

SUPREME COURT OF QUEENSLAND

CITATION: *Zieseemer v Zieseemer* [2011] QSC 214

PARTIES: **KENT EWAN ZIESEMER**
(applicant)

v

LYNETTE IRIS ZIESEMER
(respondent)

FILE NO/S: 3658/11
4745/11

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Delivered ex tempore on 10 June 2011

DELIVERED AT: Brisbane

HEARING DATE: 10 June 2011

JUDGE: Ann Lyons J

ORDER:

1. **The Respondent, Lynette Iris Zieseemer, be removed as Executor of the estate of Rex William Zieseemer (deceased).**
2. **The Grant of Probate made to the Respondent, Lynette Iris Zieseemer, be revoked.**
3. **Lynette Iris Zieseemer bring the original Grant of Probate into the Registry.**
4. **Michael Karl Klatt be granted Letters of Administration with the will to administer the estate of Rex William Zieseemer (deceased), subject to the formal requirements of the Registrar.**
5. **The costs of and incidental to this Application of all parties appearing on this Application be paid from the estate of the deceased on an indemnity basis.**

CATCHWORDS: SUCCESSION – EXECUTORS AND ADMINSTRATORS – REMOVAL AND DISCHARGE – where the applicant seeks the executor's removal to ensure the due and proper administration of the estate of his father – where 6 years have lapsed since the date of death – where break down of the family relationships – where substantial estate and significant debt to be apportioned – whether the executor should be removed.

COUNSEL: L Nevison for the applicant
 T Quinn for the first respondent
 D Morgan for the beneficiary Andrew Zieseemar
 C Carrigan for the beneficiary Kylie Fanning

SOLICITORS: McCullough Robertson for the applicant
 de Groot Lawyers for the respondent
 Creevey Russel Lawyers for the beneficiary Andrew Zieseemar
 Dean Kath & Kohler Solicitors for the beneficiary Kylie Fanning

- [1] **ANN LYONS J:** Pursuant to an application filed on 3 May 2011 but foreshadowed in September 2009, February 2010 and February 2011, the applicant, Kent Zieseemar, in proceeding 3658/11 seeks the removal of the executor of the Will of his father, the late Rex William Zieseemar. He seeks the executor's removal to ensure the due and proper administration of the estate. The executor is his mother Lynette Iris Zieseemar (Mrs Zeisemer).
- [2] Kent Zieseemar submits that the estate of the deceased has not been administered and six years have elapsed since the date of his father's death. He submits that a conflict arises because the executor has failed to determine the apportionment of debt between the beneficiaries and the debt for which she is personally liable, and has continued the farming operation in dereliction of her duty to administer the estate for the benefit of the beneficiaries.
- [3] The applicant seeks an order that Michael Klatt of Mullins Lawyers be granted Letters of Administration to administer the estate, subject to the formal requirements of the Registrar.
- [4] The late Mr Zieseemar died suddenly as a result of a farming accident at Condamine in Queensland on 8 March 2005. He was survived by his wife, his daughter, Kylie Fanning, who is 37 years of age, his son, Kent, the current applicant who is 35 years of age, and his son, Andrew, who is 33 years of age. He made his last Will on 27 May 2002. Probate of that Will was granted to the respondent, Mrs Zieseemar on 28 June 2005.
- [5] At the date of his death, Mr Zieseemar had substantial assets, with an estimated value of \$34 million. Those assets included an interest in a property at Bayview Harbour, which he owned as a joint tenant with Mrs Zieseemar, life insurance policies worth in excess of \$1 million, a share portfolio with a market value in the order of \$500,000, bank accounts with a value of approximately \$260,000, an interest in a farming partnership with Mrs Zieseemar, which is the Zieseemar Partnership, and interests in a number of farming properties of significant value. They included Santa Park, with an estimated value of \$4.8 million, Marlee, with an estimated value of \$5.85 million, Rockdale, which is estimated at \$8.45 million, Bilgola, with a value estimated at \$1.95 million, and Tarcoola, which has an estimated value of \$4.68 million.
- [6] He also had a one-fifth interest in the family partnership and a one-fifth interest with his family in the property called Gambier Park, which is valued at \$7.35 million.

He was also the controlling mind of the Marlee Trust and the trustee of Walora Pty Ltd.

- [7] There is no doubt that there were also substantial liabilities in relation to the conduct of the farming operation at the date of death. The liabilities are in the order of \$11.3 million.
- [8] In the last six years, issues have arisen in relation to the terms of the Will and the administration of the estate. The parties have been in discussions over those six years in relation to the finalisation of the administration of the estate. However, it is uncontested that there has been no resolution. Administration has still not progressed, despite a mediation which was conducted in January 2010.
- [9] It is also clear that the executor has moved between law firms. She initially retained Ken Hooper & Associates of Gatton and then Warwick Marler of Marler & Darvall. Subsequently Ken Hooper & Associates were retained again. In this application and in an associated proceeding 4745/11, Mrs Zeisemer has retained de Groot's Lawyers since early May 2011.

Mr Kent Zeisemer's submission

- [10] In relation to this application Kent Ziesemer submits that there has been no significant progress in the six years which have elapsed. No agreement has been reached or decision made as to the appropriate allocation of debt, the entitlement to life policies, the properties to be disposed of, and the accounts to be adjusted.
- [11] The applicant notes that no properties have been transmitted, even to the name of Mrs Ziesemer as personal representative. I accept that none of the properties have been transmitted to the beneficiaries but it would seem that there has been a distribution of some \$50,000 to Mrs Fanning. Kent Ziesemer also claims that the executor has failed to provide information to him in relation to the administration of the estate.

The executor's arguments

- [12] Counsel for Mrs Ziesemer argues that the Court will not likely interfere with the deceased's choice as to who should have the control of the administration of his estate and the execution of the trusts provided there under. Counsel also argues that Mrs Ziesemer is well placed as executor and she was her husband's choice.
- [13] It is also argued that Mrs Ziesemer was a rational choice because she was the co-owner with Mr Rex Ziesemer of each of the properties in question and, therefore, has a vital interest in the continued successful operation of those properties.
- [14] Counsel also argued that with the passing of her husband and given her entitlements as devisee under the Will, Mrs Ziesemer becomes entitled to more than one half of the interest in the jointly owned property of herself and her husband, and, in that sense, it's argued that she becomes the person with the greatest interest in the most substantial assets of the estate.
- [15] In addition, it is argued that Mrs Ziesemer has been involved in successful farming operations on the properties as accumulated for more than 30 years and has been a

director and secretary of the trustee company responsible for the conduct of the farming operations in that period.

- [16] The executor agrees that the liabilities are considerable and that the National Australia Bank is the largest creditor, with debts secured by way of mortgage over the various farming properties of about \$10 million. It is therefore argued by counsel for Mrs Ziesemer that she is vitally interested not only as the majority owner but as a mortgagor liable to the bank for a significant debt. It is submitted that the fact that the largest creditor, the National Australia Bank, has been prepared to allow the farming operations to continue under her stewardship for a considerable period whilst those negotiations have taken place is a significant matter.
- [17] It is also argued by Mrs Ziesemer's counsel that it would be a serious step to take control of the estate's interest in the farming properties from the considered choice of the deceased, Mr Rex Ziesemer. Further the continued successful operation of the farming properties is a prerequisite to the maintenance of the mortgage facilities securing in excess of \$10 million. Counsel submits that care needs to be taken to avoid commercial losses that may follow any disruption of the business operation, as the interest of the estate is intertwined with the operations of the trust.
- [18] Whilst it is argued that there is potential for dislocation of continuity in the business operations if a stranger is appointed to assume responsibility for the administration of the estate and a possibility that the mortgagee may become apprehensive about loss of control of its securities by its principal customer, I can find no evidence of that on the material before me.

Mrs Kylie Fanning's submissions

- [19] Counsel for Mrs Fanning submits that, on 30 September 2010, Mrs Fanning was paid \$50,000. However, she remains uncertain whether that was a payment under clause 2J of the Will or was from some other source, as the letter accompanying that documentation indicated that the nature of the payment would be designated in due course.
- [20] Counsel also submits that, since 8 March 2005, the property, Marlee, remains registered in the name of the deceased and the respondent. They were tenants-in-common in equal shares. Whilst, on 5 October 2010, the solicitors Marler & Darvall forwarded documents for transmission by death for the transfer of the deceased's interests in Marlee to Mrs Fanning, those documents needed to be amended. No progress has been made in the transfer of those properties, since the retention of new solicitors.
- [21] Neither has there been the transfer of shares in Walora Pty Ltd from the deceased's name to Mrs Fanning since the deceased's death.
- [22] The right, title and interest and partnership share of Mr Ziesemer in all the plant, machinery equipment and livestock has not been transferred to Mrs Fanning.
- [23] Furthermore, since his death, the rest and residue of the estate of Mr Ziesemer has not been transferred to Mrs Fanning, and that rest and residue includes Bilgola and Gambier Park.

- [24] It would seem from the correspondence that, for the last year and a-half, the solicitors for Mrs Fanning have written to the solicitors for the executor advising that Mrs Fanning urges the executor to take the steps to move the estate forward to completion, that she wishes to take up the gift under the Will of the transfer of the deceased's interest in Marlee, and she accepts the terms of the residency conditions in the Will. That correspondence also indicates that Mrs Fanning is willing to consider any proposal for the retention or disposal of Gambier Park, depending on the necessities of the estate and the desires of the other co-owners.
- [25] It's clear that Mrs Fanning has requested the executor to advise a proposal to move the estate forward as soon as possible. It's also clear that Mrs Fanning agrees that the allocation of the debt to the National Australia Bank as between the various properties does not appear to have been accepted or ascertained by the executor, and that, while the National Australia Bank has proposed an apportionment of liability of the assets, the executor does not adopt the National Australia Bank figures.
- [26] In particular, it would seem that Mrs Ziesemer has said that she has found "the proportion of the debt the children were proposing that I take was far in excess of the share of the debt proportionate to my property interests and what I should sensibly be taking on at my age. I was not prepared to accept what amounted to more than half the debt owed by the properties in total."
- [27] Mrs Fanning is desirous of the estate of her late father being resolved as expeditiously as possible and as economically as is reasonably prudent. In essence, Mrs Fanning supports the removal of the executor.

Mr Andrew Ziesemer's submission

- [28] Counsel for Andrew Ziesemer argues that family relationships have deteriorated to the extent that the enterprises cannot be continued as a going concern. Counsel also points to a concern that a disposal of property will trigger a capital gains tax event and require payment of stamp duty. Counsel also refers to the bank's position. In particular, it would seem that the bank will take all of the proceeds of the sale of the first property pursuant to its mortgage. Counsel also notes that, at the moment, expert accounting and tax advice on those topics is not available.
- [29] Counsel for Andrew Ziesemer submits that he does not wish to assign fault and the Court does not have to embark upon a fault-finding investigation as against individuals. Counsel argues that the focus is on the due administration of the estate, and that it is objectively ascertainable that, after six years, the estate is yet to address, in any practical way, the significant issues which arise in the course of the administration. Counsel submits that, even though the debt is being serviced, the size of the debt is daunting and does seem to have pre-occupied the executrix's attention.
- [30] Counsel for Andrew Ziesemer therefore submits that there is no basis for optimism about the family's ability to come to terms with the difficult problems unassisted, and the experience of the last six years is that the family cannot come to a consensus when it comes to committing to the detail of an agreement. It is argued that there is nothing to suggest this will change. The position of Andrew Ziesemer is that the personal representative needs to be actively discharging the responsibilities of the office.

Should the executor be removed?

- [31] I am satisfied that requests for administration accounts and details of costs have been made from at least February 2010 up to the present day, and there are concerns in relation to the response.
- [32] It is significant in my view that the executor has, to date, failed to put forward her firm proposal with respect to the apportionment of debt and her proposed method of distributing the estate of the deceased. It is also of concern that the respondent has not registered the properties comprising the estate even in her name as personal representative.
- [33] Significantly, prior to the commencement of the application that Mrs Zeisemer has filed in proceedings 4745/11, counsel for Mr Kent Ziesemer had foreshadowed making an application to the Court. Whilst the executor has now commenced an application in June 2011, she has failed to do so at an earlier point in time. Mrs Ziesemer has also failed to comply strictly with the terms of the order made by Boddice J on the 19 May 2010. In particular, Mrs Zeisemer has still not proposed her methodology with respect to the administration of the estate in its entirety, such that the parties interested in the administration of the estate can accept the proposal with confidence.
- [34] I accept that relationships in the family are strained. Mrs Ziesemer's affidavit goes into the detail of the extent of those current difficulties. I must indicate that I am concerned by some of the paragraphs in Mrs Ziesemer's affidavit as to the extent of the dispute particularly between Mrs Ziesemer and her sons, and in relation to the actions which have occurred.
- [35] Ultimately, Mrs Ziesemer, in her affidavit, states that she accepts paragraph 107 of the affidavit of Mr Kent Ziesemer. In that paragraph, Mr Ziesemer states,
 "It has now been six years since the death of the deceased. There has been no significant progress in the administration of the estate, because the interested parties have not reached agreement on the following issues:
 (a) the appropriate allocation of debt among the relevant entities and beneficiaries;
 (b) the entity or beneficiaries entitled to the proceeds of the life insurance policies;
 (c) the manner in which the property known as Santa Park should be dealt with, and;
 (d) the sum payable by the Marlee Trust to the estate of the deceased."
- [36] I note Mrs Ziesemer disputes the issues in relation to the life insurance policies, but ultimately agrees with the essence of paragraph 107.
- [37] I also note the contents of the affidavit of Mr Emerson, which sets out the steps that have been taken in this estate over the years.
- [38] In my view, it is clear that matters have clearly stalled. Notwithstanding that Mrs Ziesemer has now commenced a separate proceeding with respect to the administration of the estate, I am not confident about the future.

- [39] In relation to the removal of an executor, the law was conveniently expressed by White J in the decision of *Colston v. McMullen*¹. In that decision, her Honour said at paragraph 38:

“^[39] The jurisdiction to remove an executor of a deceased estate is sourced in s 6 and, possibly, s 52(2) of the *Succession Act* 1981 (Qld) and, with respect to executors and trustees, ss 5 and 80 of the *Trusts Act* 1973 (Qld). The court also has an inherent power to supervise executors since “the real object [of the grant of probate] ... is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto”; and to supervise trustees in the administration of trusts. The office of executor and the office of trustee are, by virtue of modern statutory intervention, now very similar,⁸ although there are also marked distinctions.

[39] The court may remove an executor to whom a grant of probate has been given. This occurs by the revocation of the grant. Such a removal will occur when the court is persuaded that the due and proper administration of the estate in the interest of those beneficiaries entitled has been put in jeopardy, or prevented, by reason of the acts or omissions of the executor or, because of matters personal to him or her, or for some good reason the executor is not a fit and proper person to carry out the executorial duties.

[40] The jurisdiction to remove a trustee is exercised by the court to protect the interests of the beneficiaries.” (footnotes omitted)

- [40] In *Miller v. Cameron*², Justice Dixon stated;

“The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee.

In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised. But in a case where enough appears to authorise the Court to act, the delicate question whether it should act and proceed to remove the trustee is one upon which the decision of a primary Judge is entitled to especial weight.”

- [41] In *Colston*, White J considered that, in that case it could be rightly said there were numerous disputed issues of fact which, for complete resolution, would require a lengthy trial. Her Honour held however that the overall impression gained from the material was that it was a very difficult estate to administer, and that the estate had been difficult to manage.

¹ [2010] QSC 292.

² [1936] HCA 13.

[42] In my view, that is the position here. This is a complex and difficult estate. Mrs Ziesemer has struggled valiantly, trying to administer the estate and conduct a large farming enterprise after the very concerning death of her husband. However, the fact remains that, after six years, there is an impasse. Family relationships are clearly strained. The matter needs to move forward. An independent person is required to administer the estate and to progress matters.

[43] Accordingly, I consider that there should be orders in the terms proposed by the applicant in this application.

1. The Respondent, Lynette Iris Ziesemer, be removed as Executor of the estate of Rex William Ziesemer (deceased).
2. The Grant of Probate made to the Respondent, Lynette Iris Ziesemer, be revoked.
3. Lynette Iris Ziesemer bring the original Grant of Probate into the Registry.
4. Michael Karl Klatt be granted Letters of Administration with the will to administer the estate of Rex William Ziesemer (deceased), subject to the formal requirements of the Registrar.
5. The costs of and incidental to this Application of all parties appearing on this Application be paid from the estate of the deceased on an indemnity basis.