CHARLES MALOYA (In his capacity as father and natural guardian of Beatrice Maloya, a minor)	Applicant
versus	
MR NYAMUPFUKUDZA (In his capacity as Executor in the Estate of Christopher P McNamara)	1st Respondent
and	
MASTER OF HIGH COURT	2nd Respondent

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 7 March 2007 and 26 November 2008

Mr *Katsande*, for the applicant
Mr *Mukonoweshuro*, for the respondents

Opposed Matter

MAKONI J: The applicant seeks an order, in terms of s 3 of the Deceased Persons Family Maintenance Act [*Cap 6:03*] ("the Act") that Stand 140 Upper East Road be awarded to the minor child Beatrice Maloya ("Beatrice").

The background to the matter is that the applicant was employed by the late Christopher McNamara, during his life time. He divorced his wife when Beatrice was still a baby. From that time, the late McNamara provided the child with the basic necessities of life until the time he met his death.

The late McNamara executed a will, whereby he bequeathed his entire estate to his sister. The will was accepted by the Master of the High Court as the deceased's final testamentary disposition

The issue for determination, as agreed by all the parties, is whether Beaular qualifies as a dependant of the deceased and whether she is entitled to an award out of the net estate in terms of the Act.

It was submitted on behalf of the applicant that the meaning of "dependant" should be given a broad purposive approach as opposed to a narrow restrictive one. It was further submitted that "dependant" should not be confined to a person who is legally entitled to support. The word, it was argued, should include persons who received support and the

necessaries of life from a deceased. I was referred to *Van Rensburg NO v Board of Trustees of the Mining Industry Pension Fund* 1979 RLR 131. In that case the court found that a wife who was in a bigamous situation was a dependant. It was dealing with the definition of dependant in the context of the Mining Industry (Pension Rules).

The said rules did not define the word dependant. *In casu* the word "dependant" is defined. In any event, the case is distinguishable to the present matter in that the dependency of the applicant was a direct result and creation of the deceased's action. He had contracted a bigamous marriage and the "spouse" only became aware of that position after his death.

It was further submitted that it is competent for the court to award the immovable property to the applicant. This was provided for in s 8(2)(d) of the Act. The child is in need of maintenance as all her material needs where provided for by the deceased.

The first respondent contends that Beaular is not a dependant as is defined in s 2(1) of the Act. The Act was designed for the provision of maintenance for certain members of the deceased's family. Beaular is not family to the deceased.

It was further contended that if the court were to find that the minor is a dependant, the Estate should only pay maintenance up to the time when the minor becomes a major. The age of the minor child was not given. At the time the application was filed in 2006 the minor child was doing form three. In making the award of maintenance the court should take into account the factors listed in s 7 of the Act.

Section 2(1) of the Act defines dependant in relation to a deceased as:

(a) a surviving spouse;

(b) a divorced spouse who at the time of the deceased's death was entitled to the payment of maintenance by the deceased in terms of an order of court;

(c) a minor child;

(d) a major child who is, by reason of some mental or physical disability, incapable of maintaining himself and who was being maintained by the deceased at the time of his death;

(e) parent who was being maintained by the deceased at the time of his death;

(f) any other person who –

  (i) was being maintained by the deceased at the time of his death; or

  (ii) was entitled to the payment of maintenance by the deceased at the time of his death.

The minor child, Beaular, does not fall under the category of minor "child" as child is defined to include an adopted and an illegitimate child of the deceased. She is neither of the above. The applicant contends that she falls under the category of persons defined in s 2(f)

Section 2(f) was inserted by the Administration of Estates Amendment Act, 1997 (No. 6 of 1997). It widened the parameters of persons who can claim maintenance under the Act. Before the insertion of the amendment, the category of persons who could file maintenance claims, in terms of the Act, was restricted to family upon whom the deceased had a legal obligation to maintain. Is s 2(f) expanding this category or is it opening up the claims to persons outside of the family who are able to establish that they were being maintained by the deceased. See s2(f)(i).

Section 2(f)(ii) is clear and unambiguous. The person must have had an entitlement to payment of maintenance which entitlement he did not exercise by obtaining a court order during the life time of the deceased.

Section 2(f)(i) is not so clear. It could mean any person who received support and the necessities of life from the deceased as suggested by the applicant or any person being maintained in terms of a court order. Once there is ambiguity in the meaning of a provision in a statute, the court should resort to the tools of construction.

In my view, there is need to read the Act as a whole and the interpretation made of all the parts together. The meaning of the statute and the intention of the legislature in enacting it can only properly be derived from a consideration of the whole enactment and every part of it in order to arrive, if possible, on a consistent plan. The statute should be construed in a manner to carry out the intention of the legislature. This can be discerned from the policy of the legislation, scope and object of the statute. See *The Construction of Deeds* & *Statutes* by Sir Charles E Odgers 2nd Edition.

The Act is titled "Deceased Persons Family Maintenance Act". The purpose of the Act, according to the long title, is to make provisions for maintenance out of the estate of a deceased person for certain members of his family. The long title was not amended when s 2(f) was inserted.

Section 2, before the insertion of s 2(f), defines the dependents who can file claims against an estate. These include surviving spouse, a divorced spouse, a minor child, a major child and parents who were being maintained by the deceased. They all fall under the umbrella of family. From the short title, long title and the definition of dependant, there is the thread of

family running through. It must have, therefore, been the intention of the legislature that the Act applies to family members. *In casu* Beular was not a member of family of the deceased. If it was the intention of the legislature that any person, regardless of not being family to deceased, be a dependant, if he was supported by the deceased, at the time of his death, then paragraphs (a) to (e) of s 2 would have been repealed and replaced by the insertion of paragraph 2(f). Section 2(f) would have covered all situations.

I was unable to locate any write up explaining the rationale for the insertion of s 2(f). The Administration of Estates Bill did not contain any provisions amending the Act. It was only during the second recording of the Bill that the amendment to the Act of the definition of dependant was introduced and was adopted without debate

It might be significant to note that the amendment to the Act No 6 of 97 was meant to cater primarily for certain situations created either by bigamous relationships or marriages contracted in accordance with custom and not solemnized. Such persons would not be surviving spouses in terms of the Act as defined in s 2. Since the insertion of s 2(f) was passed in this Bill one can safely assume that "any other person" contemplated in s 2(f) is someone in the category of persons in bigamous relationships and in unregistered customary law unions. This new category would still fit under family.

It is my view that, in the circumstances, as discussed above, a dependant in the context of the Act, must be someone to whom the deceased had a legal duty to maintain. The word "maintain", in the context of the Act, connotes a legal duty on the part of the deceased to maintain the claimant. *In casu,* the deceased had no legal obligation to maintain the minor child. It was an act of benevolence on the part of the deceased. It can also be termed "gratuitous support". He was assisting Beaular's father who had a legal obligation to maintain the child. Adopting the approach suggested by the applicant would lead to an absurdity, more particularly in the context of the African extended family. Estates would be flooded with claims from persons, who at one point, would have been assisted by a deceased during his life time. Put in another way, if the deceased, during his life time, would have ceased to assist the minor child, would the applicant have successfully sued the deceased for maintenance? The answer is in the negative. There would be no legal basis for such a claim.

In any event, if the deceased had wanted the assistance to continue beyond his life, he would have made provision for that in his will. Instead he bequeathed his entire estate to his sister.

I was unable to find case law dealing with the interpretation of s 2 (f) in our jurisdiction.

In the result, the application cannot succeed.

I accordingly make the following order:

The application is dismissed.

F M Katsande & Partners, applicant's legal practitioners
Mukonoweshure & Partners, first respondent's legal practitioners