

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2015/0117**

Between

**Yvette Powell-Freeman
Winston Powell
Agnola Powell-Morton
Emerald Wilkinson**

Claimants

-and-

Olrir Llewellyn Powell

Defendant

Before: His Lordship Justice Ermin Moise

Appearances:

Mrs. Angela Cozier of counsel for the claimants

Ms. Natasha Grey of counsel for the defendant

2020: October, 5th
October, 15th (written submissions)
December, 15th

JUDGMENT

- [1] **Moise, J .:** Mr. Lloyd James Alfred Powell (Mr. Powell) died intestate on 9th August, 2007. He was married and had four children with his wife. He left behind an estate comprising primarily real property valued at approximately \$4,000,000.00EC. The Defendant, Olrir Powell, is a son of the marriage and obtained a grant of letters of administration in his father's estate on 13th May, 2009. The claimants all claim to be children of Lloyd Powell; although not born of his marriage. They have brought this action seeking orders revoking the grant of letters of administration on account of it

having been obtained by misrepresentation and/or fraud, substituting the 1st claimant as administratrix in Mr. Powell's estate and that the defendant give an account of his dealings with the estate. I have determined that the claim for the revocation of the grant of letters of administration should be denied and decided against the grant of any order appointing the 1st claimant as the administratrix in the estate of the late Lloyd Powell. However, I have decided that the claimants are entitled to an account of the defendant's dealings with the estate and that each party should bear his/her own costs. My reasons are as contained in this judgment.

The facts

- [2] Yvette Powell-Freeman, Winston Powell, Agnola Powell-Morton and Emerald Wilkinson all claim to have been the natural children of Lloyd Powell. In his lifetime, Mr. Powell was married to Agnes Aretha Sutton who predeceased him on 25th August, 1996. I understand from the evidence that the couple had 4 children, who survived them; two of whom now suffer from mental health challenges. Mr. Powell died on 9th August, 2007 and on 7th October, 2008, the defendant applied for a grant of letters of administration in his estate. In his application for the grant of letters of administration, the defendant swore to an oath which stated that *"there is no other person or persons with a prior right to obtain a Grant of Letters of Administration to the Estate of Lloyd James Alfred Powell other than his 8 lawful children, my brothers and sisters."* However, the defendant subsequently filed another administrator's oath in which he indicated that the reference to 8 lawful children of James Alfred Powel was incorrect that that there were in fact 4 lawful children entitled to benefit from his estate. The grant of letters of administration was issued by the Registrar of the High Court on 13th May, 2009.
- [3] The claimants' quarrel is that they too are lawful children of Mr. Powell and they rely on these two sworn statements by the defendant as evidence of his misrepresentation and fraud. Mrs. Powell-Freeman states that the defendant is well aware that the claimants are his siblings and deliberately misled the Registrar into appointing him as administrator in Mr. Powell's estate.
- [4] Ms. Powell-Freeman, who represented the remaining claimants by way of powers of attorney, states that she has known the defendant for all of her life and that he has always referred to her as his sister. She remembers their interactions dating as far back as high school. She claims to have

no idea as to why he would deny that she too was a lawful child of Lloyd Powell. She states that she remembers when Lloyd Powell was buried. In the bundle of documents filed by counsel for the claimant, she seeks to exhibit copies of the leaflets for Mr. Powell's funeral service which also refer to the claimants as his children.

- [5] However, the evidence is that sometime after Mr. Powell's death the parties had consulted an attorney with a view to applying for and obtaining a grant of letters of administration in his estate. It was Mrs. Powell-Freeman's evidence that at the time it was agreed that she and the defendant would have been appointed as joint administrators. However, it was noted by the attorney who was then engaged, that the claimants had no documentary proof that they were in fact children of Mr. Powell. Their birth certificates at the time did not reflect that Mr. Powell was their father. The attorney expressed the view that the defendant could not proceed to obtain a grant of letters of administration whilst representing the claimants as children of Mr. Powell, without the necessary documentary proof. The defendant therefore suggests that upon advice he proceeded to obtaining the grant of letters of administration without reference to the claimants as he had no way of proving that they were lawful children at the time the application for the grant of letters of administration was made.
- [6] However, on 3rd June, 2013, the claimants applied for and obtained orders from the Magistrate in District "C" declaring that they were children of Mr. Powell. In 2015 they obtained birth certificates with Mr. Powell's name reflected as their father. It is unclear as to what evidence was presented to the Magistrate in the course of these applications, given that Mr. Powell was at the time deceased. I also note that the defendant, who was by then the administrator in Mr. Powell's estate, was not served with a copy of any of these applications and was not present when the Magistrate made the orders. It is also noteworthy that the attorney who lodged these applications on behalf of the claimants was the same attorney who applied for and obtained the grant of letters of administration on behalf of the defendant. It was only after obtaining these birth certificates did the claimants seek to challenge the defendant's actions by commencing the proceedings which are currently before this court.
- [7] The defendant, in his affidavits and under cross examination was adamant that he was not in a position to say for sure that the claimants were his siblings. It was his evidence that during his

father's lifetime he never did say to him that the claimants were his children. He admits to knowing Ms. Powell-Freeman and the other claimants but would not assert that they were his siblings. He states that he was not served with any application made to the Magistrate for his father's name to be added to the birth certificates of the claimants and therefore could not speak to that issue. In fact in cross examination he stated that if the court were to confirm that the claimants were beneficiaries in his father's estate he would be quite prepared to account to them for his dealings with the estate.

[8] In so far as it relates to the assertion that the defendant is guilty of misrepresentation and fraud, the claimants assert that the defendant lied in his administrator's oath when stating that there were only 4 children of Mr. Powell with a right to obtain a grant of letters of administration. The amended statement of claim filed on 9th February, 2016, whilst acknowledging that the defendant acted on the advice of his attorneys, also went on to state that he undertook to inform the 2nd claimant of this decision but did not do so. Instead he proceeded to obtain the grant without the claimant's knowledge. They also assert that he has sold property belonging to the estate and appropriated the funds for himself.

[9] The claimants also assert that the defendant is guilty of the "maladministration of the estate". They have particularized a number of grounds upon which these allegations are made. However, in general the allegations are based on the current state and living conditions of the defendant's sisters who are currently mentally ill. The allegation is that they live in deplorable conditions and that the defendant, as administrator of his father's estate, has failed to look after them.

[10] The defendant denies this and states that he does his best to look after his sisters. He notes that they are mentally challenged and he sometimes receives complaints from persons about them. Whenever that takes place he normally tries to look after them. He provides food and other items for them and does his best in the circumstances. He however asserts, and I agree with him, that his duty as the administrator is not to look after anybody but to administer the estate. Insofar as that is the case he states that there are a number of parcels of land in the estate. So far he has only sold one parcel amounting to 32,670 square feet. This was sold for \$146,000.00 for the purpose of meeting the costs of administering his father's estate. He states that he paid the attorney who applied for the grant and assisted him with this process and also reimbursed his brother who had

met some of the costs of the funeral and other expenses relating to his father's death. The more valuable assets within the estate have remained preserved at this stage.

[11] The issues for consideration in this case are:

- (a) Whether the defendant obtained the grant of letters of administration by way of misrepresentation and/or fraud;
- (b) Whether the defendant is guilty of the maladministration of the estate;
- (c) If so, whether the claimants are entitled to an order revoking the grant and substituting the 1st claimant as administratrix in Mr. Powell's estate; and
- (d) Whether the claimants are entitled to an account from the defendant of his dealings with the estate;

Did the defendant obtain the grant of letters of administration by misrepresentation and/or fraud?

[12] In their amended statement of claim the claimants have only particularized their allegations of fraud. It would seem that the pleadings of misrepresentation and fraud are all predicated on the same facts. In my view therefore, what the claimants seek to prove is that the defendant is guilty of fraudulent misrepresentation in his application for the grant of letters of administration in his father's estate. It is needless to say that allegations of fraud come with a relatively significant burden. Such fraud has been defined in the **Citty on Contracts** as follows:

"Definition of fraud. The Common law relating to fraud was established by the House of Lords in Derry v Peek(1889) 14 Appeal Cases 337). It was there decided that in order for fraud to be established, it is necessary to prove the absence of an honest belief in the truth of that which has been stated; in the words of Lord Herschell, "fraud is proved when it is shown that a false representation has been made: (1) knowingly; or (2) without belief in its truth; or (3) recklessly, carelessly whether it be true or false." The converse of this is that however negligent a person may be, he cannot be liable for fraud, provided that his belief is honest; mere carelessness is not

sufficient although gross carelessness may justify an inference that it was not honest.”

[13] The same principles apply even though this is not a case brought on the basis of a commercial contract. The issue here therefore is whether the defendant made a false representation in the administrator's oath as to the number of children of Mr. Powell who were entitled to benefit from his estate; and whether he did so knowingly or without belief in its truth or that he was reckless or careless as to whether his representation was true or false. The claimants' argument is that the defendant knew that they were children of Mr. Powell and therefore knew that his representation to the Registrar in the administrator's oath was false.

[14] However, to my mind, the issues are truly not as simple as counsel for the claimants would have wished to put it. The evidence is clear that the parties, at least the 1st claimant and the defendant, held discussions on the matter. What was subsequently observed was that there was no documentary proof upon which the claimants could have been represented as children of Mr. Powell when the application for the grant of letters of administration was made. It would seem from the evidence that the defendant was acting on the advice of his attorney at the time. Although he states in his evidence that his father had never represented to him that the claimants were in fact his children, I find that on balance there was some knowledge of the relationship. However for the purpose of obtaining a grant of letters of administration such knowledge would not be enough to place before the Registrar in these circumstances.

[15] I also note that it was not until some 4 years after Mr. Powell's death did the claimants apply for orders from the Magistrate declaring them to be his children. Counsel for the defendant refers the court to section 5 of the **Status of Children Act** which states as follows:

(1) The relationship of father and child, and any other relationship traced in any degree through that relationship shall, for any purpose related to succession to property or to the construction of a will or other testamentary disposition or of an instrument creating a trust, be recognized only if

(a) the father and the mother of the child were married to each other at the time of its conception or at some subsequent time; or

(b) paternity has been admitted by or established during the lifetime of the father (whether by one or more of the types of evidence specified by section 6 or otherwise):

Provided that, if such purpose is for the benefit of the father, there shall be the additional requirement that paternity has been so admitted or established during the lifetime of the child or prior to its birth.

(2) *In any case where by reason of subsection (1) the relationship of father and child is not recognized for certain purposes at the time the child is born, the occurrence of any act, event or conduct which enables that relationship, and any other relationship traced in any degree through it, to be recognized shall not affect any estate, right or interest in any real or personal property to which any person has become absolutely entitled, whether beneficially or otherwise, before the act, event, or conduct occurred.*

[16] This section of the legislation is very relevant to the issues at hand. It must be observed that when one is concerned with the succession and the administration of an estate, the law relating to paternity requires proof beyond mere informal knowledge. What the legislation requires is proof that the alleged beneficiary was a child of the marriage of the deceased or that the deceased had acknowledged the individual as his child or that the paternity was established during his lifetime. Section 6 of the Act establishes the manner in which paternity is proven by virtue of subsection 2. Without repeating that section in any detail, I rather doubt that the evidence presented in this case, save for the orders which the Magistrate granted in 2013, would have sufficed to prove paternity as alleged by the claimants. In my view, therefore, the defendant was entitled to rely on the advice of his attorney in seeking to obtain the grant of letters of administration, given the state of the law and the facts at the time, and I am therefore not satisfied that there is proof of fraudulent misrepresentation as alleged by the claimants.

[17] Counsel for the defendant however argues that this court should go further than merely rejecting the argument of fraudulent misrepresentation. She wishes for this court to find in fact that the claimants are not beneficiaries of Mr. Powell's estate. In relying on section 5 of the Act, counsel points out that the orders of the Magistrate were only obtained after Mr. Powell's death and in the absence of the defendant or any of his other siblings. This she argues does not comply with the provisions of the Act, which requires that such paternity must have been proven during Mr. Powell's

lifetime. Before addressing that submission, it is important to highlight the powers available to the Magistrate in coming to the decision which was then made. Section 11 of the Act states as follows:

Declaration of paternity

(1) Any person who

- (a) being a woman, alleges that any named person is the father of her child;***
- (b) alleges that the relationship of father and child exists between himself or herself and any other person; or***
- (c) being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between two named persons;***

may apply to the High Court in the prescribed manner for a declaration of paternity, and if it is proved to the satisfaction of the Court that the relationship exists the Court may make a declaration of paternity whether or not the father or the child or both of them are living or dead.

(2) An application for a declaration under this section may be made to the Magistrate's Court and if the Magistrate is satisfied there are no issues which are in dispute, the Magistrate may make a declaration and such a declaration shall be in effect the same as if it had been made by the High Court.

(3) Where a declaration of paternity under subsection (1) or (2) is made after the death of the father or of the child, the Court may at the same or any subsequent time make a declaration determining, for the purposes of paragraph (b) of subsection (1) of section 5, whether any of the requirements of that paragraph have been satisfied.

[18] For my part, I do agree that there are significant questions to be raised here. Although such an order may be granted after the death of the alleged father, the Magistrate may only do so if it is clear that there are no issues in dispute which arises as to paternity. It is difficult to see the circumstances under which such a determination can be made if the remaining children of the deceased were not even served with this application. At the time the defendant had already been appointed as the administrator of the estate. Yet even he had no knowledge of the application. It is unclear as to what evidence was presented to the Magistrate at the time the decision was made in

2013. However, it must be observed that the decision of the Magistrate is not up for review before me. It would have been open to the defendant to challenge this decision. He did not do so and I would not be minded to undermine the decision of the Magistrate in any way. In any event I rather doubt that I have the authority to do so in the manner alleged by counsel for the defendant, given the nature of the proceedings before me.

[19] The 2nd issue raised in the pleadings regarding fraud relates to the sale of one of the properties in the estate. The claimants state that the defendant sold this property without any consultation and that he has wrongfully and fraudulently appropriated the money derived therefrom. However, on balance, after assessing the evidence I can find no proof of fraud here for two main reasons.

[20] Firstly, given that at the time the claimants were not proven to have been beneficiaries of the estate, I do not find that the defendant was under a duty to consult them about the sale of the property. Secondly, having examined the evidence presented by the defendant, I am not of the view that the evidence amounts to fraud. I observe that the property in the estate as a whole is said to be valued at approximately \$4,000,000.00EC. The defendant states that to date he has only sold one of these properties for the sole purpose of raising funds to administer the estate. That property was not among the most valuable. The claimants themselves only obtained declarations of paternity some 4 years after the defendant was appointed administrator and yet they have found an estate which has largely been preserved save for the sale of one property. Mr. Powell was buried and letters of administration were applied for and obtained. All of this would come at a cost. On balance I accept the defendant's evidence that nothing fraudulent has occurred. No doubt, that the claimants would be entitled to an account, given that they have now obtained a declaration of paternity and the court is minded to grant such an order. However, I do not find that there is evidence of fraud as alleged by the claimants.

Is the Defendant Guilty of Maladministration of the Estate?

[21] As I have indicated earlier, the claimants' main quarrel in their pleadings under this heading relates to the conditions of their two sisters who the court understands are mental health patients. They argue that the defendant, as administrator in their father's estate, has failed to take care of these

two sisters, forcing the claimants to care for them. In order to address this issue, it may perhaps be necessary to outline the general duties of an administrator. Section 3(1) of the **Real Representative Act**¹ states that “...***the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto...***” The administrator therefore holds the property on trust for the interest of the beneficiaries as a whole. As it relates to this trusteeship Viscount Radcliff noted the following in the case of ***Commissioner of Stamp Duties v. Livingston***²:

“...whatever property came to the executor virtute officii came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit; and these duties would be enforced on him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary interested in the estate. Certainly, therefore, he was in a fiduciary position with regard to the assets that came to him in the right of his office, and for certain purposes and in some aspects he was treated by the court as a trustee.”

[22] This trusteeship is not one which mandates that the administrator take personal care of anyone of the beneficiaries. His duty relates directly to his preservation and administration of the assets of the estate. He is to perform his function for the interest of the beneficiaries as a group. He is encouraged to consult those in whose interest he acts and he must attempt, as much as possible to preserve the assets of the estate and deal with it in much the same manner as a prudent and responsible person would handle his own private affairs. That duty however, does not extend to him taking personal care and responsibility for the lives of anyone in the estate; unless of course there is a clear duty to do so outlined in a last will and testament or some other form of duty legally imposed on him.

[23] Insofar as the common law clearly outlines the duties of an administrator, I am unable to agree with the submissions of counsel for the claimants that any evidence of maladministration has been presented here. No doubt one may sympathize with the conditions under which these two sisters

¹ CAP10.16

² [1964] 2 All ER 692

live, but I can find nothing in law which places a duty on the defendant as the administrator of the estate of his father to personally care for the specific personal needs of these persons. In addition, the court is presented with very little evidence regarding the extent of the medical condition. People who suffer from mental health challenges may range from those with minor issues of depression to those who are so affected that they live on the streets without full appreciation of their condition. In such cases it may be more that difficult for the average person to provide care for loved ones in such a condition. Without more I am not prepared to find that the defendant has abdicated any specific duty towards his sisters, bearing in mind that his evidence is that he attempts to take care of them whenever possible.

Are the claimants entitled to a revocation of the Grant of Letters of Administration?

[24] Based on my findings so far I am not of the view that there is any need for the revocation of the grant of letters of administration. I am satisfied that the defendant has not committed fraudulent misrepresentation or fraud in any way. Neither is there evidence of maladministration on his part. I would therefore decline to make an order revoking the grant of letters of administration; save that the grant is to now reflect that the claimants are also beneficiaries of the estate. Similarly I would not make an order placing the 1st claimant as an administratrix of the Estate.

Are the claimants entitled to an account?

[25] The court need not say much on this issue as the defendant has accepted in his evidence that once the declaration of paternity is established then he would be prepared to account to the claimants regarding his dealings with the estate. Given that they were not initially identified as beneficiaries, the court can see no harm in granting such an order. In addition I would remind the defendant of his duties as the administrator and encourage him to consult all the beneficiaries of the estate in order to ensure that his duties are properly carried out. I would only add that the parties may do well to discuss the appointment of a guardian to look after the affairs of the two sisters who appear to be unable to look after their own interests.

[26] In closing I wish to make one observation about the overall conduct and management of this case.

This matter was initially lodged in 2015 and only came to trial more than five years later. I do understand that the matter may have been placed before the Court of Appeal on an interlocutory application at one point. Despite this, and with all respect to the litigants in the matter, I am of the view that there is nothing about the substance of this case which necessitates the use of over half a decade of the court's time and resources; as well as that of the parties. When the matter finally came to trial it took less than three hours in total to hear the evidence. It therefore begs the question as to whether 5 years of case management is necessary in order to address the substance of a case that takes 3 hours to try; in addition to there being no evidential or legal issue of any measure of complexity to determine. In the meantime, the administration of an estate has been held up because of this litigation. The court, as well as the parties and counsel who represent them, must continue its quest to reduce the rather extensive and unnecessary delay which continues to undermine public trust and confidence in this system. We can and must strive to do better than this.

[27] In the circumstances I make the following orders and declarations:

- (a) The claim for a revocation of the grant of letters of administration is denied;
- (b) The claim for the appointment of the 1st claimant as the administratrix in the estate of the deceased is also denied;
- (c) The defendant is to account to the claimants for his dealings with the estate so far. He is to file an affidavit identifying the assets and liabilities of the estate. This is to also include all information relating to the sale of any property in the estate and his dealings with any of the proceeds of sale. This affidavit is to be filed within 28 days from the date of delivery of this order;

(d) The claimants are at liberty to apply for any further orders relating directly to the account provided by the defendant;

(e) Each party will bear their own costs.

**Ermin Moise
High Court Judge**

By the Court

Registrar