SUPREME COURT OF QUEENSLAND

CITATION:	*Buckingham v Buckingham* [2020] QSC 230
PARTIES:	**JAMES ALBERT BUCKINGHAM** (applicant) **v** **JANETTE FAYE BUCKINGHAM (as Executor of the Will of Faye Eona Buckingham, deceased)** (first respondent) **GRAHAM CHARLES BUCKINGHAM (as Executor of the Will of Faye Eona Buckingham, deceased)** (second respondent)
FILE NO/S:	SC No 170 of 2020
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	31 July 2020
DELIVERED AT:	Cairns
HEARING DATES:	24 April 2020; 15 May 2020; 12 June 2020; further written submissions received 16 June 2020
JUDGE:	Henry J
ORDERS:	**1. Application for directions (considered as an application for declarations) dismissed.** **2. I will hear the parties at 10 am 11 September 2020 as to:** **(a) costs; and** **(b) the selection of the court appointed administrator and the consequent form of order revoking the grant and issuing letters of administration.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – GENERALLY – where an executor applied to the Court for advice about whether or not to embark upon litigation – where no "written statement of facts" has been filed per s 96(1) *Trusts Act 1973* (Qld) – where the material before the court is unclear, contradictory and disputed – whether the court should proceed to hear the application for judicial advice – whether s 6 *Succession Act 1981* (Qld) provides an alternative source of

jurisdiction to hear the application for judicial advice

SUCCESSION – PERSONAL REPRESENTATIVES – PROCEEDINGS BY PERSONAL REPRESENTATIVES – INSTITUTION OR CONTINUATION OF PROCEEDINGS ON BEHALF OF DECEASED – where an executor seeks advice about the prospects of successfully establishing that a residential unit legally owned by a beneficiary, the son of the deceased, is held subject to a resulting trust in favour of the estate – where the action's apparent overall prospects of success appear reasonable – where the executors had received legal advice that strongly recommended settling with the beneficiary rather than litigating the matter – where the estate's net worth is about $600, 000 – where the unit is worth approximately $110,000 to $120,000 – where the estate is at risk of potentially losing more than it stands to gain from the litigation – where there has been a failure by the executors to properly explore settlement options – whether it would prudent for executors to commence litigation without first having attempted to settle the matter in the context of factual and legal uncertainty

SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – ALTERATION AND REVOCATION OF GRANTS – GENERALLY – where there are disputes and disharmony between the executors – where the disharmony has led to delays in the administration of the estate – where the executors have displayed a lack of objectivity in relation to the dispute over the unit – whether the grant of probate should be revoked and a professional appointed – whether the making of such orders should be delayed to allow the executors and beneficiaries a final opportunity to settle the matter

Succession Act 1981 (Qld), s 6
Trusts Act 1973 (Qld), s 96, s 96(1)
Property Law Act 1974 (Qld), s 11, s 11(1)(c), s 11(2)

Baldwin v Greenland [2007] 1 Qd R 117, applied
Ban v The Public Trustee of Queensland [2015] QCA 18, cited
Byrnes v Kendle (2011) 243 CLR 253, cited
Calverley v Green (1984) 155 CLR 242, cited
Cherry v Boultbee (1839) 4 My & Cr 442; 41 ER 171, cited
Coore v Coore [2013] QSC 196, applied
Gissing v Gissing [1971] AC 886, cited
Kenway Investments (Australia) Pty Ltd v Teamda Developments Pty Ltd [2007] NSWSC 48, cited
Kordamentha Pty Ltd v LM Investment Management Ltd (in liq) [2015] QSC 4, distinguished

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66, cited
Nofz v Kane [2015] QSC 372, distinguished
Re McLennan [2018] QSC 124, cited
Re Murray (deceased) [2020] QSC 155, cited
Sneath v Sneath [2014] QSC 152, distinguished
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, cited

Dennis SK Ong, *Trusts Law in Australia* (Federation Press, 4th ed, 2012)
Meagher, Gummow & Lehane's Equity: Doctrines & Remedies (LexisNexis, 5th ed, 2015)

COUNSEL: J Frizzo (*sol*) for the applicant
M Jonsson QC for the first respondent
D Carey (*sol*) for the second respondent (from 12 June 2020)

SOLICITORS: The Will & All for the applicant
Murray & Lyons Solicitors for the first respondent
O'Connor Law for the second respondent (from 12 June 2020)

Introduction

[1] Faye Buckingham died on 21 September 2017. Her will appointed her daughter Janette and son Graham as executors and trustees to hold the residue of the estate on trust for her children equally.[1] In addition to Janette and Graham, her children are David, Alan, James ("Jim") and Caroline.[2]

[2] A grant of probate was issued to Janette and Graham on 12 December 2017. The administration of the estate has been stalled by various disagreements. One relates to whether a unit at Rutherford St, Yorkeys Knob ("the Yorkeys Knob unit"), bought by Jim with money provided by his parents, is Jim's or is held by him on a resulting trust for the estate. Janette thinks it is held on trust. Graham and Jim do not.

[3] On 27 March 2020, Jim sought to remove Janette as executor by filing an application seeking the revocation of the grant and its re-issue to Graham only. The application contemplated in the alternative to Graham's appointment that a solicitor should be appointed.

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1 The siblings are beneficiaries under a trust created by the will. The parties have jointly approached the interpretation of that part of the will as calling for the distribution to the beneficiaries, as soon as may be, of their equal entitlements to the residue of the estate held on the trust by the executors.

2 Intending no disrespect, I adopt the first names of the players to avoid confusion.

[4] On the part hearing of that application on 24 April 2020 Janette's counsel foreshadowed a cross-application by Janette for directions that the executors would be justified in commencing and prosecuting a claim seeking declarations that Jim holds the Yorkeys Knob unit on trust for the estate. The hearing was adjourned to 15 May. Janette's application was served prior to and filed with leave on 15 May 2020. Some further argument ensued on that date. I then made an order regarding the form of an interim distribution the respondents would be justified in making and the applications were further adjourned to 12 June 2020.

[5] Argument in both applications concluded on 12 June 2020, save for the ensuing filing of written submissions about specific issues some parties wanted time to address.

[6] It is convenient to dispense with Janette's application first because aspects of it inform consideration of the application for removal of the executors.

Janette's application for advice respecting the Yorkeys Knob unit

Introduction

[7] The question raised by Janette's application is whether it would be proper for the executors to bring an action seeking a finding that Jim holds the Yorkeys Knob unit on trust for the estate ("the action"). She seeks directions pursuant to s 96 *Trusts Act 1973* (Qld) that:

> "(a) The Respondents, in their capacity as executors and trustees of the estate of the late Faye Eona Buckingham, would be justified in doing all things necessary for and reasonably incidental to the commencement and prosecution in a court of competent jurisdiction of a claim against the Applicant, James Albert Buckingham, seeking declarations or orders that or to the effect that the said James Albert Buckingham holds his legal title to a residential unit known as 4/15 Rutherford Street, Yorkeys Knob upon trust for the benefit of the estate of the late Faye Eona Buckingham, and for consequential relief.
>
> (b) The Respondents would be entitled to have recourse to assets that comprise the estate of the late Faye Eona Buckingham for the purpose of paying their reasonable costs of and incidental to the commencement of prosecution of the aforesaid proceeding."

Relevant legal provisions and principles

[8] Section 96 *Trusts Act* relevantly provides:

> "**96 Right of Trustee to apply to Court for directions**
> (1) Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee. …" (emphasis added)

[9] No document described as a "written statement of facts" has been filed. No point was taken about this by Jim or Graham. Janette's counsel relies upon "the affidavit

material prepared and filed in support of her application" as constituting a written statement of facts, as was allowed in *Sneath v Sneath*[3] and *Nofz v Kane*.[4] Alternatively, he relies upon his written submissions as constituting a written statement of facts, as was allowed in *Kordamentha Pty Ltd v LM Investment Management Ltd (in liq)*.[5]

[10] In *Nofz*, I found that while ordinarily a document styled "Written statement of facts" should be filed, its absence will not necessarily be fatal. I observed:

> "The critical consideration, which depends on the circumstances of the particular case, is whether the information which the Court is being asked to assume to be fact for the purposes of giving directions is readily apparent from the written statement or statements of fact appearing in the material filed and read in the application."[6]

[11] In that case, the facts upon which I was asked to give directions were readily apparent from the affidavits. They are not readily apparent here. The affidavits here contain conflicting assertions of belief and fact, some of which do not properly identify their factual foundation and some of which are likely assertions of opinion or hearsay rather than direct evidence. That problem cannot be overcome by recourse to Janette's counsel's written submissions for a written statement of facts. They would be a deficient source for that purpose because they predate the filing of other relevant affidavits, including second relevant affidavits by both Janette and Jim.

[12] The case well illustrates an advantage of requiring a written statement of facts - the avoidance of confusion as to the factual premise of the directions sought.

[13] Because the facts upon which I am asked to give directions are not readily apparent, I would refuse the application forthwith if s 96(1) was the sole source of jurisdiction to give the guidance applied for. It is not.

[14] Section 6 *Succession Act 1981* (Qld) relevantly provides:

> "**6 Jurisdiction**
> (1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect. …" (emphasis added)

[15] The directions sought by Janette called for a hearing and determination of "matters relating to the estate and the administration of the estate" and the directions sought

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3 [2014] QSC 152.
4 [2015] QSC 372.
5 [2015] QSC 4.
6 [2015] QSC 372, 6.

could readily take the form of "such declarations … as may be necessary or convenient".

[16] In circumstances where the parties opposing Janette's application did not complain of an absence of a written statement of facts within the meaning of s 96(1) *Trusts Act* and argued the application on the merits, and where the relief sought could in any event be granted as declarations in an exercise of the court's jurisdiction pursuant to s 6(1) *Succession Act*, I will proceed to determine Janette's application on the merits as if she were seeking declarations in the exercise of my jurisdiction pursuant to s 6.

[17] Even though the application falls to be considered under s 6 *Succession Act*, the manner of argument of the application and the question it raises – whether it would be proper for the executors to bring the action – invites the same approach to the merits of the application as would be applied in a s 96 *Trusts Act* application. That approach should accord with the observations of the plurality in the *Macedonian Orthodox Church Case*,[7] which was concerned with s 96's New South Wales equivalent. Those observations were conveniently distilled by Atkinson J in *Coore v Coore*,[8] cited with approval in *Ban v The Public Trustee of Queensland.*[9] Atkinson J's distillation included the following points of relevance:

> (a) "Provision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that the trustee is entitled to an indemnity for all costs and expenses *properly* incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs. A trustee's application for judicial advice therefore not only protects the trustee but no less importantly protects the interests of the trust."[10] (emphasis in original).
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> (b) "The court is not just concerned with whether it is in the interests of the trust estate for proceedings to be commenced, continue or defended but whether it is practical and fair for trust assets to be used for that purpose."[11]
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> (c) "Judicial advice proceedings should not be used to settle disputes between parties to a trust. The distinction is between deciding whether it would be proper for a trustee to sue or

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7 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66.

8 [2013] QSC 196.

9 [2015] QCA 18.

10 *Coore v Coore* [2013] QSC 196, [10](7).

11 *Coore v Coore* [2013] QSC 196, [11](2).

defend and deciding the issues tendered in the proceedings that it is proposed to institute or defend."[12]

(d) "To adopt the words of the Privy Council in *Marley v Mutual Security Merchant Bank and Trust Co Ltd*[13] in a judicial advice application, 'the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties'."[14]

[18] Those points apply in the same way to the executors here. Subject to me not exceeding s 6's bounds of what is "necessary or convenient", the determinative issue is whether it would be proper for the executors to bring the action. That issue is determined by reference to whether it would be practical and fair, in the interests of the estate and consistent with the performance of the executors' duties, to use estate assets for that purpose.

[19] Accepting it is not for the court, in an application of this kind, to determine the issues to be advanced in the proposed action, the merits or prospects of success of such an action may be relevant to whether it would be proper for the executors to incur the costs and expenses of pursuing it.[15] For instance, it would not be practical or fair or in the interests of the trust estate to use trust assets for the purpose of pursuing an action which clearly has no reasonable prospect of success. However, the apparent prospects of the proposed action are not determinative. The nature of any legal advice and the size of the estate's asset pool relative to the financial risks of the action are also relevant considerations.[16] Inherent in the latter consideration is the potential cost impact of litigation upon the estate.

[20] I note for completeness that reliance was also placed in the course of argument upon the alleged lack of support amongst the beneficiaries, other than Janette, for the estate's pursuit of the action as another consideration bearing upon whether the declaration should be made. Reliance was placed upon cases such as *Stephens & Anor v Chee*[17] and *Highland v Labraga (No 2)*[18] in support of concluding it would be permissible for Janette to pursue the action in her own right as a beneficiary. It is a contortion to regard David's position as unsupportive. His affidavit advanced material evidence in support of the existence of a resulting trust and urged compromise by Jim as his favoured path to a resolution.[19] Further, Janette's counsel emphasised she is not intent on pursuing litigation come what may and that her object is to secure the court's guidance. In the circumstances of the present case the hypothetical possibility that a beneficiary could bring the action does not helpfully inform consideration of whether the court should make the declaration.

Size of the estate relative to financial risks of the action

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12 *Coore v Coore* [2013] QSC 196, [11](4).
13 [1991] 3 All ER 198, 201.
14 *Coore v Coore* [2013] QSC 196, [11] (6).
15 *Re Murray (deceased)* [2020] QSC 155, [7].
16 *Coore v Coore* [2013] QSC 196, [22].
17 [2015] QSC 139, [26].
18 [2005] NSWSC 1212, [16].
19 Court doc 10, [26].

[21] It appears uncontentious that the assets of the estate include:

1.	The proceeds of sale of the deceased's house	$400,000.00
2.	Cash in the trust account of a New Zealand law office	$22,812.00 (AUD value)
3.	Cash in United Kingdom bank account under the control of David	$5,944.00 (AUD value)
4.	Cash held in the deceased's savings account	$ 26,000.00
5.	Cash held in the deceased's Westpac term deposit account	$160,000.00
	Total:	$614,756.00

[22] According to both Jim and Graham, the assets of the estate also include cash advanced to Janette in the amount of $22,000.[20] Janette deposes that is wrong, explaining that sum was gifted to her by her late father in 2014.[21]

[23] Janette also deposes that $6,000 to $10,000 worth of jewellery is held by Cairns Beaches Law and Conveyancing and that that jewellery constitutes assets of the estate.[22]

[24] The estate may have some liabilities, probably including some costs associated with the present applications. It is reasonable to determine the application on the basis the estate's net worth is about $600,000.

[25] The successful pursuit of the action would increase the estate's value by the value of the Yorkeys Knob property less costs to the estate of the litigation. An experienced solicitor has deposed the likely cost of pursuing the proceeding, which would probably involve a two day trial, would be $60,000.[23] If successful, and if Jim were ordered to pay the estate's costs, the plaintiff might expect to recover 60 to 70 percent of that cost if the court makes a standard cost order and 80 to 90 percent if the court makes an indemnity costs order.[24] However, even if Jim loses, depending on the view the court takes, there exists the possibility that the court might nonetheless order each of the parties' costs be paid by the estate, potentially on the indemnity basis. That seems an unlikely possibility on the known materials but it cannot be regarded as so remote as to be irrelevant. Should Jim win the action the estate would inevitably be left to bear each sides' costs. This all suggests a best case scenario of the estate having to bear about $6,000 costs and a worst case scenario of the estate having to bear about $114,000 costs.

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20 Court doc 2, [5], Ex p 12; Court doc 3, [3].
21 Court doc 9, [11].
22 Court doc 9, [12].
23 Court doc 20, [3].
24 Court doc 20, [5].

[26] As to the value of the property, Jim exhibited a real estate agent's appraisal valuing the property in the range of $110,000 to $120,000, an appraisal qualified by the uncertainty occasioned to the real estate market because of the COVID-19 pandemic.[25] His solicitor exhibited an internet search suggesting the property is worth $175,000 to $200,000.[26] Such searches are notoriously unreliable and it is a reasonable inference that the appraisal is the more reliable valuation. The property is also encumbered by a mortgage to Jim on which he owes $46,549.53 and which he would have to clear were the action successful.[27] In the event the estate secured ownership of the property and chose to sell it, the cost of that process including the commission and legal costs would probably total $9,400.[28] Such a sale would also likely attract capital gains tax.

[27] It appears clear that, depending on the outcome of the action and costs orders, the estate risks losing proportionately more than it stands to gain. That equation alone suggests a prudent executor would hesitate to pursue such an action without at least first exploring settlement of the dispute.

Factual background relevant to prospects

[28] The Buckinghams migrated from England to Auckland, New Zealand in 1976. After Faye and her husband John retired, in about 1989, they moved into a four bedroom home at Onemana, New Zealand. A two bedroom unit was also purchased there with the names of John and Faye and David and his wife being recorded as the registered owners, although David and his wife asserted no interest in the property.[29] At that time David was the only sibling living in New Zealand but he moved back to England in around 1991.

[29] John and Faye became attracted to Cairns, where Jim lived, after visiting there in 2001 and 2002. At first it appears their interest in Cairns was as a place to go to for winter holidays.[30] Jim deposes his father checked with him that he was intending to remain living in Cairns and asked him to look for a unit near to where he was living.[31]

[30] Jim found such a unit – the Yorkeys Knob property – and negotiated a purchase price of $65,000. Jim duly purchased the property in his name in mid-2002, using money transferred by his father. He deposes:

> "I put in an offer, and rang up Dad. He said he would send me the money and that I could buy it. I recall him specifically saying to me, 'I want you to put it in your name'."[32]

[31] On Jim's own account there was no more detailed discussion as to whether his parents intended to gift the property to Jim by having him buy the property in his

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25 Court doc 19, Ex p 2.
26 Court doc 13, Ex p 3.
27 Court doc 13, Ex p 4.
28 Court doc 24, [3], [4].
29 Court doc 10, Ex p 9.
30 Court doc 19, [14].
31 Court doc 19, [11], [13].
32 Court doc 19, [15].

name or whether that was just a device of convenience by which Jim purchased the property as their agent.

[32] Jim deposes that he lived in the unit "on and off after settlement" when furnishing it and making it "liveable".[33] His parents did stay in the unit when holidaying at Cairns but within a year or so had decided to move to Cairns to live permanently. Caroline explains the appeal of Cairns was that Jim lived there and, as her father used to say, Jim could "look after" them in their "dotage".[34] Jim deposes his parents did not want to ever move into a nursing home and there was an "expectation" he would be looking after them.[35] His parents bought a house in Bayview Heights in March 2004[36] and on Jim's account did not use the Yorkeys Knob property again. Indeed, Jim deposes his parents did not even have a key to the unit.[37] On Jim's account his father did not ever mention the unit again.[38]

[33] Jim does not assert there ever a subsequent conversation in which his parents expressly gifted him the unit. Whether there was a gift, whether of the money with which Jim obtained the unit or of his parents' beneficial interest in the unit, is a matter of inference.

[34] Jim's highlights his parents accessed the first homeowners grant to assist them in buying at Bayview Heights. He notes his father was a Justice of the Peace and would not sign a false document. However, their recourse to the first homeowners grant says more of the financial convenience of the moment than of whether they were the beneficiaries of a resulting trust.

[35] The affidavit of one of the siblings, David, deposes to an understanding that the Yorkeys Knob unit was his parents' holiday home in Cairns.[39] He asserts the arrangement was similar to an arrangement he had with his parents in relation to a holiday unit at Onemana.[40] However, that arrangement was different in that the names of both he and his wife and of his parents were on the title to that property.[41]

[36] David highlights that in correspondence from his parents of 1 August 2002 they wrote of the Yorkeys Knob unit, that they were "really excited at seeing what our new unit will be like".[42] In a similar vein, in correspondence of 30 September 2002 his parents wrote of how Jim and his partner "had certainly done us proud with the purchase of the unit and the furnishings".[43] Further, in an email to David of 14 November 2002, his parents wrote of having been in Queensland "in our new townhouse" and went on to say:

> "Jimmy has found a semi-permanent tenant for our place, a lady who pays a low rental and doesn't mind moving out for when we want to stay in the townhouse and willing to come back when we've gone

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33 Court doc 19, [18].
34 Court doc 25, [21]-[23].
35 Court doc 19, [12].
36 Court doc 19, [20].
37 Court doc 19, [36].
38 Court doc 19, [55].
39 Court doc 10, [12].
40 Court doc 10, [13].
41 Court doc 10, Ex p 9.
42 Court doc 10, Ex p 4.
43 Court doc 10, Ex p 6.

> back to New Zealand. That will more than cover the rates, body corporate fees and all the other expenses associated with the place."[44]

[37] There was a further reference in an email to both Jim and Alan from their parents on 31 October 2003 to the Yorkeys Knob unit as "our unit".[45] That email goes on to apologise for inconveniencing Jim and the new tenant Jim had recently acquired. In an email to Alan of 13 November 2003 his parents referred to there being "a tenant in our villa there at Yorkeys".[46]

[38] Finally, in an email to Alan and others of 16 April 2004, Jim wrote of the prospect that Graham and Janette "may like to stay at Dad and Mums beach palace at Yorkeys".[47]

[39] Janette deposes Jim assisted Faye and John with their search for a permanent home and sent them a Christmas card in which he referred to newspaper clippings of homes for sale in Cairns, noting one was over budget but looked great.[48] Apparently addressing that budgetary challenge, Jim's Christmas card continued, "You could sell Rutherford Street and a few shares".[49] That reference to Rutherford Street was to the Yorkeys Knob property. It provides powerful evidence that, at least at that time, even Jim perceived the Yorkeys Knob property was his parents' property to sell if needing to raise enough funds to buy their new house.[50]

[40] That Faye, John and Jim referred to the Yorkeys Knob property in the above ways in the few years subsequent to its purchase tells against the purchase monies having been gifted to Jim for his own use. It also tells against his parents in that era gifting their beneficial interest in the property, deriving from them having paid for it. However, that was long ago.

[41] Janette deposes that when her parents moved to Bayview Heights in 2004, they kept the Yorkeys Knob unit vacant to accommodate family and friends when visiting.[51] The only particular provided is that she stayed in the unit for about three weeks when visiting Cairns in August 2004. David deposes, that the Yorkeys Knob property continued to be stayed at by visiting members of the family from 2004 to 2014 but gives no particulars of such stays.

[42] The absence of detail of alleged stays beyond 2004 makes it impossible to assess the significance of the topic in respect of the ownership issue. It is conceivable there were times between tenants that the unit was available. Jim explains the unit was typically occupied on a long term basis, either by tenants to whom he privately rented the property between 2004 and 2014 or by himself since he took up residence

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44 Court doc 10, Ex p 13.
45 Court doc 10, Ex p 14.
46 Court doc 21, Ex p 2.
47 Court doc 21, Ex p 1.
48 Court doc 9, Ex p 15.
49 Court doc 9, Ex p 15.
50 Janette also exhibited what appears to be a Centrelink photocopy of her father's driver's licence from 2004 (court doc 9, Ex p 16). The front of the licence bears the Yorkeys Knob unit address and the change of address details on the rear of the licence bear the address of the home her parents acquired at Bayview Heights. Janette's recollection is that her parents had lived at the Yorkeys Knob unit at least for a time after moving from New Zealand, so the driver's licence tends to corroborate that fact. However, it says nothing as to the ownership of the property in which they were residing.
51 Court doc 9, [67].

there in 2014, after separating from his girlfriend.[52] Jim does not accept there was an on-going practice of visiting relatives using the Yorkeys Knob property, although he acknowledges that he sometimes let visiting family members stay with him while he was residing in the unit.[53]

[43] Another area of factual vagary post-2004 is whether Jim had an arrangement with his parents by which he and they shared the rental proceeds of the Yorkeys Knob property.[54] Jim denies such an arrangement, explaining the only circumstance in which he paid his parents money derived from renting the unit was one occasion when he gifted his parents $900 each, explaining the unit made a profit after tax that year.[55] Jim deposes:

> "Since I purchased the property I have included all rental income in my personal tax returns. I paid for all rates and body corporate fees, except perhaps for the very first, which I think was an adjustment on the purchase price. In the past seven years I have paid about $17,500 in outgoings for rates, water, body corporate fees, repairs and maintenance."[56]

[44] As against this, Janette exhibits a body corporate bill for September and December 2004 which is endorsed in her father's handwriting as paid.[57]

[45] More significantly, Janette's account alleges a variety of communications with Jim in which he indicated there was some form of on-going financial arrangement with his parents regarding the unit. Janette deposes that, unbeknown to her, Jim mortgaged the Yorkeys Knob unit in 2008 to Westpac.[58] She recalls around that time Jim owned a cleaning business and had organised for one of his cleaners to clean their parents' house for two to three hours a fortnight. Janette deposes that when she asked Jim if he charged their parents for that cleaning service, he responded, "No – it's part of the arrangements about Yorkeys".[59] This suggests that at least by this time there was an arrangement in play as between Jim and his parents regarding the ownership of the Yorkeys Knob unit.

[46] Janette's affidavit acknowledges her understanding "that the exact arrangements between my parents and Jim changed over the years".[60] She deposes to a conversation, the date of which she cannot recall, in which, when discussing the Yorkeys Knob unit, Jim said:

> "I pay for the rates and strata fees. I collect the rent from the tenant. I give half to Dad. I keep half to cover my costs and the work involved in the management of the unit."[61]

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52 Court doc 19, [28], [29].
53 Court doc 19, [53], [54].
54 Court doc 19, [57].
55 Court doc 19, [28].
56 Court doc 19, [24].
57 Court doc 22, Ex p 6.
58 Court doc 9, [70].
59 Court doc 9, [70].
60 Court doc 9, [72].
61 Court doc 9, [71].

[47] It is noteworthy under that alleged arrangement that it was Jim, not his parents, who paid for the rates and strata fees and that Jim retained the benefit of half the rent collected from the tenant. If there was such an arrangement it does not compel the singular inference Jim was being remunerated for managing a property which must in truth have been owned by his parents. Another inference is that Jim's parents considered they were receiving a form of gradual payment in return for their largess in gradually letting Jim own the property.

[48] Janette deposes that in 2014, after Jim had moved into the unit, her father said there was an arrangement between them by which Jim was required to purchase and deliver their groceries in lieu of him paying rent to her parents.[62] Jim explains he bought groceries for his parents over a long time and that eventually he did so without payment. He explains he did so in the context of helping out his elderly parents, reciprocating their past generosity to him, not because it was in lieu of rent.[63] The evidence certainly suggests Jim shouldered a significant burden in caring for his parents as they aged.

[49] Janette deposes that after John's death in May 2016 she, David and Jim held enduring powers of attorney for their mother who was suffering from dementia. Jim had evidently moved into their mother's home in early 2016 to help care for her. Janette deposes that in June 2016 David and Jim agreed that Jim would receive the rental income from the Yorkeys Knob unit to help with his expenses in caring for their mother. Janette does not depose to how she is aware that such an agreement was reached.[64] Jim denies any such agreement but acknowledges he sent a sarcastic email thanking David for letting Jim use his rent to look after his mother.[65]

[50] Sarcasm does not appear to be a sensible explanation for the content of a number of emails by Jim of mid-2016. In those emails he explained, in varying degrees of detail, arrangements relating to the splitting of rental profit from the unit with his parents and his covering of the cost of various aspects of supporting his parents.[66] His written explanation included:

> "…Dad put Yorkeys in my name and we agreed to split the profit in renting it out and it made $3000 per year so I was even over paying on that deal".[67]

[51] Subsequent emails from him explained his financial generosity was a way of paying his parents back for the gift of the unit.[68]

[52] The emails provide powerful evidence there had been some form of revenue sharing arrangement between Jim and his parents in connection with the unit. It undermines the credibility of Jim's present position that there was no arrangement. The likely existence of such an arrangement is not necessarily at odds with John and Faye believing they were gifting Jim the Yorkeys Knob property.

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62 Court doc 9, [73].
63 Court doc 19, [41], [61].
64 Court doc 9, [19].
65 Court doc 19, [40].
66 Court doc 9, Ex pp 28–9.
67 Court doc 9, Ex p 28.
68 Court doc 9, Ex p 41.

[53] It is obvious from Janette's further emails in 2016, calling for an explanation as to how Jim paid for the purchase of the unit at Yorkeys Knob, that she did not accept his explanations that his parents intended he would have ownership of the unit and that they would receive money and other benefits over time from him.[69] Janette evidently considered the property could only have been gifted if expressly gifted to Jim at a specific point in time rather than her parents having allowed Jim to become the beneficial owner of the Yorkeys Knob unit in a gradual way.[70] In a similar vein, it is difficult to avoid the conclusion Jim was concerned about the enforceability of a graduated, reciprocal arrangement. That would be a logical explanation for the marked inconsistency between his affidavit's effective denial of the shared rent arrangement and his email acknowledgements of such an arrangement.

[54] The Bayview Heights house remained John's and Faye's principal place of residence until their deaths. Jim remained the registered owner of the Yorkeys Knob property. He continued to manage and at times reside at the property. John and Faye well knew Jim remained the registered owner of the Yorkeys Knob property and there is no evidence of them ever taking any steps to alter that equation in the many years between its inception in 2002 and their deaths in 2016 and 2017.

[55] John and Faye each experienced some decline prior to their eventual deaths but there is no evidence that historically or at the time of making their wills they lacked understanding of basic aspects of finance and ownership. There is no allegation of a lack of capacity or undue influence attending the making of their wills. There is no suggestion of their wills or any other formally executed documents indicating that they were the beneficial owners of the Yorkeys Knob property.

[56] That such a long time passed during which John and Faye elected to take no steps addressing the state of ownership of the Yorkeys Knob property, not even at the time of their wills, supports the inference that, as time passed, Faye and John may have come to consider their beneficial interest in the property as having been gifted by them to Jim.

[57] Two relevant features of the case suggest it would be unremarkable if they came to such a view. Firstly, during their lifetimes Faye and her husband, John, were financially generous to their children. On Janette's own account she was gifted $22,000 by her late father in 2014,[71] to help her fund renovations.[72] Caroline deposes to receiving inter vivos gifts from her parents of $24,000 in 2013, $7,000 in 2014 and $10,000 in 2016 to assist with financial challenges in the wake of her separation.[73] She also deposes Graham told her their parents gifted him $25,000 towards a house deposit in 2010.[74]

[58] Gifting the Yorkeys Knob property involves somewhat greater financial generosity than those examples but the prospect of an additional degree of generosity to Jim is readily explained by the second relevant feature of the case. That feature is that Jim, the only sibling living in the same city as his parents in their twilight years, was

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69 Court doc 9, Ex p 39.
70 Court doc 9, [94], [98].
71 Court doc 9, [11].
72 Court doc 25, [8].
73 Court doc 25, [31]–[33].
74 Court doc 25, [43].

generous with his care and money in support of them. The need for and provision of that support materially increased from about 2012.[75]

Prospects

[59] As a matter of general principle, where A pays wholly for property which is vested in B, two potential presumptions arise. One, the presumption of advancement, is the presumption that where a relationship exists between A and B a gift has been made of the property by A to B. The other, the presumption of a resulting trust, is that B holds the property on trust for A.[76] In substance they are mutually inconsistent presumptions. Where, as here, the presumption of advancement arises from the relationship of the parties, it may be rebutted by evidence of an intention to create a resulting trust and a resulting trust will thereby be established.[77]

[60] In this context the court's inquiry would be directed towards the intention manifested by the players, that is, the intention which their words and conduct would reasonably convey to an objective bystander.[78] Words or conduct by Jim, tending to acknowledge his parents' beneficial interest in a property to which he held title would carry particular weight as being against his interest.[79]

[61] The above discussed evidence shows that at the time of the property's purchase, and for a few years thereafter, Jim and his parents exchanged correspondence indicating they all regarded the property as having been bought and held by Jim on behalf of his parents. Thus, despite Jim having become the registered title holder of the property, the prospects of rebutting the presumption of advancement and proving Jim's parents intended to create a resulting trust appear to be good.[80]

[62] If it were concluded the property was acquired upon trust for John and Faye that may not be the end of the debate. The correspondence repeatedly supporting such a conclusion seemingly peters out post-2004. John and Faye's failure to ever address Jim's on-going legal ownership of the property, supports the inference that they may, with the passage of time, have come to consider their beneficial interest in the property as gradually gifted by them to Jim. The influence upon a fact finder of the passage of time argument as against the influence of Jim's inconsistencies about the existence of a revenue sharing arrangement with his parents cannot be forecast on the information available. However, even if a court were prepared to infer John and Faye later regarded the beneficial interest they acquired in the property at the time of purchase as released, it does not follow that there was an effective extinguishment or surrender of their equitable interest. In this context a purported extinguishment or surrender of their interest is arguably a form of release.

[63] Subject to statute, equitable rights may be released by an instrument under hand, orally or by conduct.[81] However, s 11(1)(c) *Property Law Act 1974* (Qld) requires:

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75 Court doc 19, [41].

76 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 708; *Calverley v Green* (1984) 155 CLR 242, 246–7.

77 Dennis SK Ong, *Trusts Law in Australia* (Federation Press, 4th ed, 2012) 439.

78 *Gissing v Gissing* [1971] AC 886, 906; *Byrnes v Kendle* (2011) 243 CLR 253, 263 (French CJ), 274–7 (Gummow and Hayne JJ), 289–90 (Heydon and Callinan JJ).

79 *Calverley v Green* (1984) 155 CLR 242, 262.

80 On a scale of poor/ poor to reasonable /reasonable/ reasonable to good/ good.

81 *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis, 5th ed, 2015) [37-030].

> "(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be manifested and proved by some writing signed by the person disposing of the same, or by the person's agent lawfully authorised in writing, or by will."

[64] A "disposition" is defined in Sch 6 of the Act as including a release. There does not appear to be any writing manifesting and proving a release here. Whether s 11(1)(c)'s requirement of such writing applies to a release is at least placed in doubt by s 11(2) which provides s 11 "does not affect the creation or operation of resulting, implied, or constructive trusts". What is under potential consideration here is not the creation but the ending of a resulting trust. Whether a release comes within the meaning of "operation" of a resulting trust is not addressed by the statute or any case referred to in argument before me.

[65] The above collection of uncertainties associated with developments post-2004 call for some modification of the assessment of apparently good prospects regarding proof of the existence of a resulting trust pre-2004. The actions' apparent overall prospects of success appear to be reasonable.[82]

Legal advice?

[66] Executors acting reasonably in a case of this kind might be expected to secure legal advice. That occurred. Executors acting reasonably might also be expected to follow such advice. That did not occur.

[67] By letter of 29 March 2019 the solicitors acting for the estate, Cairns Beaches Law and Conveyancing, provided Graham and Janette with advice in respect of issues raised in a chronology of events supplied by Janette.[83] This apparently did not refer to much of the aforementioned correspondence and its support of the inference that a resulting trust was created on the acquisition of the property. It seems much of that correspondence was discovered later.

[68] The advice dealt principally with the ownership of the Yorkeys Knob unit, but also with some allegations of misappropriation of funds by Jim while exercising an enduring power of attorney. The advice included the following (typographical and punctuation errors not corrected):

> "The property is registered in the names of James Buckingham (Jim). It was paid for with $65,000 received from your parents in June 2002. At that stage, it was well known that Jim was purchasing the unit for his parents with a view to them residing in it one day.
>
> When your parents decided to move to Cairns their needs had changed and instead of moving into the unit at Yorkeys they purchased a property in Bayview. It would and could be argued that if they did not want the unit in Jim's name that this would have been an appropriate time to transfer the title.

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82 On a scale of poor/ poor to reasonable/ reasonable/ reasonable to good/ good.

83 Court doc 9, Ex pp 1–7.

In any event the title was never changed however it also appears that your parents did not request at any stage that it be transferred back into their names.

There is no evidence as such that your parents held a view that the property was not Jim's and belonged to the estate. However it is clear from the chronology that that Caroline was of the opinion that in 2016 the unit was still an asset of your mother's living estate.

Although I would have to agree that there is an argument for the fact that Jim was holding the property in a constructive trust for both your parents and now the estate. To commence an action on this would be costly to the estate for little gain. The value of the unit is significantly higher now than what it was purchased for. There are resolutions to this issue without the need for litigation which I will outline later in this correspondence.

There are also several arguments against the unit belonging to the estate mainly, Queensland's indefeasible title which short of fraudulent transactions cannot be defeated.

There are other reasons why it is my opinion that any action to include the unit in the estate would fail foremost indefeasible title however there is also evidence contained within the emails that your parents, your father helped out all of you at some stage with financial assistance. It is not a far leap to conclude that this unit which was purchased at $65,000 was Jim's helping hand. …

There is no evidence of undue influence… . This leads us back to indefeasible title or lengthy litigation with no certain outcome.

There is also another matter that I would be remiss in not clarifying is that the source document in these proceedings is the will. There is no mention of any debt owed to the deceased or a less benefit to Jim because he got the unit. Once it is acknowledged that all of you have received financial assistance at some point or another from either your mother of father it would not be a far stretch to say that they had intended that Jim has the unit.

To litigate this would be a significant cost to the estate and possible outweigh any benefit to the estate. Please be aware that any litigation of this type would necessarily involve at least two legal practitioners, the estates and Jim's whose fees would be borne out of the estate. We would estimate in total the estate would suffer a significant loss of up to $100,000 if it was litigated. …

I would <u>strongly recommend</u> a discussion between the executors and Jim in respect of the unit and the allegations under the Enduring Power of Attorney. Jim's benefit could be reduced by the cost of the unit when purchased $65,000. This would be reimbursing the estate in respect of the purchase price which Jim insists that he has paid back to your late father which would have benefited your late mother and also any wrongdoing under the Power of Attorney.

There are several other ways in which to resolve this dispute such as the legal fees which I have discuss below which are in dispute and

> the pool fencing could be deducted from Jim's share. This would be significantly less than $65,000 but he may be more agreeable to this if it means having the estate administered quickly. …
>
> It is now a matter for you to both decide whether or not you wish to have those discussions with Jim, litigate the matter or finalise the matter without any further delay paying out all expenses of both executors and distributing the funds without further delay.
>
> If you are successful in any litigation each beneficiary will have gained approximately $30,000 as the rest of the Yorkeys Knob unit would be taken in legal fees. If it is not successful, then the estate will be liable for Jim's fees and the estates fees costing the estate up to $100,000 and equally reducing the benefit of each beneficiary. I also mention that any litigation commenced by the estate must be commenced by both executors and if you are not agreeable then we are back at the point where you may be removed.
>
> Please remember that both executors must agree on what comes next unless an independent trustee is put in place. I can almost guarantee that if an independent trustee were put in place to finalise the administration of the estate, they would err on the side of caution and would not litigate this matter in respect of the Yorkeys Knob unit. …"[84] (emphasis added)

[69] The general effect of the advice was to the effect that an action to claw back ownership of the Yorkeys Knob unit for the estate was likely to fail and would incur a significant financial loss to the estate and settlement of the dispute should be pursued.

[70] As it turns out, more evidence of the written communications of John, Faye and Jim is now available and the legal advice that the action would likely fail is no longer accurate.

[71] The advice of 29 March 2019 was to "strongly recommend" the pursuit of discussions between the executors and Jim in the hope of achieving a financial settlement by which Jim would forego a component of his prima facie share as a beneficiary. This was sound advice. If followed, it might have extracted a monetary concession from Jim. Some communication of sorts with Jim ensued.[85] However, it was not in the form of any combined attempt by the executors to achieve such a settlement. This, Janette deposes, is because Graham rejected the putting of a compromise to Jim and continued to support Jim's entitlement to the Yorkeys Knob property.[86] While Graham complains of a pattern of Janette not meaningfully consulting with him,[87] in this instance it appears his non-pursuit of a

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84 Court doc 9, Ex pp 1–6.

85 Janette deposes to having discovered in April 2019 that Graham, Caroline and Jim had struck a deal to support him keeping the Yorkeys Knob unit in exchange for him bequeathing it in his will to their children. The email trail exhibited in support of this assertion dated in April 2019 does not support the allegation of a "deal" having been struck. Rather, it shows Jim had two years earlier expressed an intention when he died to voluntarily pass the Yorkeys Knob property to his parents' grandchildren and that he remained prepared to confirm that intention (see court doc 9, Ex pp 8-9).

86 Court doc 2, Ex p 9.

87 Court doc 2, Ex p 14.

financial settlement which would increase the estate asset pool, or at least diminish Jim's share of it, was because of his support for Jim's position.

[72] The pursuit of a financial settlement with Jim, as the legal advice urged, was the estate's most realistic chance of improving its asset pool without putting the existing pool at risk. There appears to be no explanation for the executors' failure to properly explore such a financial settlement other than the polarising influence of their enmities and allegiances.

Conclusion

[73] I have concluded on the information available that the actions' prospects are reasonable. I have also explained that because the estate risks losing proportionately much more than it stands to gain by pursuit of the action a prudent executor would hesitate to pursue such an action without first exploring settlement of the dispute.

[74] Because the prospective action's prospects appear to be reasonable, the executors are credibly positioned to persuasively explore a settlement with Jim. Indeed, those prospects suggest it would be prudent for Jim to welcome an opportunity to reach a financial compromise given his own position is at genuine risk.

[75] There has been a failure to date to properly explore settlement, even despite legal advice that it should occur. I cannot conclude it would be proper for the executors to commence and prosecute the action in circumstances where they have not even made a proper attempt to first settle the dispute provoking the potential action.

[76] It follows that in the circumstances presently prevailing I should dismiss Janette's application.

[77] I was urged by Graham's solicitor not only to dismiss the application but to declare the executors would not be justified in pursuing the action. The premise appeared to be that such a declaration would follow from a conclusion that the declaration sought ought not be made. It does not.

[78] It will be recalled the absence of a written statement of facts meant I did not consider the application as an application for directions pursuant to s 96 *Trusts Act* and instead considered it as an application for declarations pursuant to s 6 *Succession Act*. Section 6 contemplates the making of such declarations "as may be necessary or convenient". It will be obvious that my weighing of reasonable prospects as against concerning financial risk left the matter finely balanced but for the circumstance that there has not yet been a proper attempt at settlement of the dispute. In the absence of such an attempt, in a case crying out for financial settlement, it is not necessary or convenient for any declaration about pursuit of the action to be made.

Application for removal of executors

Relevant considerations

[79] The court's power to remove an executor and trustee derives respectively from s 6 *Succession Act* and s 80 *Trusts Act.*[88] It has been described as a widely expressed power.[89] In considering whether to exercise it, respect should be given to the testator's choices and it should be assumed the appointees were considered worthy of the task entrusted to them.[90] However, the overriding consideration is the due and proper administration of the estate.[91]

[80] Section 52(2) *Succession Act* also appears to be a source of the power to remove, in the event of neglect of duty. However, neglect of duty is not a pre-requisite for establishing, nor will it necessarily establish, that the due and proper administration of the estate is so in jeopardy as to require the replacement of executors and trustees pursuant to s 6 *Succession Act* and s 80 *Trusts Act*.[92]

An ineffective administration

[81] It is obvious from the filed materials that there was disharmony between some of the siblings, including Graham and Janette, in the era prior to their mother's death, over the circumstances under which some of them had come into possession of their parents' money.[93] That disharmony persisted after Faye's death.

[82] In addition to the dispute regarding ownership of the Yorkeys Knob property, there were various disputes between Janette and Graham since their assumption of the executorship, with apparently little ground ceded by either. The upshot is that there was an abject failure to distribute the estate as soon as may be and Janette and Graham were so at odds with each other that they were together incapable of advancing the administration.

[83] The materials are replete with allegation and counter-allegation as to the respective reasonableness of their conduct. Many of the allegations are couched in terms which make it difficult to distinguish whether the information advanced is fact or assumption. It is sufficient to refer to some illustrations of the executors' inability to co-operate to administer the estate.

[84] Janette deposes that from the commencement of their executorship, Graham insisted that all decisions were to be made via a majority vote which she explains was contrary to her view that their role was to administer the estate according to law.[94] Janette also deposes that Graham would perform executorship tasks without her knowledge or agreement.[95] She provided an example of Graham travelling to Cairns in January 2018 to clear out their parents' Bayview Heights house and insisting that he and Jim would perform the task without her involvement, asserting that he had the support of the majority.[96]

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88 Properly described, the power to remove an executor is, in the present context, the power to revoke a grant of probate.
89 *Baldwin v Greenland* [2007] 1 Qd R 117, 127.
90 *Baldwin v Greenland* [2007] 1 Qd R 117, 130.
91 *Baldwin v Greenland* [2007] 1 Qd R 117, 128, 130.
92 *Re McLennan* [2018] QSC 124, [34].
93 See, for example, court doc 9, [21].
94 Court doc 9, [22].
95 Court doc 9, [22].
96 Court doc 9, [23].

[85] Graham's affidavit exhibited a number of emails revealing an impasse between he and Janette where under she was prepared to agree to a partial distribution but he was not, because it would exclude Jim and this would supposedly be illegal.[97] It remains unclear why a partial distribution to all siblings excluding Jim could not have occurred, so long as the executors retained sufficient funds to cater for the potential cost to the estate of the action and payment to Jim of his lawful entitlement once that entitlement was in due course resolved. Indeed the withholding of an interim distribution to Jim, while it remained in doubt whether he would have to contribute in aid of the estate, would have been in keeping with the rule in *Cherry v Boultbee*.[98] Such a course was eventually taken but only after my orders during the hearing of the application.

[86] Jim's solicitor wrote to Janette and Graham on 25 September 2019 complaining the estate should by then have been administered. Jim's solicitor indicated she held instructions to commence Supreme Court proceedings, including for "the removal of the executors and the re-issuing of a grant to an independent person" if Jim's bequest was not received within 14 days.[99] In her response by letter of 2 October 2019 Janette asserted it had been apparent to her since April 2019 that five issues, on which she and Graham could not agree, should be referred to the Supreme Court for judicial advice, namely:

> "1. Whether or not Jim is holding the property at 4/15 Rutherford Street Yorkeys ("Yorkeys") on trust for the estate, and if so, could the executors instigate recovery action against him;
>
> 2. Whether or not Graham has a conflict of interest as executor which has become apparent in relation to Yorkeys;
>
> 3. Whether or not my mother's ashes can be divided up as requested by some of the beneficiaries;
>
> 4. Whether or not the UK estate monies were expended without proper authorisation by the executors;
>
> 5. Whether or not Jim should pay back money he has withdrawn and allowed other siblings to withdraw from my mother's bank account without the consent or knowledge of the other power of attorneys at the time. These monies were provided to Graham and Caroline for their travel costs incurred for them and their families to attend Dad's funeral in Cairns in May-June 2016."[100]

[87] Janette's letter asserted Graham had refused to agree to refer the issues to the Court and indicated she had agreed to partial distribution of the estate funds to all the beneficiaries, subject to Jim's share being withheld until the issue of the ownership of the Yorkeys Knob unit had been determined.[101]

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97 Court doc 3, Ex pp 1-2.

98 (1839) 4 My & Cr 442; 41 ER 171, discussed in *Kenway Investments (Australia) Pty Ltd v Teamda Developments Pty Ltd* [2007] NSWSC 48, [63].

99 Court doc 2, Ex p 7.

100 Court doc 2, Ex pp 8-9.

101 Court doc 2, Ex p 10.

[88] Conversely, in his letter of 3 October 2019 to Jim's solicitor, Graham alleged Janette's position in estate matters tended to be "the polar opposite" of his and that she refused meaningful consultation with him.[102] He wrote:

> "This pattern of behaviour has become so entrenched that in around November 2018, I and the majority of the beneficiaries requested that the executors seek professional mediation to resolve all issues and find a way around the constant stalemates that the estate administration had become mired in. Janette refused to co-approve the engagement of a professional mediator."[103]

[89] The letter complained Janette had helped herself to estate assets and was refusing to disclose what she had removed.[104] Graham complained Janette was resistant to the division of their mother's ashes in accordance with a majority vote of three of the siblings.[105] He also complained Janette was withholding her instructions to the estate lawyer to distribute the estate.[106]

Discussion

[90] It is a serious step to interfere with Faye's wish that Janette and Graham act as executors. However, they have proved themselves to be together incapable of the due and proper administration of the estate entrusted to them by Faye's will. It is inevitable that the court must intervene to bring their executorship to an end.

[91] An argument was mounted that the court's orders should remove Janette and allow Graham to act as the sole executor. I reject that argument. It relied upon two main points. The first was that Graham, Alan and Caroline support Jim's application for the removal of Janette and reissuing of probate to Graham as sole executor.[107] This rather ignores the fact that Janette and David do not support the application but in any event the issue does not fall for determination by the court on a majority vote.

[92] The second point seemed to be that only Janette was responsible for the failure of the joint executorship. The evidence does not support that view. For instance, Graham sided with Jim in respect of the ownership of the Yorkeys Knob unit, thus undermining the prospective success of any attempt to negotiate, on the estate's behalf, a financial settlement with Jim to increase the value of the estate. In fairness to him it may be that having raised the idea of mediation the previous year he thought such attempt would be futile. However, having received legal advice strongly recommending an attempt at settlement he should have pursued such an attempt and set to one side his subjective preference for Jim's position. A similar lack of objectivity has seen him depose to an obviously tit-for-tat allegation in this proceeding that the estate includes the $22,000 his parents gave to Janette.

[93] I am well satisfied that the grant of probate to Graham and Janette should be revoked and letters of administration should issue to an independent professional administrator. It will of course be necessary for that administrator's services to be

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102 Court doc 2, Ex pp 13-14.
103 Court doc 2, Ex p 14.
104 Court doc 2, Ex p 13.
105 Court doc 2, Ex p 13.
106 Court doc 2, Ex p 13.
107 Court doc 4, Ex pp 7, 9.

paid for by the estate, consequently reducing the prospective inheritance of the siblings.

[94] I will not make those orders now and instead will do so on 11 September 2020, when I will hear the parties as to costs and as to which of the proposed administrators should be appointed. I have deliberately selected a date that far ahead in order to allow the siblings one final opportunity to avoid the need for the orders by negotiating a settlement of all their disputes in connection with the estate and its administration, including how the remainder of the estate should be distributed. Such a settlement would amply protect the executors in distributing the estate as unanimously agreed without the need for further court supervision. It was admittedly open to the siblings to reach such a settlement long before now. However, the siblings' knowledge of my reasons, the order which is looming and its consequent reduction of their prospective inheritances might prompt an abandonment of blame and an outbreak of pragmatism between the main protagonists.

[95] I record for completeness that the prospect of a court ordered mediation was raised in the course of argument. I did not favour such an order both because of the stage the dispute was at and because not all of the siblings were participating in it. In any event, a court order is not required for a mediation. It is common for persons, despite their disagreements, to at least agree to make a genuine attempt at resolving their disputes with the aid of a mediator. It has been and remains within the siblings' power for them to consensually arrange and engage in a mediation without court order.

Orders

[96] My orders are:

1. Application for directions (considered as an application for declarations) dismissed.

2. I will hear the parties at 10 am 11 September 2020 as to:

    a. costs; and

    b. the selection of the court appointed administrator and the consequent form of order revoking the grant and issuing letters of administration.