

# SUPREME COURT OF QUEENSLAND

CITATION: *King v Wogandt: Re Beutel (deceased)* [2015] QSC 98

PARTIES: **JEANETTE THERESE KING**  
(applicant)

v

**JUNE ANNETTE WOGANDT** as executor of the estate of  
**Charles William Leslie Beutel**  
(respondent)

FILE NO/S: BS390/14

DIVISION: Trial

PROCEEDING: Application filed 14 December 2014

DELIVERED ON: 30 April 2015

DELIVERED AT: Brisbane

HEARING DATE: 16 January 2015

JUDGE: Jackson J

ORDERS: **The order of the Court is that:**

- 1. The respondent is removed as executor of the estate.**
- 2. The grant of probate to the respondent dated 15 September 2010 is revoked.**
- 3. Robert Phillip Howard Gunningham is appointed administrator and trustee of the estate and is granted letters of administration with the will dated 20 August 1998 attached.**
- 4. The respondent pay the applicant's costs of the application.**

CATCHWORDS: SUCCESSION – PERSONAL REPRESENTATIVES – TITLE AND ESTATE – REMOVAL AND DISCHARGE – GENERALLY – where an application by the respondent to rectify the testator's last will was dismissed – where an order was made that the respondent sell the estate's interest in land and administer the estate according to law at the time the application was dismissed – where the respondent failed to comply with the order – where the applicant applied for removal of the respondent as executor and trustee of the estate – whether the respondent should be removed as executor of the estate

*Succession Act 1981 (Qld)*, s 6

*Baldwin v Greenland* [2007] 1 Qd R 117; [2006] QCA 293, cited

*Colston v McMullen* [2012] QCA 109, cited

*Colston v McMullen* [2010] QSC 292, cited

*In the Will of Fernando Masci* [2014] QSC 281, cited

*Jee v Jee* [2012] QSC 210, considered

*King v Wogandt: Re Beutel (deceased)* [2014] QSC 175, cited

*Letterstedt v Broers* (1884) 9 App Cas 371; [1884] UKPC 18, followed

*Miller v Cameron* (1936) 54 CLR 572; [1936] HCA 13, followed

*Schumacher v Emmerson* [2013] QSC 205, considered

*Williams v Williams* [2005] 1 Qd R 105; [2004] QSC 269, applied

COUNSEL: M Lawrence for the applicant  
The respondent in person

SOLICITORS: Graceville Lawyers for the applicant  
No solicitors for the respondent

- [1] **Jackson J:** The applicant seeks an order that the respondent be removed as executor and trustee of the estate of Charles William Leslie Beutel (“the testator”). The applicant seeks further orders that the grant of probate to the respondent be revoked and that Robert Phillip Howard Gunningham be appointed personal representative and trustee of the estate, together with consequential orders and costs.
- [2] In *King v Wogandt: Re Beutel (deceased)*<sup>1</sup> (“the first judgment”) I dismissed an application made by the respondent to rectify the testator’s last will, dated 20 August 1998, and made a declaration that the applicant is the beneficiary identified in cl 3(a) of the will. At the same time, I made other orders, including an order that the respondent sell the estate’s interest in land described as the Dundathu property so as to collect and get in the estate of the testator and to administer the estate according to law.
- [3] At that time, there was a fund held in an account by the respondent’s then solicitors. Another of the orders which I made was that the sum of \$30,000 constituted costs to be paid out of the fund. Otherwise, the fund remains in an account held by those solicitors.
- [4] Following those orders, the applicant’s solicitors regularly inquired of the respondent’s solicitors as to progress of the sale of the estate’s interest in the Dundathu property or administration of the estate. No answer was forthcoming.
- [5] Accordingly, the applicant made this application. On the first occasion when the matter came before me, before an application had been filed, the respondent’s solicitors sought an order that they cease to be the solicitors on the record for the

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<sup>1</sup> [2014] QSC 175.

respondent. I made an order that they hold the funds in their trust account pending the resolution of the application.

- [6] Following service on the respondent of the relevant documents, the application came on for hearing on 16 January 2015. The respondent's position was clear but misconceived. She wished, if at all possible, to have a further hearing about the matters that had been resolved against her by the first judgment.
- [7] Otherwise, it appears that the respondent has attempted to facilitate the sale of the estate's interest in the Dundathu property by listing the estate's interest in that property with a real estate agent or agents, but with no success. As to other matters by way of progress in the estate's administration, the respondent has had contact with one of the legatees but not otherwise moved forward. She has not paid any amount to the applicant, apparently because she has not been ordered to do so yet.
- [8] In my view, it is clear that matters can no longer continue in this fashion.
- [9] There is no question that the court has a discretionary power to remove the respondent as executor and to replace her by appointing an administrator with the will annexed under s 6 of the *Succession Act 1981 (Qld)*.<sup>2</sup>
- [10] There are some uncontentious principles that inform the exercise of the discretion. First, the court will not lightly interfere with a testator's appointment of executors and trustees. Second, the due administration of the estate in the interests of the creditors and beneficiaries is paramount. As it was put in *Miller v Cameron*<sup>3</sup> by Dixon J:
- “The jurisdiction to remove a trustee is exercised with a view to the interest 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.”<sup>4</sup>
- [11] A leading case is *Letterstedt v Broers*.<sup>5</sup> The Privy Council referred to removal where there have been:
- “...acts or omissions ... such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.”<sup>6</sup>
- [12] And they said:
- “... In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries.”<sup>7</sup>

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<sup>2</sup> *Williams v Williams* [2005] 1 Qd R 105, 109 [13]; *Baldwin v Greenland* [2007] 1 Qd R 117, [44]; *Colston v McMullen* [2010] QSC 292, [38]-[40]; *Colston v McMullen* [2012] QCA 109, [22]-[23]; *Jee v Jee* [2012] QSC 210, p 11-12; *Schumacher v Emmerson* [2013] QSC 205, [72]-[73]; *In the Will of Fernando Masci* [2014] QSC 281, [35].

<sup>3</sup> (1936) 54 CLR 572.

<sup>4</sup> (1936) 54 CLR 572, 580.

<sup>5</sup> (1884) 9 App Cas 371.

<sup>6</sup> (1884) 9 App Cas 371, 386.

<sup>7</sup> (1884) 9 App Cas 371, 387.

- [13] Delay in the execution of the trust, without good reason or justification is a common ground for removing an executor and trustee. *Jee v Jee*<sup>8</sup> is a recent example. Atkinson J found that the interests of the beneficiaries of the estate in that case were not being met because of the extraordinary delay in the administration of the estate, the end of which did not appear to be in sight. Her Honour made orders removing the executor, revoking the ground of probate and granting letters of administration with the will annexed to an independent solicitor.
- [14] *Schuhmacher v Emmerson & Ors*<sup>9</sup> shows that an executor who incorrectly administers an estate based on a wrong of view of a disputed question as to entitlement to the estate may survive an application for removal. However, it is not comparable to the present case. The respondent in this case contested the issue of her entitlement under the will, leading to my decision in the first judgment. Having lost that dispute, and having been directed to sell the estate's interests in the Dundathu property, she has proved unwilling or unable to do so. She also "demonstrate[s] a lack of understanding of [her] role as executor and trustee, and an unwillingness to accept criticism and mend [her] ways."<sup>10</sup> I do not, however, wish to make further specific findings that are critical of her. It is unnecessary to do so.
- [15] In the circumstances, it is appropriate that the orders applied for are made. Robert Gunningham is an independent solicitor who has sworn that he is prepared to accept the appointment to act as personal representative and trustee. In the circumstances it is appropriate that the orders that are sought should be made in the form of the draft that was tendered at the hearing of the proceeding.
- [16] The applicant applies for an order for costs of the application. In my view that order should also be made. The respondent was unable to understand the difference between her wish to reventilate questions that had already been decided in the first judgment and the questions which arose for decision on this application. The application was necessary and was conducted in an appropriate fashion by the applicant through her lawyers. The respondent should be ordered to pay the applicant's costs of the application.

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<sup>8</sup> [2012] QSC 210.

<sup>9</sup> [2013] QSC 205.

<sup>10</sup> *Williams v Williams* [2005] 1 Qd R 105, 115 [47].