BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Claim No. CV 255 of 2002

BETWEEN:

KIM MEDFORD **FIRST CLAIMANT**
(Administratrix of the Estate of Wayne Abrams)

KADIJA MEDFORD **SECOND CLAIMANT**

AND

DAWN ABRAMS-GRAZETTE **DEFENDANT**

Before The Honourable Justice Cecil N. McCarthy, Judge of the High Court

Dates of Hearing: 2019 October 28
2020 January 27

Date of Decision: 2020 December 2

Appearances:

The First Claimant appearing for herself and the Second Claimant

Ms. Dawn J. Grant for the Defendant

DECISION

INTRODUCTION

[1] This matter first came before me on 28th October 2019; however, it was commenced on 25 November 2002. The last hearing was on 27 January 2020, when oral submissions were presented to the Court.

[2] Having not had control over most of the history of the proceedings every effort has been made to ensure that an accurate account has been given of the chronology and the content of the significant events in the litigation.

[3] It would appear that initially the main object of the legal proceedings was to recover 'reasonable financial provision' out of the sum of $78,600.00 which was paid to the defendant, Dawn Abrams-Grazette who is the sister of Wayne Abrams, ("the deceased") who died intestate in Guyana on the 9 May 2000. The monies were paid to the defendant as the proceeds of a group policy in which the deceased had nominated the defendant as his beneficiary.

[4] The deceased is the father of the second claimant, Kadija Medford. The first claimant, Kim Medford, is the mother of the second claimant.

[5] A perusal of the court file reveals that the second claimant was the only child of the deceased, who died without leaving a spouse. The second claimant was

born on 30 June 1994. Her mother, the first claimant applied for a grant of letters of administration for the use and benefit of the second claimant. The letters of administration were issued to her on the 2nd day of February 2001.

[6] On the face of it, the **Succession Act Cap. 249** ("the Succession Act") is a relatively straightforward statute written in simple language, concerning the succession to the property of deceased persons. It deals principally with the devolution, administration, testamentary disposition and distribution on intestacy of such property.

[7] However, as the recent case of **Smith v Selby [2017] CCJ 13** illustrates, the deceptively simple language of the statute can give rise to the difficult questions of interpretation.

[8] In this case, it is not only a problem of statutory interpretation but a matter of the application of the relevant provisions of the statute in the wider arena of the law and practice of the administration of estates.

[9] The application before me is an application by the defendant to strike out an amended fixed date claim and an amended statement of claim filed on behalf of the claimants in 2016 and 2018 respectively, by the last of a number of attorneys-at-law who have had conduct of the proceedings for the claimants.

THE CHRONOLOGY

[10] For reasons which will become apparent later, I set out a brief chronology of the proceedings filed, which commenced with an originating summons filed by the claimants' first attorney-at-law in these proceedings on 25 November 2002, in which the prayer for relief stated:

> "*By this Summons, which is issued on the application of Kim Medford the Administratrix of the Estate of Wayne Abrams, Deceased and Kadija Wynonna Medford minor by her mother and next friend, the Plaintiffs claims against the Defendant that an order under section 100 of the Succession Act be made for reasonable financial provision to be made for minor KADIJA WYNONNA MEDFORD.*"

[11] The summons was not served on the defendant; nor was an affidavit filed in support of it.

[12] For the next nine years or so, nothing was done to advance the matter until 2 November 2011 when the claimants' second attorney-at-law applied to the Court to extend the time limited for service of the originating summons to allow service within 14 days.

[13] The application was supported by an affidavit in which the plaintiff deposed that she was the legal representative of the deceased, Wayne Abrams, who died intestate without making any or any proper provision for his dependant, the second plaintiff.

[14] The Court granted an order on 25 April 2012 to allow service of the summons within fourteen days. It also granted the claimants leave to file all necessary documents to bring this matter in conformity with the new Civil Procedure Rules.

[15] On 7 May 2012, the claimants filed a fixed date claim in which they requested an order pursuant to section 100 of the Succession Act for "reasonable financial provision" to be made for the minor, KADIJA WYNONNA MEDFORD.

[16] On 2 November 2016, the third attorney-at-law for the claimants filed an amended fixed date claim form, (sometimes called "the 2016 claim") the rubric of which reads:

> "KIM MEDFORD FIRST CLAIMANT
> Administratrix of the estate of
> Wayne Abrams
>
> KADIJA WYNONNA MEDFORD SECOND CLAIMANT
> (A minor by Kim Medford her
> mother and next friend)
>
> AND
>
> DAWN ABRAMS-GRAZETTE DEFENDANT"

[17] In this amended claim the claimants sought relief as follows:

> *"*1. *A Declaration that the proceeds from the deceased's insurance policy were held in trust by the Defendant for the estate of Wayne Abrams, Deceased.*
>
> 2. *That the Defendant transfers the sum of $78,000.0 to the estate of Wayne Abrams.*
>
> 3. *That adequate provision for the maintenance of the dependent Kadija Wynonna Medford be made out of the estate pursuant to section 58 of the Succession Act of the Laws of Barbados.*
>
> 4. *Any order which this Honorable court deems fit."*

[18] On 15 October 2018, counsel for the claimants filed a document marked "Amended Statement of Claim" (sometimes called "the 2018 statement of claim") in which the rubric was amended to omit the reference to the second claimant as a minor and joining her in the proceedings in her own right. The statement of truth accompanying the statement of claim was signed by the claimants' attorney-at-law without any reasonable explanation therefor.

[19] In my perusal of the court file there is no evidence that the permission of the Court was sought for the amendments reflected in the last two pleadings.

[20] The first claimant has disavowed the 2018 statement of claim. According to her, it was not made on her instructions and she knew nothing about it until November 17, 2018.

[21] Having carefully perused the court file there is no evidence that permission of the court was sought and given for this amendment. Moreover, the certificate of truth was not given on the instructions of the litigating parties as required by CPR 3.12 (4)(b). In my opinion the certificate of truth also runs afoul of CPR 3.12 (4)(a) which requires the legal practitioner also to certify:

> "*the reasons why it is impracticable for the litigating party or any litigating party, as the case may be, to give the certificate".*

[22] Merely to state that the claimants were unavailable is not a reason contemplated by these provisions.

[23] It is for the foregoing reasons that I do not consider that the 2018 statement of claim can form part of these proceedings.

[24] The defendant who had submitted to the process up to this time and had filed a defence, finally decided it was time to try to bring this litigation to an end. On 2 January 2019 she filed an application to strike out both the 2016 claim filed on 2 November 2016, and the 2018 statement of claim, filed on 15 October 2018.

[25] Both claimants claim that the defendant holds the proceeds of the ICBL policy on trust for the estate. They allege that the deceased did not intend to

make a gift of the proceeds from the "Pension Plan" to the defendant for her sole benefit. They contend that the deceased intended that the defendant hold the proceeds of the pension plan on trust for his estate in the event of death.

[26] It is noteworthy that the ICBL Plan makes provision for a child to be paid a pension. In perusing the claim filed, no evidence is given of the amount of the pension, nor whether it was in fact paid. Indeed the amount received by or on behalf of the second claimant as the sole beneficiary of the deceased's estate was not discussed in the documents filed with the Court.

[27] Quite remarkably, the grant of administration given to the first claimant has not been filed, nor has the claimants filed a birth certificate as proof of age and identity of the second claimant. I have been able to see the grant by examining the probate file which was referenced in the proceedings.

[28] In addition to the pleadings, the parties have filed a number of affidavits as follows:

1. affidavit of Kim Medford filed 2 November 2011.
2. affidavit of Kim Medford filed 7 May 2012.
3. affidavit of Dawn Abrahams-Grazette filed 2 January, 2019.
4. affidavit (labelled "Defence") of Kim Medford, filed 30 January, 2019.

[29] Based on the pleadings and the affidavits above-mentioned, the first claimant is claiming as the sole administratrix of the estate of the deceased who died on May 9th 2000 without a spouse; and who is survived by the second claimant, his only child.

[30] The second claimant is described in the 2016 claim as follows:

> *"A minor suing by Kim Medford as mother and next friend"*

She is suing as the sole issue of the deceased and a dependant of the deceased pursuant to section 58 of the Succession Act.

[31] The fact that the claimant received a grant for the use and benefit of the second claimant during her minority and the date of birth of the minor had to be culled from the pleadings and affidavit evidence on file. It is not clear whether these omissions were caused by inadvertence or lack of knowledge of what was required.

The Defendant's Submissions

[32] Oral submissions were made by the parties on 27 January 2020.

[33] On the 25 October 2019, the defendant filed written submissions prepared by her legal counsel Ms. Dawn J. Grant.

[34] Counsel made the following submissions:

1. A grant of representation may be limited. The grant obtained by the first claimant was a limited grant. It was made for the second claimant's benefit during her minority.

2. The power of the first claimant to act on behalf of the second claimant is limited by time.

3. The power expired when the second claimant reached 18 years. This occurred on June 30, 2012.

4. At time of filing the amended claim in 2016, the second claimant had reached the age of majority; the grant of administration was no longer effective, and the claimant, therefore, has no locus standi, and is not a proper party to these proceedings. Moreover, counsel argues that she is no longer the administratrix of the estate of the deceased.

[35] Counsel also submits that the defendant is the named beneficiary under a life policy and in those circumstances the policy proceeds do not form part of the estate but are payable to the named beneficiary. In support of this argument counsel cites section 121 (i) of the Insurance Act, Cap. 310 which reads:

"Designated beneficiary

> *Where a beneficiary other than a personal representative has been designated by a policyholder, the money payable under the policy from the time of the happening of the event upon which the insurance money becomes payable, does not form part of the estate of the insured and is not subject to claims of the creditors of the insured."*

The Claimant's Submissions

[36] When the time came for making submissions, the claimants were no longer represented by counsel. The claimants' submissions were made by the first claimant. She filed two sets of written submissions: one filed 25 October 2019, the other filed 20 November 2019. A summary of her submissions is set out below:

1. There are two (2) models of pension schemes which arise from the employer/employee relationship. These are the Defined Contribution ("DC") model, and the Defined Benefit ("DB") model.

2. There are three (3) types of claimable trusts in Family Law: constructive trusts, resulting trusts, and proprietary estoppel. Regarding resulting trusts, they are *"imposed to return property to the person who gave it and is entitled to own it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner."* According to

the ICB Statutory Corporations Handbook, *"The Statutory Corporations Pension Fund (SCPF), the CBC/ICB Pension was established as a Defined Benefit Plan [sic] under a Master Trust."* The policy was arranged for the insured, or his spouse and/or defendant child, following his retirement. Thus, the defendant was holding the policy's proceeds on trust for the deceased, until his retirement. Otherwise, the proceeds would be disbursed according to his wishes.

3. The defendant was the deceased's nominated beneficiary of the proceeds of the policy. As the named beneficiary, the defendant was a trustee, with a fiduciary duty to hold the proceeds on trust for the second claimant in the event of the deceased's death. The defendant breached this duty.

4. The defendant, through her "wilful default and intermeddling, caused devastavit to the Estate of the deceased." This is defined as, *"a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them."*

5. Pensions are always a future provision for the insured and/or their dependents. The defendant was neither, at any time.

6. The policy, which included the defendant as named beneficiary, created a trust for the deceased's estate.

7. The defendant deposed that the entirety of the estate of the deceased was for the second claimant. And the deceased's estate included the policy, held on trust by the defendant for the second claimant.

8. The claimants' claim does not fit within the criteria of a claim that is an abuse of the process of the Court.

THE ISSUES

[37] Having carefully considered the pleadings and the submissions of the parties, it does not appear to me that the parties have clearly demarcated the issues on the facts.

[38] In my judgment the facts give rise to the following issues:

(1) Does section 100 of the Succession Act (and section 58 of the said Act) give the Court jurisdiction to hear the matter as pleaded?

(2) Does the sum of $78,600.00 paid to the defendant under the provisions of the group life policy, form part of the estate of the deceased or should the funds be regarded as properly paid to the defendant in accordance with the provisions of the policy?

[39] It is convenient first to examine the history of these proceedings to determine whether the Court has jurisdiction to hear the matter and make the orders requested.

[40] As set out in paragraph 10 hereof, the originating summons asked for an order under section 100 of the Succession Act for "reasonable financial provision to be made for minor KADIJA WYNONNA MEDFORD".

[41] Section 100 of the Succession Act reads:

> "*(1) Where, after 13th November, 1975 a testator dies leaving a child who is a minor or a child who is minor or a child who is, because of some mental or physical disability, incapable of maintaining himself or herself, then, if the Court, on application by or on behalf of such child the testator, is of the opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by will or otherwise, the Court may order that such provision shall be made out of the estate as it thinks fit.*
>
> *(2) The provision for maintenance to be made by order shall, subject to subsection (3), be by way of periodical payments, and the order shall provide for their termination not later than*
>
> (a) *in the case of a child who is a minor, his or her attaining the age of 18 years;*

> (b) *in the case of a child under disability, the cesser of his or her disability,*
>
> *or, in any case, his or her earlier death.*
>
> *(3) The Court may make an order providing for maintenance, in whole or in part, by way of a lump sum payment.*
>
> *(4) An order under this section shall not affect the legal right of a surviving spouse, or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.*
>
> *(5) An order under this section shall not be made except on an application made within 12 months from the first taking out of representation of the deceased's estate.*
>
> *(6) The definition "father" contained in section 48 (2) shall have effect for the purposes of this section.*"

[42] It is clear that the above section applies to circumstances where the deceased died testate. It begins

> "*Where after the 13th November, 1975 a* ***testator*** *dies leaving a child who is a minor or a child who is, because of some mental or physical disability, incapable of maintaining himself." [my emphasis]*

Moreover, section 100(5) provides that an order under this section:

> *"shall be made within 12 months from the first taking out of representation of the deceased's estate.*"

[43] Letters of administration were issued to the first claimant on the 22 February 2001.

[44] The proceedings issued, therefore, have been commenced outside of the 12-month period required by section 100(5) of the Succession Act, supra. Therefore, the action was unsustainable both in terms of the substantive requirements of section 100 and the time limitation set out in the said section.

[45] The Barbados Succession Act is modelled after the Irish Succession Act 1965. Section 117(6) of that Act originally provided as follows:

> "*An order under this section shall not be made except on an application made within twelve months from the first taking out of representation of the deceased's estate."*

In other words, the wording of the Irish statute was substantially similar to section 100(5) of the Barbados Act.

[46] Section 117(6) was considered by the Irish High Court in **MPD v MD [1981] 1.L.R.M.,179**.

[47] In that case probate of the will of the testator was granted to the defendant on 25 September 1978 and the summons seeking a declaration under section 117 of the 1965 Act was not issued until 16 October 1979.

[48] In considering whether section 117(6) precluded her from making an order under section 117, Carroll J stated at page 184:

> "*Normally, unless a defendant specifically relies on the defence of effluxion of time barring a claim, the claim will be decided on the merits. However, this appears to me to be a case where both the right and the remedy are barred. I am reluctantly forced to the conclusion that s.117(6) lays down a strict time limit which goes to the jurisdiction of the court and which cannot be ignored …*"

[49] In a subsequent case: **S1 v P.R.1 [2013] 1EHC**, 302 Laffoy J. at page 313 expressed a similar view of the purport of the section. (See the very helpful discussion on the construction of 117(6) of the Irish Act at pp.312 et seq. of the judgment of Laffoy J.)

[50] Of course, I am not bound by the interpretation given to the equivalent Irish provision; however, it seems to me that there is no ambiguity in the wording and I consider that the meaning of the section given in the Irish case is correct.

[51] I am of the view, therefore, that the Court has no jurisdiction to make the orders sought in the originating summons and the fixed date claim filed on 7 May 2012.

[52] I hold therefore, that this Court has no jurisdiction to make an order under section 100 because it applies only to cases where the deceased made a will, and also because an application under section 100 must be made within 12

months of the first taking out of representation, to engage the court's jurisdiction.

[53] On 2nd November 2016 an amended fixed date claim was filed on behalf of the claimants. The particulars of this claim are set out in paragraphs 16 and 17 of this judgment.

[54] It is noteworthy that this claim was brought in part under section 58 of the Succession Act. The dependency provisions of the Succession Act relating to children are section 57(c) and section 58. They read as follows:

> "*57. For the purposes of this Part*
>
> (c) *a child who is presumed to be a child of the deceased person and is*
>
> (i) *under the age of eighteen years; or*
>
> (ii) *because of some mental or physical disability, incapable of maintaining himself or herself,*
>
> *and was wholly or mainly maintained by, or was living with, the deceased person at the date of his death.*
>
> *58. (1) Subject to this section where an intestate dies leaving a dependant, the Court may, on application made by or on behalf of that dependant on the ground that the law relating to intestacy does not make provision for maintenance to be made out of the intestate's estate as it thinks fit, having behalf the application is made is entitled under any other enactment on the death of the intestate.*

> *(2) An application under subject (1) shall be made within 12 months from the first taking out of the representation of the intestate's estate.*"

[55] The application having been brought outside of the 12-month period stipulated by section 58(2), it therefore follows that the application under section 58 of the Succession Act also fails for the same reason given above, and the Court has no jurisdiction.

[56] Moreover, since the minor child was the sole beneficiary of the intestate's estate, it does not appear to me that it could have been contemplated that the dependency provisions would apply to the circumstances of this case.

[57] The application is also proscribed by the fact that child is defined in section 57 above as a person under the age of eighteen years; or who is because of some mental or physical disability incapable of maintaining himself of herself. At the time of the 2016 application Kadija Medford was 22 years old and no allegation has been made in the pleadings that she was unable to maintain herself because of some mental or physical disability.

The requirements for the child to be under 18 years is also emphasized in section 58 (5) (c)(i) which requires a periodical payment under the section to cease when the dependent child reaches the age of 18 years.

[58] For the above reasons I also hold that the Court has no jurisdiction to make the order applied for under section 58 of the Succession Act.

[59] It does not appear to me to be reasonable to interpret section 58 as making provision for maintenance out of the estate for someone who in fact has inherited the entire estate. However, since the application was brought outside of the time limit of 12 months, the Court has no jurisdiction, and the interpretation given to section 58 otherwise is not significant in this case.

[60] For the above reasons, I hold that section 58 is inapplicable to the facts of this case.

[61] In her written submissions, counsel for the defendant, Ms. Dawn Grant, also submitted that since the second claimant had reached 18 years the grant issued to the first claimant would have expired and therefore, the first claimant had no standing before the court.

[62] I agree with counsel on this point. The grant issued to the first claimant was a grant "Durante Minore Aetate". It was expressed to be effective until the second claimant attained the age of eighteen years. When the 2016 claim was filed the first claimant was no longer administratrix of the estate of the second claimant. The second claimant was no longer a minor, and therefore, the first

claimant could not have been acting as the next friend of the second claimant based on her minority.

[63] Essentially, what counsel for the defendant contends is that the second claimant having reached her majority, her mother, Kim Medford, had no legal capacity to represent her daughter, the second claimant, in these proceedings. She was no longer administratrix and she was not her next friend, based on her being a minor.

[64] For the above reasons I accept counsel's submissions that the 2016 claim should be struck out.

[65] Counsel for the defendant also argued that the claims should be struck out because the defendant was a named beneficiary under section 121(1) of the Insurance Act, Cap. 310 ("the Insurance Act") and, therefore, the proceeds of the policy were correctly paid to that person.

[66] In this regard, it must be borne in mind that section 121 only applies to policies taken out after 17 February 1997. That is the effect of section 114(1) of Insurance Act which states:

> "*The provisions of this section and sections 115 to 126, subject to anything to the contrary contained in those sections, apply in respect of policies taken out after 17th February, 1997*."

[67] The facts before the court indicate that the group policy was taken out in 1994. The effect of sections 114(1) of the Insurance Act is that the provisions of section 121(1) would not apply.

[68] The issue that arises is whether at common law the provisions in the group policy are effective to confer the benefit on the named beneficiary or whether the nomination is a testamentary disposition and therefore must comply with the provisions of the Succession Act which apply to testamentary dispositions.

[69] This matter was canvassed before Williams J. (as he then was) in **Norris v Norris [1977] 29 W.I.R. 22**. That case was one in which a beneficiary was nominated under a group insurance policy which was effected by the employer for the benefit of his employees. During his marriage to the first defendant the employee had designated her as his beneficiary but prior to his death he had divorced her and married to the plaintiff. The plaintiff became the administrator of his estate and claimed that she was entitled to the benefits payable under the policy. Williams J. held that the nomination did not satisfy the requirements of the Wills Act because it had not been attested before two witnesses as required by the Act.

In arriving at this decision Williams J. said:

> "*The deceased had the right under the policies to change his beneficiary at any time and in the document of designation he in fact reserved this right. All his interest in the policies remained vested in him while he lived and the beneficiary only became entitled to an interest on the death of the deceased. Thus, the acts of the deceased were testamentary in character and invalid by reason of their being in breach of the requirements of the Wills Act*."

[70] In **Baird v Baird [1987] 83 W.I.R. 333**, a decision of the Judicial Committee of the Privy Council on an appeal from Trinidad and Tobago, the issue of compliance with the succession law was canvassed and the Court held that the matter turned on the provisions of the policy.

In that case, which dealt with a contributory pension scheme effected by a Trinidad Oil Company for its employees, the consent of the management committee of the scheme was required in certain circumstances and the individual rights of members were limited. The court held that the nominations under the pension scheme did not have to satisfy the requirements of the law of succession since the members of the plan had a restricted right of disposition.

[71] It would seem that the view of the Privy Council is that whether or not a named beneficiary will be entitled to the benefits under the policy or scheme will depend upon the construction of the policy.

[72] If the member retains the right to do as he pleases with his contributions then it would be testamentary in character. However, if his right of disposition is constrained by the provisions of the scheme then the nomination would be governed by the rules relating to the operation of the scheme.

[73] The full content of the group plan has not been placed before the Court and, therefore, it is not possible for the Court to make a determination of the effectiveness of the nomination using the principles applied by the court in **Norris** or in **Baird**.

[74] The claim that the $78,600.00 paid to the defendant under the group policy formed part of the estate of the deceased was first pleaded in the 2016 claim.

[75] Previous to that claim, which was filed on 2 November 2016, the first claimant had based her claim on section 100 of the Succession Act and was alleging that the deceased had failed to make adequate provision for the second claimant who was a minor when the claim was first filed.

[76] I have already indicated that the grant being a limited one had expired when the second claimant attained her majority in 2012. However, even if that were not the case, the claimants would have had to justify the delay of 16 years before pleading this new cause of action.

[77] Moreover, the claimants have not disclosed to the court the full extent of the group policy so that the court can make a determination as to whether the nomination was effective to confer the benefit on the defendant or whether it failed because it was not executed in accordance with the Succession Act.

[78] On 2 January 2019 the defendant applied to have the 2016 claim and the 2018 statement of claim set out respectively in paragraphs [17] and [18] hereof struck out. Counsel for the defendant had based her application mainly on the ground that the power of the first claimant to act on behalf of the second claimant had expired when the second claimant reached 18 years on June 30, 2012.

[79] Section 26.3 of the (Civil Procedure) Rules, 2008 ("CPR") make provision for striking out a statement of case. CPR 26.3 (3)(b) gives the court power to strike out a claim where it "discloses no reasonable ground for bringing or defending a claim."

[80] In the 2008 edition of the Caribbean Court Practice the learned authors state that the above provision covers two situations:

(1) Where the context of a statement of case is defective in that even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or

(2) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.

[81] At paragraphs 40 to 60 hereof I have detailed the reasons why the court had no jurisdiction to hear this matter, and why the matter was bound to fail as a matter of law. I also accept counsel's submission with respect to the termination of the limited grant through which proceedings were commenced.

DISPOSAL

[82] For the reasons set out herein the proceedings filed in the 2016 claim and the 2018 statement of claim are both struck out.

[83] I will hear the parties with respect to costs.

Cecil N. McCarthy
Judge of the High Court