



[2021] JMSC Civ. 70

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020 ES00245

**IN THE ESTATE OF HAZEL
GERTRUDE LEIBA** late of
Morgan's Pass, Chapelton in the
parish of Clarendon, deceased.

AND

**IN THE MATTER OF THE WILLS
ACT AND THE APPLICATION
TO PROVE COPY WILL**

BETWEEN	COLLIN ANTHONY LEIBA	CLAIMANT/RESPONDENT
AND	ULRIC CHARLES LEIBA	DEFENDANT/APPLICANT

IN CHAMBERS

Jahmar Clarke instructed by Myers, Fletcher & Gordon, Attorneys-at-Law for the Claimant.

Shelby Maye Walker instructed by Austin L. Francis & Co., Attorneys-at-Law for the Applicant.

Heard: 7th and 30th April 2021

Civil Procedure - Executors not parties to proceedings - Whether relief in the nature of administration claims can be sought and granted if pursued by way of Notice of Application for Court Orders in existing proceedings concerning the estate to be administered by executors.

Interpretation - Section 13(2) of the Trustees, Attorneys and Executors (Accounts and General) Act.

COR: C. BARNABY, J

[1] On the 7th April 2021 a Notice of Application for Court Orders filed 2nd November 2020 (the Application), came on for hearing before me. By it, the Defendant/Applicant seeks the following orders.

1. *That the Power of Attorney granted by the executors in the Estate of Hazel Gertrude Leiba to Collin Anthony Leiba be set aside or alternatively varied to include Ulric Charles Leiba as co-attorney.*
2. *That in the event the Power of Attorney is set aside, the executors appointed in the Last Will and Testament of Hazel Gertrude Leiba apply for the Grant of Probate and administer the estate of the deceased.*
3. *Alternatively, where it is found that the executors are unable to or unwilling to administer the estate of Hazel Gertrude Leiba, the executors are to renounce their executorship or in the alternative be removed as executors and the two surviving beneficiaries Collin Anthony Leiba and Ulric Charles Leiba be appointed as administrators of the estate of Hazel Gertrude Leiba.*
4. *That the Applicant Ulric Charles Leiba be provided with an audited statement of account on the estate of Hazel Gertrude Leiba.*
5. *Costs to be costs in the claim or to be paid from the estate of Hazel Gertrude Leiba.*

[2] The filing of the Application followed the issue and service of a Fixed Date Claim Form in which the Respondent sought the court's leave to prove a copy of the will of the late Hazel Gertrude Leiba, the mother of both parties. They are two of three beneficiaries under the will, another brother having predeceased them. The Applicant, in acknowledging service of the Fixed Date Claim Form indicated his intention to defend the claim but as it transpired, consent was given for the grant of the order sought in the claim and the same was granted accordingly.

[3] On the occasion of the hearing of the Application, the Court permitted Counsel to make oral submissions and directed that written submissions and any authorities referenced be filed on or before the 16th April 2021. The Applicant

and Respondent on the 15th and 16th April 2021 respectively, complied with the order of the court. A decision on the application was reserved today's date.

- [4] Although not raised in the submissions advanced on behalf of either party, on consideration of the nature of the relief being sought by the Applicant, a question arises as to whether it is open to the court to grant them where the executors have not been added as parties to the claim. For reasons which follow, the question is answered in the negative.
- [5] The various relief sought on the Application emanate from a challenge to the grant of a Power of Attorney to the Respondent by the executors named in the will of the late Hazel Gertrude Leiba, in respect of the deceased's estate. On an examination of the substantive orders being pursued by the Applicant, they all appear to me to be in the nature of "*claims to determine... question[s] or grant any relief relating to the administration of the estate of a deceased person...*" to which Part 67 of the CPR applies. This, pursuant to rule 67.1 (1) (b). Claims of that nature are required to be brought by Fixed Date Claim Form as prescribed by rule 67.1(2); and any executor of the relevant estate who is not a claimant must be a defendant in accordance with rule 67.2 (2).
- [6] There being a subsisting claim concerning the estate of the late Hazel Gertrude Leiba however, it was open to the Applicant to bring an administration claim by way of an ancillary claim within the existing proceedings in accordance with Part 18 of the CPR. Such a claim could be brought against any person, whether or not already a party for a remedy. That has not been done by the Applicant.
- [7] In consequence, there is no claim against the executors of the estate as they have not been enjoined as defendants or ancillary defendants in the existing claim. It is therefore not open to the court to grant the reliefs which have been sought by the Applicant and accordingly, the Application is refused.
- [8] Having so concluded, I hesitate in making any findings of fact in respect of the parties' competing contentions on the Application. However, I will address issues of law which arise on the submissions before me with a view to providing some clarity on the meaning and scope of **section 13(2)** of the **Trustees**,

Attorneys and Executors (Accounts and General) Act (hereinafter called “the Act”) and rule 68.23 of the CPR, on which both parties relied.

- [9] It was contended on behalf of the Applicant that section 13(2) of the Act and rule 68.23 make it clear that an executor who is not a sole executor may appoint an attorney in circumstances where the executor is resident outside of or absent from the jurisdiction. In response, Counsel for the Respondent submitted that absent an express statutory prohibition, an executor who is present in the island but who is unable to discharge his duties for any reason whatsoever may appoint an attorney.
- [10] The Respondent’s Counsel referred to the decision of the K. Anderson J in **Ann Marie Llewellyn Young and another v Louise Hilda Llewellyn (Executrix of the Estate of Messiah Llewellyn) and others** [2019] JMSC Civ. 129 in seeking to persuade the court of the propriety of his contention, but I do not believe the case is capable of the use to which it has been put. An issue for that court was whether the 2nd and 3rd defendants had a duty to render accounts to the claimants in respect of their purported administration of property forming part of the estate for which the 1st defendant was executrix. Power of attorney was given to the 2nd and 3rd defendants by the 1st defendant who was in the jurisdiction but suffered from ill health. The decision does not make reference to, nor does it discuss the provisions of the Act or the rule raised in submissions before me. In any event, Anderson J found that the power of attorney which was granted did not make reference to the deceased’s estate but only to the estate of the 1st defendant executrix. Accordingly, it was concluded that responsibility of administering the deceased’s estate remained with the 1st defendant executrix.
- [11] On consideration of the competing submissions of Counsel, I find myself unable to agree with either.
- [12] My observations on the scope of rule 68.23 can be briefly stated. It makes provision for an attorney acting under a duly recorded Power of Attorney to obtain a grant of administration where the person who is entitled to apply for a grant in a deceased’s estate resides outside of Jamaica. It does not make any

provision for the appointment of an attorney by an executor. The requirement of residency outside of Jamaica of the person who is entitled to a grant does not apply to the appointment of an attorney by an executor.

[13] The power of an executor to appoint an attorney is granted by section 13 of the Act which provides thus.

(1) A sole executor, administrator or trustee may from time to time appoint the Administrator-General as his attorney during his absence from the Island.

(2) An executor, administrator, or trustee who is not a sole executor, administrator, or trustee may from time to time appoint a fit and proper person to be his attorney during his absence from the Island for the purpose of executing and signing deeds and documents, and other acts not requiring an exercise of discretion.

[14] It appears to me on consideration of section 13(2) of the Act, that there is a distinction between the time at which an executor who is not a sole executor may appoint an attorney, and the purpose for which an appointment can be made, to which the words “*absence from the Island*” relate. I will address each in turn.

Time appointment may be made

[15] Firstly, an executor who is not a sole executor may appoint a fit and proper person from time to time to be his attorney. The power to appoint an attorney is not dependent on the executor’s absence from or presence on the island.

[16] While the legislation does not provide a test for determining whether a person is “fit and proper”, in light of the functions exercisable by an attorney under section 13(2) of the Act, I am of the view an executor’s attorney must be able to fairly and competently represent the estate and should have no interest which is adverse to that of the estate. Whether or not a person so qualifies will depend upon the circumstances of a particular case. That being said, a beneficiary who qualifies as a “fit and proper person” is not precluded from being appointed attorney by the executors of a deceased’s estate from time to time.

Purpose of appointment

- [17] Second, the attorney is not appointed at large, but to be the executor's attorney during the executor's absence from the island and then, only for the purpose limited in the statute.
- [18] It was submitted by Counsel for the Applicant that to qualify for appointment as an attorney under section 13(2) of the Act, the person must be resident in Jamaica. While I do not agree with that contention, it appears to me, certainly as a practical matter, that an attorney ought to be present on the island during the executor's absence in order to exercise the powers vested. This is on the basis that an attorney who is absent from the island is in no better position than his absent principal "... *for the purpose of executing and signing deeds and documents, and other acts not requiring an exercise of discretion*".
- [19] Additionally, contrary to the submission of the Respondent's Counsel, the section does not empower an executor to appoint an attorney where the executor is unable to discharge his duties for reasons other than absence from the jurisdiction. Where a person is named or appointed as an executor or executrix but is unwilling to carry out those functions himself, and has not intermeddled in the estate of his testator or testatrix in any way, he may renounce in accordance with the **Executors' Renunciation Act** and rule 68.33(1) of the CPR. Where he is unable to perform the functions of executor due to mental incapacity a grant for his use and benefit may be sought pursuant to rule 68.30.
- [20] On a final analysis, while an executor who is not a sole executor may appoint a fit and proper person to be his attorney from time to time, the purpose of the attorney is limited to executing and signing deeds and documents, and other acts which do not require the exercise of discretion during the absence of the appointing executor from the Island.

ORDER

[21] In consequence of the foregoing, it is ordered as follows:

1. The Notice of Application for Court Orders filed on the 2nd November 2020 is refused.
2. No order as to costs.
3. The Applicant's Attorneys-at-Law are to prepare, file and serve this order on the Attorneys-at-Law for the Respondent and on the Executors named in the will of Hazel Gertrude Leiba, deceased.

**Carole Barnaby
Puisne Judge**