IN THE SUPREME COURT OF BELIZE, A.D. 2007

CLAIM NO. 560 of 2006

	(DENISE HYDE CARD	**APPLICANT**
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BETWEEN	**(AND**	
	(	
	(FREDRICK GEORGE HYDE JR.	**1ST RESPONDENT**
	(RUSSEL DANE HYDE	**2ND RESPONDENT**

Coram: Hon. Justice Sir John Muria

Hearing: 4th July 2007
Judgment: 30 August 2007

Advocates:
Mr. K. Arthurs for Claimant
Ms. C. Pitts for the Defendants

JUDGMENT

Will – administration of deceased's estates – executors appointed under the Will – executors residing outside of jurisdiction – section 21(4) of Administration of Estates Act (Cap. 197) – application to remove executors – Court's power under section 164 of Supreme Court of Judicature Act (Cap.91) – whether executors should be removed.

Muria J.: This is an application by the applicant Denise Hyde Card for an order to remove the respondents as executors of the estate of Fredrick George Hyde Sr. (deceased) and to appoint the applicant as administratrix with the Will annexed. The applicant based her application under section 21(4) of the

Administration of Estates Act (Cap. 197) of the Laws of Belize.

Brief background

It is not disputed that the applicant and the respondents are children of the deceased. It is also not in dispute that the applicant resides here in Belize and respondents reside in the U.S. It is further not in dispute that the deceased made a Will in which the respondents together with Randy Hyde were appointed executors and trustees under the Will. The deceased died on 4 October 2003 and the Will was read out for the first time after the funeral of the deceased.

Shortly after the deceased's death, the respondents left for the U.S. and have been residing in the U.S. since then although they have been making trips back to Belize.

Presently, a probate application is before the Court, filed on 24 October 2003 by Randy Hyde, one of the executors and trustees. That application has not been issued out since a renounciation is said to be required from the respondents. It seems that the respondents, either refused or are unwilling to renounce their positions as executors and trustees of their deceased father's estate.

Grounds of Application

There are three grounds advanced by the applicant in her application, namely:

1. That the Claimant/Applicant is the daughter of the Fredrick George Hyde Sr. (deceased) and beneficiary of the Estate.
2. That the Respondents are appointed executors of the Will of Fredrick George Hyde Sr. (deceased), both of whom have been residing outside the jurisdiction of Belize for the past two years and have not sought to obtain probate of the Will of Fredrick George Hyde Sr. (deceased).
3. The application is made pursuant to section 21(4) of the Administration of Estates Act (Cap. 197) of the Laws of Belize.

Obviously the last ground is relied upon to buttress the second ground of the application.

The evidence relied upon in this application is contained in the affidavits filed by both parties. As agreed, this application is determined on those affidavit evidence now before the Court.

The case for the Applicant

The applicant's case is that following the death of their father, Fredrick George Hyde Sr. (deceased), the executors who are her brothers, were not able to administer the deceased estate because two of the executors (the respondents) have since been residing in the United States of America. The third executor, Randy Hyde, who resides in Belize had applied for probate of the deceased's Will in October 2003. However, he was unable to proceed with the case due the absence of the other two co-executors who, it is said, need to renounce their executorship or appoint some other person(s) to act on their behalf. The respondents have not taken any steps to renounce their executorship. However, they have now appointed other persons to act on their behalves.

It is apparent from the correspondence annexed to the affidavit of the applicant sworn to on 4 July 2007 that there had been some discussions and exchanges of views between the respondents and applicant in June and July 2006, on a number of issues relating to the estate of the deceased. According to the applicant, the contents of the correspondence from the first respondent were petty, spurious and had nothing to do with the question of probating the Will.

It was submitted on behalf of the applicant that the inaction on the part of the respondents executors is deliberate and demonstrates the unwillingness of the respondents to carry out their duties and responsibilities as executors of the deceased's Will. Apart from the contention that the respondents are unwilling to act, the applicant is also concerned with the existence of certain amount of disputes between the other members of the family and respondents, which may be capitalized by the respondents in order to take no action in executing the Will in this case.

In the circumstances, it is the applicant's case that the respondents should be removed as executors of the deceased's estate because they have been absent from Belize for more than one year and have failed to carry out their duties and responsibilities as executors. In support of this contention, Counsel for the applicant relies on section 21(4) of the *Administration of Estates Act* which, Counsel argues, empowers the Court to remove an absentee executor.

The Respondents' case

The respondents deposed to in their affidavits evidence that they, together with their brother Randy Hyde, had been appointed executors of their deceased father's estate under the Will dated 20th March 2003. Shortly after their father died, and before leaving for the United States of America, they were given a copy of the Will. However, there was no discussion among the executors or with the Law Firm of Shoman & Chebat (who are in possession of the deceased's Will) about the probate of the Will.

It is the respondents' case also that they were not aware of any application by the other executor, Randy Hyde, for probate of the Will in October 2003. They have not been advised, by either Randy Hyde or Shoman & Chebat, of such an action taken by their co-executor.

The correspondence between the first respondent and applicant in June and July 2006, also reflects the stand taken by the respondents regarding the handling of the estate of the deceased. This is borne out by the series of questions directed at the applicant, Ms Alma and Randy Hyde. Although branded by the applicant as "petty unrelated and spurious," the contents of the email correspondence from the

first respondent to the applicant dated Wednesday, July 19, 2006, add to the position of the respondents in this matter.

The respondents agree that they have been residing out of the jurisdiction. They insisted that they have not abrogated their executorship conferred on them under their late father's Will. They claimed not to be aware of the requirements of section 21(4) of the *Administration of Estates Act* in the first place. However, having now been advised of the requirements of section 21(4) of the Act, they reiterate their willingness to continue as executors of the deceased's estate under the Will. In this regard, they have now, by their powers of attorneys, appointed other persons to act on their behalf and carry out their duties as executors under the Will. Attached to their affidavits, the respondents annexed copies of their powers of attorneys.

It is not disputed that the three executors have not carried out their responsibilities under the Will since the deceased died in October 2003.

Section 21 (4) of Administration of Estates Act and section 164 of Supreme Court of Judicature Act

The applicant relies on the provisions of section 21(4) of the *Administration of Estates Act* to ground her application. That provision states:

> *"(4) When an executor or administrator to whom probate or administration has been or may be granted departs from and remains absent from Belize for a period of one year, without having appointed an attorney to act for and represent him, the court may, on petition verified by affidavit proving to the satisfaction of the court that the interests of the parties concerned in the estate are, or will be, prejudiced by the absence of such executor or administrator, appoint a special administrator with the will annexed or an administrator* ***de bonis non****, as the case may be, who shall, during the absence of such executor or administrator, on giving sufficient security, have, possess and exercise all and singular the same power and authority as the executor or administrator so absent as aforesaid would have had if personally present."*

Section 164 of the *Supreme Court of Judicature Act* (Cap. 91) which is also relied upon by the applicant provides as follows:

> *"164. Under special circumstances where it may appear to the Court to be just or expedient, probate or administration may be granted to some person other than the person ordinarily or by law entitled to such probate or administration."*

It is contended on behalf of the applicant that section 21(4) of the *Administration of Estates Act* authorizes the removal of an executor who is absent from Belize for more than one year without appointing and attorney to act for him. In my judgment, the clear language of the provision does not confer power on the Court to remove an executor. It only permits the appointment of a special administrator with the Will annexed or an administrator *de bonis non* to exercise all the power and authority of the executor or administrator while such executor or administrator is absent from Belize for more than one year.

On the other hand, I accept the submission of Counsel for the applicant that section 164 of the *Supreme Court of Judicature Act* confers power on the Court to remove an executor, the exercise of which, is of course, discretionary. I also accept that the test, as submitted by Counsel for the respondents, to be applied in exercising the Court's power under the section is that there must be "special

circumstances" that make it *"just or expedient*" to appoint some other person to be executor other than the person appointed under the Will.

The Executors named in the Will

After the testator's death, his Will speaks. The general position in law is that the testator chose his executor(s) deliberately. As such, the right of a testator to nominate the executor(s) to administer his estate should not be lightly interfered with. The Courts have been firm to reiterate the proposition that a Court of probate had no right to refuse probate to an executor named in a will unless he was legally incompetent to act. See *Re Agnew Estate* (1941) 3 W.W.R. 723. See also the cases of *Re Ratcliff* [1898] 2 Ch 352 at 356; and *The Thomas and Agnes Foundation v Carvel & Anor* [2007] EWHC 1314 (Ch).

There are special circumstances, however, when the law confers discretion on the Court to remove an executor and appoint some other person in place of an appointed executor. This is particularly so in cases where the executors have breached their fiduciary duties or have shown the inability or unwillingness to carry out their duties. The onus is on the person applying to replace the appointed executor, to show the special circumstances under which it is just or expedient to replace the appointed executor by that other person.

Counsel for the applicant cited the case of *In the Estate of Biggs (deceased)* [1966] 1 All E R 365 in support of his submission that because of the absence of the executors and there is some hostility between the parties in the present case, it would be just or expedient to remove the respondents as executors. In *Biggs*, the executors, Mr. and Mrs. Glew, actually refused to take steps to obtain grant of probate of the deceased's Will. The applicant (the deceased's niece) applied to the Court for an order requiring the executors to apply for probate of the deceased's Will. Despite being ordered by the Court, the executors still refused to take steps to obtain probate of the deceased's Will. Consequently the Court ordered that the executors be passed over as executors and granted the applicant Letters of Administration with a Will annexed. The position obtained in *Biggs* is quite different from the present case now before the Court.

In the present case, the applicant's main contention, as shown in ground 2 of the application, for seeking an order to remove the respondents from their executorship is that they have been residing outside of Belize for more than two years and have not taken out probate of the deceased's Will. She fears that the respondents are deliberately keeping away and not taking any steps to proceed with the administration of the deceased's estate.

I accept the genuine concern of the applicant to see that the deceased's estate is properly administered for the benefit of those entitled under the Will, including the applicant herself. I do not think she can be criticized for insisting that the respondents perform their obligations under the Will and that if they fail to do so, that they should be removed. The question is: should the respondents be removed as executors?

In my considered view the critical consideration to look for in a case such as this, is for evidence showing that the property in the deceased's estate has been or is endangered by the conduct of the appointed executors and trustees. If this were so, then the discretionary power of the Court under section 164 of the *Supreme Court of Judicature Act* can be invoked to order the removal of executors and trustees appointed under the Will and replace them with some other person(s). It seems to me that there are three aspects of the respondents' conduct which the applicant is concerned with, namely, their absence from Belize, the seemingly existence of hostility between the respondents and other members of the family, and the seemingly unwillingness to take actions to administer the deceased's estate. These factors, singularly or jointly, and if established, can have adverse

effects on the administration of the deceased's estate, and which the Court may take into consideration when deciding whether or not to remove an executor.

In the present case, the primary conduct of the respondents said to be stalling the probating of the deceased's Will is their absence for more than two years from the jurisdiction of Belize. Does the absence of the respondents from Belize endanger the deceased's estate in this case? In my view, the absence of the executors in this case can only endanger the deceased's estate if it is coupled with some elements of unwillingness to carry out their duties and responsibilities as executors. The evidence now before the Court in this case, does not support the suggestion contended for by the applicant, that the respondents by their absence, are unwilling to perform their duties and responsibilities as executors and trustees of their deceased father's Will. Here, the position as I see it, is that although the respondents are residing outside the jurisdiction of Belize, they maintain their willingness and readiness to carry out their duties and obligations as executors under the Will. The first respondents deposed to in his affidavit that had paid property tax on the property. Also both respondents have now appointed other persons to act on their behalves as executors. They have also appointed their legal attorneys to represent their interests in the matter. Thus it would be difficult to accede to any suggestion that the respondents are unwilling to carry out their duties and obligations as executors.

The applicant also raised the concern that there is some friction among the family members in this case. She deposed to the suggestions that the exchanges in the email correspondence, show some hostility toward herself and Randy Hyde, as well as other beneficiaries under the Will, and that the respondents would create difficulty and prolonging of the probating of the deceased's Will. Quite understandably, the behaviour of the respondents would raise these concerns in the mind of the applicant.

I have considered the contents of the correspondence referred to in the applicant's affidavit and while they may have some tone of disputes and discontent in them between the parties, I do not feel that they bear the hallmark of hostility as suggested by the applicant. They, certainly, are far from the level of hostility found in *The Thomas and Agnes Foundation v Carvel & Anor* (above) where the deceased's personal representative was found to be in an irreconcilable conflict with the principal beneficiary of the deceased's estate and displayed a hostile attitude which made it impossible for her to carry out her fiduciary duties in the administration of the deceased's estate.

In the present case, the one thing which is clearly shown by the correspondence between the applicant and first respondent is that there have been disagreements among the family members over the manner in which the Will was made. This disagreement stems from what the first respondent described as his deceased father's "*Will took a 360 degrees change in reference to the language use, distribution of properties, etc.*" Such disagreement may well raise friction among the parties concerned and it is not unheard of in family disputes. However, friction between the parties, although a factor to be considered, is insufficient in itself to ground removal of executors or trustees unless the friction endangers the trust property. I am not convinced that the disagreements present in this case between the respondents and applicant and Mr. Randy Hyde endanger the deceased's estate nor am I convinced that they will render it impossible for the executors to carry out their duties.

It is not uncommon to see upset beneficiaries demanding removal and replacement of executors and trustees who are thought to be unacceptable. It is, however, not as straight forward as it may seem to complainants and sometimes, even to their legal representatives. There must be evidence to demonstrate that removal of an executor is justified.

I am mindful of the family dynamics here involved and in the circumstances of the present case, the Court would be most loathed to accept friction stemming from family disagreement as the basis for the removal of the respondents as executors.

In the present case, not only the fact of absence must be established but that the unwillingness or the inability of the executors to carry out their duties and responsibilities under the Will must also be shown to the satisfaction of the Court. When that is done, the Court's power under section 164 of the *Supreme Court of Judicature Act* may be invoked to order removal of an unwilling executor or executor who is unable to act as executor. It will clearly be just or expedient for the Court to do so in those circumstances. Those circumstances, however, do not pertain to the present case before us.

It is within the exercise of its discretionary power that the Court will, on occasions, give the executor another chance to remedy the default or face removal, depending on the facts of a particular case. I am of the firm view that this is one such occasion.

In the circumstances before the Court in this case, and in view of the steps now taken by the respondents to carry out their duties and responsibilities as executors, the order sought by the applicant cannot be granted.

On the question of costs, it remains a matter for the Court's discretion. In the present case, this application has been brought about by the conduct of the respondents. In those circumstances, no order for costs should be granted to them, although they succeed in defending this claim.

The appropriate order on costs is that each party to bear its own costs.

Hon Justice Sir John Muria