

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHCV 2016/0196

**IN THE MATTER OF THE ESTATE OF KENNETH MALCOLM MADURO (DECEASED)
AND IN THE MATTER OF PARCELS 81 & 82 (FORMERLY PARCEL 52), BLOCK
3137B OF ROAD TOWN SECTION
AND IN THE MATTER OF PARCEL 85 BLOCK 3037B AND PARCELS 135 AND 574,
BLOCK 3038B ROAD TOWN SECTION**

BETWEEN:

DAPHNE FRETT

Applicant

and

REESO MADURO

Respondent

Appearances:

Ms. Lavonna Burrows for the applicant

Mr. E. Leroy Jones for the respondent

2020: July 24
July 30

JUDGMENT

- [1] **JACK, J [Ag.]**: By an *ex parte* application filed 24th June 2016 the applicant sought a limited grant of administration of the estate of her late father, Kenneth Malcolm Maduro (“the deceased”). The deceased died as long ago as 6th November 2004. He left ten children, including the applicant and the respondent. One of the other siblings has since died, but nothing turns on this.

[2] The applicant's case is that from 1996 or 1997 the deceased's physical and mental capacity declined. The deceased purported in consideration of natural love and affection to transfer land in Road Town to the respondent by transfers dated 14th August 1997 and 11th March 1999. The applicant says the deceased was incapacitated and could not make the transfers. Alternatively, the respondent exercised undue influence over the deceased in order to cause the deceased to execute the transfers.

[3] No details of the value of the land transferred to the respondent have been adduced. Further, it appears that the deceased transferred land to the applicant as well as to at least some of his other children. (Whether, as is suggested, some of the transfers to the respondent were to be held on trust for, or were otherwise for the benefit of, other siblings is not in evidence.) The details of the value of these gifts are not in evidence. This may be significant, because of the doctrine of "hotchpot". The relevant principle is described in **Lewin on Trusts**,¹ as follows:

"(4) When a parent makes a testamentary gift in favour of a child, or any other person towards whom he stands *in loco parentis*, and afterwards confers a portion on the child or other person, a presumption arises against double portions; that is, the testamentary gift is treated as adeemed *pro tanto* by the portion, so that the portion must be brought into account against the amount of the gift.

(5) In the administration of the estate of a person... wholly or partially intestate, a child of that person benefiting under the intestacy had to bring into account advances or (in a partial intestacy) what he took under the deceased's will."

[4] In other words, by advancing gifts of land to some of his children during his lifetime, those children must give credit for the value of the gift when a distribution is made on intestacy. If the deceased was broadly fair in his allocation of land between his children (as the respondent alleges here), it may mean that setting aside the transfers to the respondent would simply result in his entitlement to a

¹ 20th Ed, 2020 at para 25-002. Principle (5) has been abolished in England and Wales for deaths from 1996 onwards: Law Reform (Succession) Act 1995 c. 41, but not in this Territory.

share of the deceased's estate being correspondingly increased. (The grant of letters of administration *ad colligenda bona* does not entitle the administratrix to distribute the estate, but there is no point making such a grant if assets which stand to be recovered have to be paid out immediately to those from whom the assets have been taken.)

- [5] It is common ground that by the time of the deceased's passing there were no assets for distribution on intestacy. All the land had been given away. No grant of letters of administration has ever been made.
- [6] The same day that the applicant issued her application for the grant of limited letters of administration she also issued a substantive claim against the respondent and the Registrar of Lands (claim no BVIHCV 2016/0195) for declarations that the transfers of land to the respondent stood to be set aside. This claim eventually came before the Court of Appeal, who struck the claim out on the basis that she was not the personal representative of the deceased.² Following the Court of Appeal decision, one of the siblings, Mark Brian Maduro has lodged a caveat requiring the applicant to give him notice before applying for a grant. The applicant alleges that Mark Maduro's application was made in bad faith. The merits or otherwise of that submission are not before me. Mark Maduro is not a party.
- [7] In the current application, the applicant does not seek appointment as administratrix of the deceased's estate for all purposes. Instead she seeks appointment as administrator *ad colligenda bona*. The nature of such a grant is conveniently set out in the judgment of Joseph Olivetti J in **Re Liao Yo Chang; Lioa Chen Toh v Liao Hwang Hsiang**:³

"[10] The Court's jurisdiction in probate causes is to be exercised in accordance with the provisions of the West Indies Associated States Supreme Court (Virgin Islands) Act Cap 80, and in accordance with any

² BVIHCVAP 2018/0004 (determined 25th May 2020, unreported).

³ BVIHPB 2011/0093 (determined 29th November 2011).

other law in the Territory and rules of court. In addition, where no special provision is contained in Cap 80 or any other law, the jurisdiction falls to be exercised in conformity with the law and practice of the High Court of Justice in England. See section 11 of Cap 80.

[11] As we have no special provision about grants *ad colligenda bona defuncti*, it is properly accepted by both counsel that the Court has a general power to make a limited grant of administration in order to preserve assets of the deceased within the jurisdiction without waiting until those entitled to a grant have applied. This grant is known as an *ad colligenda bona defuncti* grant, although the '*defuncti*' is often omitted when referring to it.

'Application may be made for a grant of administration *ad colligenda bona defuncti*, owing to the impossibility, in the special circumstances of the case, of the court constituting a general personal representative in sufficient time to meet the necessities of the estate. It is now more usual, in appropriate cases, to obtain wider powers by invoking the powers conferred upon the court by s.116 of the Supreme Court Act 1981...'⁴

[12] Such a grant is made for a limited purpose, for example, to allow the deceased's business to be run or for any urgent purpose. Unlike an ordinary executor or administrator, the holder of such a grant cannot make any distribution of the estate's assets. His or her role is to protect the assets of the estate until a full grant is made. Accordingly, the grant on issue is usually limited, 'for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the same and until further representation be granted.'⁵...

[13] It is also well established that a grant *ad colligenda bona*, 'may be made not only to a person whom the court considers suitable, but also to the persons who are entitled to a full grant but in the interests of the estate cannot wait, or to entire strangers who have been brought into connection with the matter.'⁶ And the issue of such a grant can be objected to on, for example, the grounds of ill health or bad character (which is in part what CT is trying to do here⁷."

[8] In the current case there was a mediation directed by Ellis J. This resulted in the family agreeing two neutral siblings as appropriate general administrators of their

⁴ Tristram and Cootes, Probate Practice (28th ed, 1999) para. 25.173.

⁵ *Ibid* para 25.177.

⁶ *Ibid* para 25.174.

⁷ *Ibid* para 14.17.

father's estate, however, the agreement was never adopted by the Court after objections from the applicant.

- [9] In deciding whether to make a limited grant I need to exercise my discretion. An important point is the fact that the action is now over four years old. This is sufficient to show that there is no real urgency. There are other considerations which weigh against making such a grant as well.
- [10] Firstly, the overall merits are doubtful. The letter of Dr. Charles Payne of 19th August 1997 diagnoses the deceased as suffering from amyotrophic lateral sclerosis, which is a form of motor neurone disease often called Lou Gehrig disease. The textbook extract attached to Dr. Payne's letter does not suggest that a patient suffering from the disease develops dementia. It does not support the applicant's case that the deceased lacked mental capacity. Physical incapacity does not equal mental incapacity. Second, the issue of hotchpot may mean that, even if an attempt to set aside the transfers was successful, the actual financial result of such a case might be negligible. Such litigation may be disproportionate. Third, there has been ample opportunity to obtain an ordinary grant.
- [11] Against these considerations, it is true that there is an ever-worsening limitation problem, if a claim for return of land is made by the estate. The primary limitation period of twelve years for recovering the land given in 1997 and 1999 expired in 2009 and 2011 respectively. If the deceased lacked mental capacity when he made the transfers, then time only started running on his death in 2004. That limitation period would have expired in 2016. (The applicant issued her two claims just before the twelve year period expired, but that does not extend the time for the estate to bring a claim.) The applicant says that she is entitled to a further extension based on fraud or mistake. I do not find that convincing. Even if she and her siblings did not know of the transfers at an early stage, they should have investigated. Within a year or two of the deceased's passing, it must have been apparent that no one was administering the estate and that the respondent was in

possession of the land now in dispute. At most a short extension of the limitation period would result.

- [12] Balancing all of these considerations, in my judgment this is not a matter in which the Court should grant limited letters of administration. Accordingly, I dismiss the application with costs.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar