members shall form a quorum and not less than three votes in favour of such rules or regulation or other matter before the Board shall render same valid and binding on the Trustees.

7. The first trustees were appointed by clause 2 of the will. These were Vincent Stanley Harris and the testator's wife, Annie Murray Brown. The wife got a life interest in the property and on her death the property known as Fairy Hill Penn together with the houses, furniture, fixtures, live and dead stock "shall be converted into and called 'The Winnifred Rest Home' " (see clause 16).

8. There is an order dated February 18, 1938, ordering that the Administrator General of Jamaica be appointed Trustee of the will of Mr. Brown in place of Vincent Stanley Harris and Eunice Giles Harris (wife of Vincent) who were retiring as trustees.

Application by Administrator General to be removed as trustee in 2001

9. By originating summons dated August 23, 2001, the current Administrator General, Mrs. Lona Brown (no relation to the testator) applied for:

1. the release of the Administrator General as sole trustee of the Winnifred Rest Home;
2. the appointment of a new trustee in place of the Administrator General;
3. a variation of the trust to meet the needs of modern society or in the alternative the dissolution of the trust by sale of the property with direction as to the use of the proceeds of sale;
4. such other order as the court may deem fit in the circumstances

10. According to the affidavit of Mrs. Lona Brown, dated August 23, 2001, file in support of the application, the Administrator General in his capacity as trustee sold most of property, in 1972, which, prior to the sale, consisted of at least 300 acres. After the sale 26 acres were left. A new home was built on the 26 acres.

11. Mrs. Brown swore also that the house was managed fairly well over the years, but the Administrator found it difficult and impractical to manage the trust properly. She

attributed this to the distance the property was from her office and the volume of work that came to the department. She added that she tried to call two meetings of the trustees but those efforts were futile because a quorum could not be formed. According to her, over the past twenty years, the trust has been run entirely by the Administrator, and the intent was, that it would be participatory. She closes that affidavit by saying that the day-to-day affairs of the home have become increasingly difficult.

12. On October 24, 2001, an order was granted in the following terms:

1. With effect from March 31, 2002 the Administrator General shall be released from the position of being sole trustee of the Winnifred Rest Home.
2. The present board of trustees shall be appointed and/or become trustees of the Winnifred Rest Home as from April 1, 2002.
3. Prior to March 31, 2002, the Administrator General and the board of trustees shall agree upon the appointment of an additional trustee or member of the board of trustees to replace the Administrator General.
4. A proposal for the management and the administration of the Winnifred Rest Home shall be developed by the board of trustees to form the basis of a further application to this court for an appropriate variation of the terms of the trust.
5. The proposal referred to at 4 above shall cover short term (2 years) and a long term (5 years) showing plans indicating the viability and sustainability of the trusts' operations.
6. The further application for variation to be made to this Honourable Court shall be filed not later than May 31, 2002.
7. Liberty to apply

13. The trust instrument established a board of trustees of which the trustee of the will was a member of the board. The appointment of the Administrator General in 1938 was as trustee of the will and by virtue of that appointment became a member of the board of trustees. As trustee of the will he had other responsibilities spelt out in the document. With this background, the current applications can be better understood.

The variation application of 2002

14. An originating summons dated May 28, 2002, was filed seeking:

1. The approval of the appointment of Mr. Boyd Lewis to replace the Administrator General as one of the Trustees of the Winnifred Rest Home.
2. Approval of the attached proposal for the management and administration of the Winnifred Rest Home to cover:
 - a. Short term
 - b. Long Term
3. A variation of the Trust to meet the needs of modern society.

4. Such other order as the Court may deem just in the circumstances.
15. On November 6, 2002, an order was granted in terms of paragraphs one and two of the May 28 summons. The other paragraphs read:
 2. The trustees shall in cooperation with the Administrator General arrange for the transfer of assets including the real property, government securities and/or cash to the present trustees provided, however that the real property shall be held by the trustees on trust for the religious organisation previously specified in the will of Frederick Barnet Brown and provided that (a) the trustees shall designate not more than three nor less than 2 of their number to the (sic) signatories on an account to be opened with and operated at a commercial bank in Port Antonio, (b) the trustees shall provide an annual report of its stewardship to the court each calendar year commencing 2003 unless and until the court shall otherwise determine.
 3. Paragraph 3 of the originating summons to be fixed after consultation with the Registrar.

The current applications

16. The applications have been stated in paragraph one. The Administrator General relies on the affidavits of Mr. Boyd Lewis, a current member of the board of trustees, Mr. Andrew Gyles, the Deputy Administrator General, and her supplemental affidavits dated November 7, 2005, and another dated June 30, 2006. The board are accused of the following:
 1. failing to open the account required;
 2. lacking in business acumen;
 3. failing to submit the annual report;
 4. not acting in a business like manner.
17. This has resulted in the Administrator General continuing to act as de facto trustee despite being replaced.
18. The Administrator General gives some further history of the property. It is used to house refugees from Haiti. Her accusation of tardiness is supported by Mr. Lewis who states that the trustees have failed to meet; some have left the parish; they have not set up any bank account. He added that he is now 73 years old and is trying to reduce his commitments. He highlights the problem of frequent transfers of the trustees appointed pursuant to the trust instrument.
19. The Administrator General also speaks of the arbitrary management of the property by one of the trustees, a Captain Selbourne Oats. According to her, the Captain has been single handedly managing the property without any input from the

other trustees. He has been submitting bills to the Ministry of Justice regarding the housing of Haitian refugees.

20. She suggests that the board membership should be expanded to include respectable persons of Portland, government entities and/or charitable groups. Another suggestion is the sale of the property with power to the trustees to use the fund to achieve the purpose of the trust.

21. The trustees have refuted the charges of tardiness. They blame the Administrator General for their inability to act in the way they would have liked. She is accused of not handing over the money and other property. They admit that the bank account was not opened until March 2005, but they say that since then, the Administrator General has not handed over the money to them.

The submissions

22. Miss Anderson relied on a number of statutory provisions as well as the inherent jurisdiction that existed in the Courts of Chancery to remove trustees where it was necessary to do so. That jurisdiction, I agree is now in the Supreme Court, because of section 27 of the Judicature (Supreme Court) Act which states that subject to section 3 (2) the Supreme Court shall be a superior court of record and shall have and exercise in Jamaica all the jurisdiction, power and authority which at the time of the commencement of the Act was vested in a number of Courts and Judges of those courts. One of the courts included in that list, is The High Court of Chancery. That court always had a power over trusts. The power may be either inherent, or statutory, or a combination of both.

23. Miss Anderson relied on section 8 of the Trustees, Attorneys and Executors (Accounts and General) Act. Under that section the Administrator General or anyone beneficially interested is authorised to petition the court to remove a trustee for, among other things, receiving or taking commission in excess of that authorised. The provision also empowers the court to appoint the Administrator General or any other person to administer the estate. I am not sure why this provision was mentioned since it is not being contended that anyone has received any commission of any kind to say nothing of an excessive one. There is no suggestion that the behaviour of the trustees has resulted in any loss to the trust, and neither is there any allegation of dishonesty.

24. Miss Anderson's submission rested heavily on section 25 (1) of the Trustee Act. The section reads:

The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or

trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of new trustees in substitution for a trustee who is convicted of felony, or is a bankrupt.

25. That section empowers the court to appoint new trustees either in substitution for or in addition to any existing trustee or trustees, or where there is no existing trustee. The discretion conferred by the court is not to be exercised arbitrarily, that is to say, there must be some legal principle that guides the exercise of the discretion. It seems to me that a careful reading, the provision contains at least one principle that must be observed, and it is this: the court may act, if it is difficult, inexpedient or impracticable, to appoint a new trustee without the court's assistance. I have not been able to find a case directly in point, but reading several cases in which the court has been asked to appoint new trustees shows that the circumstances in which the court's power is invoked, include (a) all the trustees dying before the settlor or testator (*In Re Smirthwaites* (1870-71) LR 11 Eq 251); (b) the surviving trustee is of unsound mind (see *In Re M* [1899] 1 Ch. 79); (c) where the instrument creating the trust does not name any one who may appoint new trustees or has any mechanism by which new trustees are to be appointed. To use more orthodox language, there is no donee of the power of appointment, or no donee capable of acting; (d) the trustee becoming incapable of acting because of old age and infirmity (*Re Lemann's Trusts* (1883) 22 Ch. D. 633; *Re Phelp's Trust* (1885) 31 Ch. D. 351); (e) where the trustee is an infant; (f) where there is friction among the trustees. The list is not exhaustive.

26. My understanding is that the court does not readily exercise either its statutory or inherent power to appoint trustees. This power in the courts is exercised with considerable restraint. It seems that while trusts are under the supervision of the court, the court is not expected to be a micromanager seeking to set right every dispute, however trivial, between the trustees.

27. Regarding the removal of trustees the courts again exercise great restraint. The removal of trustees against their will may be seen as casting a slur on their character. Having said this, the courts have recognised that it may be necessary to remove a trustee. In so doing the main criterion is the welfare of the beneficiaries (see Lord Blackburn in *Letterstedt v Broers* (1889) 9 App. Cas. 371, 386, 387). Under this "so delicate a jurisdiction" (per Lord Blackburn) an honest but very difficult trustee may be removed. The sense of the authorities is that it must become virtually impossible to conduct the business of the trust with the particular trustee before his removal is considered. The following passage from Lord Blackburn indicates how lightly the courts should tread (pp 385 - 387):

It is not disputed that there is a jurisdiction "in cases requiring such a remedy," as is said in Story's Equity Jurisprudence, s. 1287, but there is very little to be found

to guide us in saying what are the cases requiring such a remedy: so little that their Lordships are compelled to have recourse to general principles.

Story says, s. 1289, "But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties in the Court below, for, as far as their Lordships can see, the Board would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and disagreeable position. But the case was not so treated.

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 above enunciated, 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 on details often of great nicety. But they proceed

to look carefully into the circumstances of the case.

28. The thrust of the passage is that removal of trustees is a very drastic step. This explains why Story indicates that want of honesty, reasonable fidelity and proper capacity to carry out the office of trustee are obvious grounds for removal. Story also guarded against removing trustees for very trivial reasons. He said that trustees are not to be removed for every mistake, neglect or inaccuracy. Ultimately, for Lord Blackburn, the court must have an eye on the proper execution of the trust. The removal and replacement of trustees must be with a view to seeing that the trusts are properly administered.

29. I note that the Administrator General has not alleged any want of probity on the part of the trustees. It is true that they have failed to meet as often as required but that seems to me to be more the result of the terms of the will indicating who should be trustees. Clause 18 (cited above) establishes a limited class of person who are eligible to be appointed trustees. It seems to me that the real problem has to do with the transient nature of the trustees. The testator stated that the holders of certain offices in the parish of Portland were to be the trustees. It may well be that at the time of the will the holders were in place for long periods of time. Apparently, over the years there has been a revolving door of office holders with no one being in the parish long enough to properly undertake the onerous duty of a trustee. If this is so, it seems to be that the solution may well lie in widening the class of persons who may be appointed trustees and vesting the power of appointment of such persons in the head of the various church groups identified in the will. Mr. Brown obviously wanted religious leaders to have a strong hand in the operation and management of the property. If the variation is done in the manner suggested by me then it may go a far way in settling the matter, if not once for all but certainly for sometime to come.

30. That the transient nature of persons eligible to be appointed trustees is a part of the problem, is supported by the affidavit of Mr. Boyd Lewis, an existing trustee. He says at paragraph 4 (a) that "some trustees are pastors or overseers of small churches and subject to frequent moves. The trustees should be well-established permanent members of the community and with adequate business and financial experience to development (sic) this property". Mr. Lewis stated that the trustees have failed to meet and a number have left the parish. He himself had indicated that he does not wish to continue any longer because he is now 73 years old and wishes to reduce his commitments.

31. The Administrator General herself indicates at paragraph 5 of her affidavit dated June 30, 2006, that "lack of consistent participation by its members [i.e. Board of Trustees] and frequent changes of members of the Board continue to plague the due administration of the trust and makes for inefficiency in its administration".

32. The Administrator General states that the existing trustees do not have the business acumen to operate the trust. What she has done is to state a conclusion but she has not set out any facts upon which such a conclusion can be arrived at. She may well be correct but it has to be demonstrated by cogent evidence. The cases relied on by the Administrator General all show that a strong case for removal has to be made before the court acts.

33. The Administrator General, in a previous application when she wished to be removed as sole trustee indicated her problems she was having in her office and why she found it difficult to carry out her duty as sole trustee, after such a long period of so doing. There is nothing in her current application that demonstrates that her position has changed and she would be better able to do operate as a sole trustee now than then. During the course of the hearing when I enquired of the possible plans for the property, the response was that one possibility was to sell the remaining property and establish a fund. The enquiry was pursued further by asking how the fund would be managed to carry out the purposes of the trust. The response did not inspire confidence, that the purposes of the trust would be met under this proposal.

34. I am not satisfied that appointing the Administrator General as sole trustee is the appropriate solution to the problem. It is my view that neither solution will advance the proper execution of the trust. At paragraph 18 of her affidavit dated June 30, 2006, the Administrator General proposes two other solutions. The first is a change in the composition of the Board of Trustees. The second is a variation of the trust. The proposed variation is that the trust property be sold and the proceeds of sale used to fund retreats for churches and teachers, providing scholarships and funding of projects aimed at poverty alleviation and for religious purposes. As an alternative she proposes that the money be invested and the income paid to designated charities that provide for the class of beneficiaries named by Mr. Brown in his will.

35. I do not think that the second proposal is acceptable. It has not been demonstrated that there has been any change of circumstances that would make it difficult if not impossible to meet the wishes of the testator. The general rule, a strong one at that, is that the original provisions of the will must be obeyed. The courts do not likely sanction any variation. Mere inconvenience is not a basis for varying a trust. I have examined the cases submitted by Miss Anderson and they demonstrate that variation of a trust requires much evidence. From the case examined, there is usually very detailed evidence showing when the trust was established, its purposes, how that purpose was being met over time, what has happened to prevent the purposes being met, how the proposed change will be an advantage over what currently obtains, how the trust will be administered in the proposed arrangements and so on. The evidence before me has fallen short of what is required.

36. The first proposal made by the Administrator General should be pursued. The parties are to return to court within one hundred and twenty days of this order with submissions on how best to give effect to this proposal. It would be helpful if the Administrator General was to provide the court with information concerning the operation of the trust from 1938 to the present. It is obvious that Mr. Brown desired that the Christian character of the home be maintained. Both applications are dismissed.