

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Jurisdiction

No. 2113 of 2005

IN THE ESTATE OF EVERTON EDWARDS also known as EVERTON SYLVESTER EDWARDS,  
deceased

LISA MONIQUE PRESCOD

Applicant

AND

DWIGHT EVERET EDWARDS

First Respondent

TAMEEKA SIMMONE YEARWOOD

Second Respondent

RENALDO EDSYL ALEXANDER

Third Respondent

EDWARDS (a minor herein represented

by his Guardian *ad litem*, MARLENE BOYCE)

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court.

2005: November 10; December 2;

2006: January 6, 3; February 21

2007: June 22

Messrs. George Walton Payne & Co. for the Applicant and First and Second Respondents.

Ms. Lisa Gaskin for the Third Respondent.

OPINION OF THE HIGH COURT

INTRODUCTION

[1] This matter involves an application by originating summons filed herein on the 5<sup>th</sup> day of January, 2006 by the Applicant, Lisa Monique Prescod, the Administratrix of the estate of Everton Sylvester Edwards, (The deceased) for the following orders:

1. That this Court renders its opinion, advice or direction respecting the management and administration of the assets of the intestate Everton Edwards and in particular, the acquisition of the share of the minor Renaldo Edwards by the Applicant in her personal capacity as the fourth Respondent in this action pursuant to **Section 74 (1) of the Trustee Act**.
2. That the Court directs whether **Section 11 (3) of the Trustee Act** may be applied.

## THE FACTS

- [2] Everton Sylvester Edwards, the deceased, died intestate in this island on the 22<sup>nd</sup> day of October, 2004. He was not survived by any spouse within the meaning of the provisions of the **Succession Act, Chapter 249** of the Laws of Barbados but he was survived by his four (4) children namely the Applicant and the first to third Respondents in this matter. The third Respondent is a minor child, who was born on the 8th day of March, 1991. The Applicant applied for and, on the 2<sup>nd</sup> day of June, 2005, had Letters of Administration dated the 18<sup>th</sup> day of May, 2005 issued to her by the Supreme Court of Barbados. The deceased, at the date of his death, was the estate owner of the fee simple in the property situate at Lot 156 Husbands & Oxnards in the parish of St. James in Barbados. This property was subject to a mortgage given in favour of Barbados Mortgage Finance Company Limited in respect of which the sum now payable on redemption is BBD \$12,273.70. The Applicant alleges that the first and third Respondents have agreed to relinquish and disclaim their respective shares and interests in the said property and transfer the same to the Applicant in her personal capacity.
- [3] Two valuations of the property have been prepared by George A. Ramsay & Co. and A N Kirton Inc. which value the property at BBD \$150,000 and \$154,000 respectively. The property is in a state of disrepair and the mortgagee is pressing for payment. It is alleged that the Applicant is the only beneficiary capable of obtaining a mortgage in order to redeem the property and liquidate the debts of the estate and effect repairs to the property. She is desirous of purchasing the share and/or interest of the minor child at its fair market value.

## PRELIMINARY ISSUES

### A) Separate Legal Representation of the Minor Child

- [4] When the matter first engaged the attention of the Court, Counsel for the Applicant indicated that he also acted for the beneficiaries of the estate including the minor child. In view of the child's minority and the nature of the application, which seeks an opinion on the acquisition of the minor child's interest in the property, the Court felt that it would be better for the child to be separately legally represented so that he would have the benefit of independent legal advice and the Court so ordered. In consequence, the services of Ms. Lisa Gaskin were procured by the guardian of the infant child and she filed affidavits on his behalf. On the 21<sup>st</sup> day of February, 2006 an order was made, pursuant to a summons filed on the 9<sup>th</sup> day of February, 2006 appointing Marlene Boyce guardian *ad litem* of the minor child.

### B) Whether Section 11(3) of the Trustee Act may be applied.

- [5] Section 11 (1) of the **Trustee Act Chapter 250** of the **Laws of Barbados**

provides:

"Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract of sale, and buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss."

- [6] This section allows a Trustee, in whom a power of sale or a trust for sale is vested, to sell the interest of the deceased in the property whether the deceased was the sole beneficial owner of the property or held an interest in the property in common with some other co-owner or co-owners. The subsection is self-explanatory as it gives the power of sale subject to existing charges or encumbrances since the trustee can only convey the property subject to the same encumbrances upon which the deceased held it.

**Section 11(3)** provides:

"where the trust or power authorises an exchange, the trustee may give or receive any money for equality or exchange."

- [7] It appears to me, given the facts as above outlined, that Section 11 (3) is inapplicable to this matter. There is no issue of the trust or power vested in the Administratrix authorising an exchange. It necessarily follows, therefore, that there is, likewise, no issue of the Administratrix giving or receiving any money for equality of exchange. **Section 3(1)** of the **Succession Act** provides that:
- “The real and personal estate of a deceased person shall on his death, notwithstanding any testamentary disposition, devolve and become vested in his personal representatives.”
- [8] **Section 3(2)** provides that:
- “The personal representatives for the time being of the deceased person shall be the representatives of the deceased in regard to his real and personal estate, and shall hold the estate as trustees for the persons by law entitled thereto.”
- [9] **Section 32(1)** of the **Succession Act** of Barbados provides that:
- “The personal representatives may sell the whole or any part of the estate of a deceased person for the purpose not only of paying debts but also (whether there are or are not debts) of distributing the estate among the persons entitled thereto, but before selling for the purposes of distribution, the personal representatives shall, so far as practicable, give effect to the wishes of the persons of full age entitled to the property proposed to be sold, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons.”
- [10] **Subsection 2** of **Section 32** provides that:
- “A purchaser of the estate or part thereof to which subsection (1) refers shall not be concerned to see that the personal representatives have complied with the wishes of the persons referred to in subsection (1), and it shall not be necessary for any person beneficially entitled to concur in such sale.”
- [11] The difference between **Section 11 (1)** of the **Trustee Act** and **Section 32** of the **Succession Act** appears to be that **Section 11 (1)** applies where a trust for sale or a power of sale is vested in the Trustee whether by the instrument creating the trust or by operation of law where the property is held by statute upon trust for sale. Although the term “Trust” includes the duties incident to the office of a personal representative and “Trustee” includes a personal representative (**Section 2** of the **Trustee Act**), a personal representative does not automatically hold the property of a deceased upon trust for sale but holds it upon trust for the persons entitled thereto. The power of sale conferred on him by **Section 32** of the **Succession Act** is for the purposes of not only paying debts but for the purposes of distribution of the estate whether there are or are not debts.
- [12] **Section 32** of the **Succession Act** appears therefore to be directly applicable to the issue of the ability of the personal representative, in her private capacity, to purchase the interests of the beneficiaries since she will also be a personal representative exercising a power of sale under **Section 32** of the **Succession Act**. It is because of this duality of roles with the potential for a conflict of interests that the law observes these transactions with scrupulous diligence as will be seen later in this opinion. The skeletal arguments submitted by Counsel did not address this issue in any detail.
- [13] It would appear that the applicable sections would be **section 11(1)** of the **Trustee Act** (above quoted) and not **section 11(3)** and **Section 32** of the **Succession Act** since the nature of the opinion sought has to do with the desire of the Administratrix to purchase the interests of the other beneficiaries, including the interest of the minor child. The two sections, to some extent, cover the same ground.
- [14] The **Trustee Act** applies to trustees generally and Trustee is defined as including a personal representatives. **Section 2** of the Act also provides that the expression “Trust” and “Trustee” extend to cases where the Trustee has a beneficial interest in the Trust property and to the duties incident to the office of a personal representative. The **Succession Act** is a specific Act which details the rights, duties and powers of personal representatives. Nothing in the particular act limits the application of the general act or vice versa.
- [15] In the particular circumstances of this application, it would appear that **Section 11(1)** of the **Trustee Act** is applicable since the Administratrix who is seeking to purchase the interests of the other beneficiaries, herself has an interest in the property by virtue of **sections 49 (5)** and **(6)** of the **Succession Act**. This is dealt with later in this opinion.

## MAIN ISSUES

- [16] There are two (2) other main issues in respect of which the Court is asked to render its opinion, namely: -
1. Whether the applicant can purchase in her individual capacity the shares of the other beneficiaries in the estate who are of the age of majority; and
  2. Whether she can acquire the interest of the minor child in the said property.

## THE LAW

[17] The jurisdiction to render the opinion sought is conferred on the Court by **Section 74(1) of the Trustee Act, Chapter 250** of the Laws of Barbados which provides that:

“a trustee or personal representative may without commencing an action apply by petition to the Court or by summons upon a written statement to a Judge in chambers for the opinion, advice, or direction of the Court or Judge in Chambers on any question respecting the management or administration of the trust property or the assets of any testator or intestate”.

[18] **Section 74 (2)** provides that:

“Such application shall be served upon and the hearing shall be attended by all persons interested in such application or such of them as the judge thinks expedient.”

[19] This section engaged the attention of my brother **Blackman J.** who, on the 3<sup>rd</sup> day of January, 2006 ruled on the point and made consequential orders which paved the way for the action to be continued with all relevant parties having the right to be heard before the Court.

[20] **Section 74 (3)** provides that:

“The Trustee or personal representative acting upon the opinion, advice or direction given by the judge, shall be deemed so far as regards his own responsibility to have discharged his duty as such trustee, or personal representative, in the subject matter of the said application.”

[21] **Section 74 (4)** further provides that:

“This Act does not extend to indemnify any trustee, or personal representative in respect of any act done in accordance with such opinion, advice or direction if he is guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion or advice.”

[22] A personal representative of a deceased person means the Executor or Administrator for the time being of a deceased person (**Section 2(1) of the Succession Act, Chapter 249** and **Section 2** of the **Trustee Act of Barbados**). The expression “trusts” and “trustee” extend to implied and constructive trusts and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative; trustee includes a personal representative (**Section 2** of the **Trustee Act, Chapter 250** of the Laws of Barbados).

[23] The Court has made a distinction between the purchase of trust property by a Personal Representative from himself and purchase by a Personal Representative of the beneficial interest of a beneficiary.

[24] In **Williams, Mortimer & Sunnucks, ‘Executors, Administrators & Probate’** at **pg. 59**, it is stated that:

‘An executor cannot properly purchase assets from himself. If he does so, he will have to account as Trustee for any advance which he gains in the transaction and the transaction itself is voidable. There is a distinction between an Executor’s dealing with himself and an Executor dealing with legatees and other beneficiaries. The latter dealings are watched by the Court ‘with the utmost diligence’ and are liable to be set aside if there is any hint of an abuse of the Trustee’s position or of undue influence exercised by him over the beneficiaries.’

[25] In **Coles v Trecothick and Others [1803-1813] All ER Rep 14 at 18 Lord Eldon L.C.** noted:

“On the question as to a purchase by a trustee from the cestui que trust, I agree, the cestui trust may deal with his trustee, so that the trustee may become the purchaser of the estate. But, though permitted, it is a transaction of great delicacy which the court will watch with the utmost diligence - so much that it is very hazardous for a trustee to engage in such a transaction.”

[26] Where a sale has been effected to a Trustee,

‘the burden of proof that the transaction was a righteous one rests on the Trustee, who is bound to produce clear and affirmative proof that the parties were at arm’s length, that the cestui que trust had the fullest information upon all material facts, and that

having this information, they agreed to and adopted what has done': *Williams v Scott* [1900] A.C. 499.

[27] At **paragraph 24 of Volume 41 of the Atkins Court Forms 1991 issue at page 36** it is noted that:

'An action may be brought for an order approving any sale, purchase compromise or other transaction by a person in his capacity as Trustee. It should be noted that reference made is to the approval of such a transaction and not to the transaction itself. The Court cannot, therefore, on an originating summons under this rule order such a transaction to be carried out. Accordingly, the proposed transaction must be one within the trustees' powers either under the trust instrument or under the general law. This procedure is frequently adopted to seek the Court's approval of a proposed purchase by a trustee of trust property. It is desirable that all of the beneficiaries should be made parties to such an application, and the co-trustee or co-trustees should make an affidavit stating whether in their opinion the proposed transaction is for the benefit of the beneficiaries, and making such criticisms as occur to them. The instructions given to the valuer should be exhibited. The valuer should also make an affidavit exhibiting his valuation.'

[28] The outline submissions of both counsel agree substantially with these statements of principle and both submit that the Court ought to apply them. Having regard to the authorities on the subject, the Court accepts Counsels' submissions on the law.

[29] A Personal Representative has a statutory power of appropriation of assets pursuant to **Section 32 (1)** of the *Succession Act Cap 249* of the Laws of Barbados. This appropriation must be seen in terms of the fiduciary obligations which the personal representative owes to the estate and the beneficiaries. It is not a power of appropriation in his or her own right. It is for this reason that the Court scrupulously examines transactions, which involve purchases by personal representatives of the estate of interests of beneficiaries.

[30] The position of trust of the personal representative must never be abused or undermined nor must it appear to have been abused or undermined. **It is for this reason also that this Court ordered separate legal representation for the minor child. It must be stated that the Court does not suggest that there was any impropriety on the Plaintiff's part or Counsel since there was none. (my emphasis)**

[31] In this case, the Applicant is both a Trustee and Beneficiary and purports to purchase the trust property in her individual capacity. Because of the dual nature of her interest in the estate, both counsel submitted, and the Court agrees, that the Court should adopt the approach of a 'jealous and scrupulous examination of all the circumstances' before approving the contemplated sale.

[32] The facts reveal that two of the beneficiaries are of the age of majority and are also represented by Counsel for the Applicant, who is herself a beneficiary. In examining all of the circumstances in a jealous and scrupulous manner, the Court is of the opinion that whilst it may approve the contemplated sale, these two (2) beneficiaries ought to be separately legally represented so that there would be no hint or suspicion that the interests of any one of the beneficiaries, including the Applicant, is compromised by the fact that the same Attorney-at-Law or firm of Attorneys-at-Law represents all of them.

[33] There must be the reality as well as the appearance that the transaction in respect of which approval is sought has been conducted at arm's length and that everyone has had the benefit of independent legal advice.

#### **SHARES OF THE PARTIES ON INTESTACY**

[34] **Section 49 (5)** of the *Succession Act* provides:

"if an intestate dies leaving issue and no spouse, his estate shall be distributed among the issue in accordance with Sub-section (6)'.

**Subsection 6** provides:

**"if all the issue are in equal degree of relationship through the deceased person, the distribution shall be in equal shares among them; if they are not, it shall be per stirpes".**

[35] Thus, the interest of the beneficiaries, in the estate, is a one-fourth share of the estate or interest of and in, *inter alia*, the real property of the deceased. None of the affidavits indicate whether or not the deceased left any cash sufficient to liquidate the indebtedness. It is the duty of the Applicant to provide to the Court and to the beneficiaries a full and accurate account of all of the assets of the estate including any cash in hand, cash at the bank or other securities which may be sufficient to liquidate the deceased's debts.

[36] Provided the safeguards above outlined are implemented, it is the opinion of this Court that the Applicant may purchase the shares of the adult beneficiaries in the deceased's estate.

**Issue 2 – Whether the interest of the minor child, (the third Respondent) in the property situate at Lot 156 Husbands & Oxnards in Barbados can be acquired by the Plaintiff/Administratrix.**

[37] Both counsel submit that the minor's interest can be acquired provided that (1) it is in the best interest of the child and (2) the Court is satisfied that the price offered is such a price which ought to be accepted. In *Mondey v Mondey (1813) 1 ves & b 223, 35 ER 87 cc.* the Plaintiff Mortgagee filed a bill against the infant heir of the Mortgagor and other persons seeking, inter alia, to redeem the mortgage and that the monies derived from the sale be applied firstly in payment of the monies due to the Plaintiff and the surplus, if any, secured to the benefit of the infant heir of the Mortgagor.

[38] **Lord Eldon LC** said:

"It would be too much to let an infant be foreclosed when, if the Mortgagee will consent to a sale, a surplus may be got, ... for the benefit of the infant. If there was no precedent, I would make one:"

Accordingly **Lord Eldon** directed the Master to take an account of the monies due to all encumbrancers and in case the Mortgagee should consent to a sale, that the master should enquire, and report, whether it would be "for the benefit of the infant, that the estate should be sold."

[39] In this particular matter, the major asset of the estate is the real property situate at 176 Husbands, St. James. The estate is heavily indebted and there are no moneys in hand or cash at the bank to pay off the subsisting mortgage. Although the outstanding principal is small, (\$12,273.70) as at the 20<sup>th</sup> day of November 2005, interest is accruing at the rate of eight per cent per annum. The last payment on the mortgage was \$225.64 on the 30<sup>th</sup> day of December, 2002. The minor child lives with his aunt who must look after his daily requirements. There are no moneys in hand to provide for the infant's maintenance.

[40] It appears to the Court that this asset cannot be maintained by the estate and that the only recourse is its sale. It appears to me also that the sale of the real property may be required for the purposes of paying the debts (if any) of the estate and distributing the estate amongst the persons entitled thereto.

[41] The Court must be guided by the principle that the welfare of the infant is the paramount consideration. In doing so, the Court must take into account the infant's long term, as distinct from, short term interests. It is clear that the child's best interests and its long term interests favour the sale of the real property at the best price obtainable.

[42] Two independent valuations have been obtained and exhibited in the affidavits showing the market value of the property and the Court has no reason to doubt their bona fides.

[43]