

SUPREME COURT OF QUEENSLAND

CITATION: *Baldwin & Neale v Greenland* [2005] QSC 341

PARTIES: **ROBYN JUNE BALDWIN and CHRISTOPHER CHARLES NEALE**
(applicants)
v
BRUCE WILLIAM GREENLAND
(respondent)

FILE NO: BS9105 of 2005

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 21 November 2005

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 11 November 2005

JUDGE: Wilson J

ORDER:

CATCHWORDS: SUCCESSION – EXECUTORS AND ADMINISTRATORS
– TITLE AND ESTATE OF – REMOVAL AND
DISCHARGE – QUEENSLAND – EXECUTORS -
REMOVAL

EQUITY – TRUSTS AND TRUSTEES – TRUSTEES –
THEIR APPOINTMENT, DISMISSAL, ESTATE, ETC –
RETIREMENT AND REMOVAL – REMOVAL BY THE
COURT – application for removal of respondent as executor
and trustee – application for appointment of Public Trustee as
executor and trustee - where respondent had been removed
from the management of the deceased’s estate during his
lifetime – where respondent has been found guilty of
professional misconduct of the deceased’s affairs – where
professional misconduct was not related to dishonesty

Public Trustee Act 1978, s 27(3)
Uniform Civil Procedure Rules 1999, Rules 603

*Greenland & Batstone v Intellectually Disabled Citizens
Council of Queensland & Anor* [2000] QSC 084, cited
In re Smith [1904] 1 Ch 139, cited
In the Matter of Practitioner X SCT/53; 9 October 2001,
cited
Williams v Williams [2005] 1 QdR 105, cited

COUNSEL: KT Magee for the applicants
L Stephens for the respondent
R McTaggart (solicitor) for The International Gospel Centre Incorporated

SOLICITORS: Streeting Haney for the applicants
Winchester Young & Maddern for the respondent
Stephens & Tozer for The International Gospel Centre Incorporated

- [1] **WILSON J:** This is an application that the respondent be removed as executor and trustee of the estate of Christopher John Neale ("the deceased") and that the Public Trustee of Queensland be appointed in his stead. The applicants are the children of the deceased.
- [2] The deceased died on 20 July 2005 aged 91 years. He was survived by his third wife and the respondents who are the children of an earlier marriage. By his will made on 12 August 1994 he appointed the respondent (a solicitor) and James Glyn Batstone as the executors and trustees of his estate. Mr Batstone has renounced his right to probate and execution of the will. The respondent has applied for probate, but the female applicant has objected to a grant of probate being made to him on the ground that he has demonstrated unfitness to be the executor of the estate.
- [3] By his will the deceased left his widow a weekly allowance of \$350-00 (to be adjusted annually) and the applicants \$150,000-00 each. By clause 3(b) he gave his home unit at Golden Gate, Surfers Paradise to Mr Batstone, but that legacy was adeemed by the transfer of the unit to him and Mrs Batstone before the deceased died. By clause 3(e) the deceased provided -
- “(e) As to the rest and residue of my estate, the nett income derived therefrom for the express benefit and care of such children throughout the world as may be being cared or provided for by the charity or organization known as WORLD ACTION INTERNATIONAL GOSPEL CENTRE INCORPORATED for a period of 20 (twenty) years from the date of my death whereupon such property, investments or the like which still form part of my estate, shall be distributed to such organization or organizations of a similar type as may be directed by and at the discretion of my said Trustees.”
- [4] Searches conducted so far have failed to reveal the existence of an entity called "World Action International Gospel Centre Incorporated", although there is an entity "The International Gospel Centre Incorporated", which was represented at the hearing of this application. The validity of the residuary provision and the true identity of the residuary beneficiary are not matters for determination in this application. I note that Mr JT Beard, a director of The International Gospel Centre Incorporated, deposed to having no objection to the respondent's remaining as executor, and expressed a slight preference for his doing so.
- [5] The deceased was a property developer. Although the evidence is somewhat incomplete, it seems that the deceased conducted his property developments through a number of companies collectively referred to as "the Neale Group of

Companies". Until August 1995 the applicants held small shareholdings in the companies. The deceased acquired their shares and became the sole shareholder in Neale Industries Pty Ltd. The deceased was the only director of that company until November 1996 when his accountant Mr Baker was appointed. The respondent and Mr Batstone became directors in January 1997.

- [6] It was common ground that the deceased had testamentary capacity when the will was made, but that subsequently he was progressively affected by dementia to the point where he lost that capacity and the capacity to manage his own affairs. In June 1995 he was examined by Dr Ziukelis, a psychiatrist, who considered that he then had testamentary capacity, but that his capacity would deteriorate over time. In August that year he gave an enduring power of attorney to the respondent (having previously granted an enduring power of attorney to the respondent and Mr Batstone). In November that year he was examined by Dr Elizabeth Merson, a physician specialising in geriatric medicine, who considered that he did not have the capacity to enter into a contract for the sale of real estate.
- [7] In 1998 the respondent was effectively removed from the management of the deceased's affairs by the intervention of the Legal Friend and a decision of the Intellectually Disabled Citizens Council of Queensland that the deceased be provided with the assistance of having his estate managed by the Public Trustee. The Council's decision was affirmed on internal review and on appeal to this Court: *Greenland & Batstone v Intellectually Disabled Citizens Council of Queensland & Anor* [2000] QSC 084.
- [8] By mid-January 2001, Mr Batstone, Mr Baker and the respondent had all resigned as directors of Neale Industries Pty Ltd and Mr Batstone's son Hayden Batstone and Stephen Forster (an officer of the Public Trustee) had been appointed as directors. The deceased's shareholding in Neale Industries Pty Ltd is potentially very valuable, because of the company's ownership of land at Coomera.
- [9] The Public Trustee wrote to the applicants' solicitors dated 11 August 2005 in these terms -

“Below is a list of estate assets:

Neale Industries Pty Ltd

- 16 Walterway Drive Coomera – valued 24/6/04 - \$5,725,000.00
- Funds held by the company - \$25,000.00 approx

Personal assets

- Funds held by the Public Trustee - \$135,000.00 approx.

For your information, it is considered that the Waterway Drive property is valued at substantially more than \$5.72m.”

He has supplied the respondent's solicitors with the same particulars of the estate and has undertaken to provide a full accounting of the assets and current liabilities "on receipt of a certified copy of the probate document": letter to the respondent's solicitors 11 August 2005. In a further letter to the applicants' solicitors of 24

October 2005 he said that he was prepared to act as executor of the estate "if agreed upon by all parties".

- [10] In *Williams v Williams* [2005] 1 QdR 105 I considered whether this Court has power to remove an executor who has not taken out probate. I concluded that it has such power under s 6 of the *Succession Act* 1981. It has power to remove a trustee and appoint a substitute trustee under s 80(1) of the *Trusts Act* 1973.
- [11] The applicants submit that the conduct of the respondent which resulted in his removal from the management of the deceased's estate while he was still alive was such that he ought not be allowed to act as the executor and trustee of his estate. As they pointed out -
- (a) the will was executed before the respondent's conduct which resulted in his removal from the management of the deceased's affairs; and
 - (b) that conduct occurred after the deceased had lost capacity to alter his will to remove the respondent as executor and trustee.
- [12] The Solicitors Complaints Tribunal found the respondent guilty of three counts of professional misconduct in relation to his management of the deceased's affairs, and fined him \$2,000-00: *In the Matter of Practitioner X* SCT/53; 9 October 2001.
- [13] Broadly there were three aspects of the respondent's stewardship of the deceased's affairs which resulted in his being removed from their management:
- (i) the transfer of the unit at Golden Gate to Mr and Mrs Batstone;
 - (ii) the payment of taxation owing by the respondent by Neale Industries Pty Ltd; and
 - (iii) the intermingling of funds.
- Dishonesty was not alleged against him, but rather mismanagement and the failure to exercise sufficient care in relation to the deceased's affairs.
- [14] The consideration for the transfer of the unit was stated as \$140,000-00 in the transfer document, but in fact no consideration passed. The respondent witnessed the deceased's signature as transferor and signed the document as solicitor for the transferees. Although the document was executed on 24 August 1995, he subsequently dated it 20 December 1995, apparently to avoid having to pay a penalty for submitting the document for stamping late. In proceedings before the Solicitors Complaints Tribunal he admitted inserting a date of execution which he knew to be false and submitting the document for stamping knowing it bore an incorrect date and that penalty duty was likely to be imposed if the Stamps Officer was aware of the true date of execution.
- [15] In January 1997 the respondent's co-directors of Neale Industries Pty Ltd, with his knowledge, authorised the company to pay \$150,000-00 to the Australian Taxation Office on his behalf. This was to be accounted for as \$47,285-14 outstanding legal costs and outlays plus \$56,000-00 director's fees for September 1995 - January 1997 at \$800-00 per week plus \$46,714-86 advance payment pursuant to a retainer agreement with the company. In fact he was not a director of the company over the

- period to which the \$56,000-00 was said to relate, and examination of the company's accounts showed no record of the transaction.
- [16] The respondent acted as solicitor for the vendor in a number of transactions in which the deceased or one of his companies sold land. The proceeds of sale were deposited to accounts other than that of the particular entity within the group which was the vendor.
- [17] Counsel for the respondent conceded that his client had mismanaged the deceased's affairs in his lifetime, but stressed that there had been no allegation or finding of dishonesty against him. He submitted that the past problems had been rectified, that proper accounting procedures had been put in place, and that given the respondent's express intention to retain professional assistance where needed, there is no likelihood of a recurrence of such conduct. Accordingly, he submitted, the assets of the estate would not be in jeopardy under the respondent's control.
- [18] The land at Coomera is being developed as a marina.
- [19] The respondent has the support of Mr Hayden Batstone, who is a director of Neale Industries Pty Ltd and Neale Properties Pty Ltd.
- [20] Counsel for the respondent drew attention to the residuary clause of the will, under which the Trustees are empowered to direct to whom the capital is to be distributed after the expiration of the 20 years in which World Action International Gospel Centre Incorporated is entitled to the income. As he submitted, the Court will not lightly interfere with a testator's selection of executors and trustees, particularly where the will contains a provision such as this. But I do not accept his submission that the removal of the respondent as trustee could cause an intestacy in respect of the residuary estate. Under clause 3(e) the power of selecting the organization or organizations to take the residue after 20 years is exercisable by "my said Trustees". Had the deceased intended that it be exercisable by the persons named in the will as trustees (the respondent and Mr Batstone) to the exclusion of the trustees for the time being, one would have expected clear and apt language to that effect. Here there was nothing to displace the prima facie presumption that the deceased intended the power to be exercisable by the trustees for the time being: see Picarda *The Law and Practice Relating to Charities* (London: Butterworths, 1995) 2nd ed at 456 – 457; *In re Smith* [1904] 1 Ch 139. Indeed, it was even contemplated elsewhere in the will that the respondent might not accept the office of trustee: see clause 6 in relation to his entitlement to charge for professional services as solicitor to the estate "whether or not he accepts the office of trustee under this my will".
- [21] The Court's overriding concern is the due administration of the estate in the interests of creditors and beneficiaries. The estate is a large one, and its administration potentially complex. The respondent is a 66 year old man and with 40 years' experience as a solicitor. That he was so careless in the management of the deceased's affairs during his lifetime that he was removed in favour of the Public Trustee does not augur well for his future performance as executor and trustee. The Court has no more than his assurances that he has seen the error of his ways and that there will be no repetition of past failures. In any event, given his age, it seems unlikely that in 20 years' time he would still be the trustee to exercise the power of appointment over the residuary estate. In the circumstances I am satisfied that the estate would be best served by his removal as executor and trustee.

- [22] Under rule 603 of the *Uniform Civil Procedure Rules* there is a descending order of priority of persons to whom the Court may grant letters of administration with the will, beginning with the trustee of the residuary estate. However, the Court may make a grant to any person in priority to a person mentioned in the list.
- [23] The applicants seek the appointment of the Public Trustee as executor and trustee. While resisting the application in its entirety, the respondent has asked the Court to consider the joint appointment of him and the Public Trustee if it is not otherwise minded to allow him to remain in those roles. Given the history of the respondent's having been removed from the management of the deceased's estate during his lifetime and his having been replaced by the Public Trustee, I consider that the interests of the estate would not be well served by such a joint appointment.
- [24] The consent of the Public Trustee is required before the Court appoints him as executor and trustee: *Public Trustee Act 1978 s 27(3)*. In view of the qualification on the consent he has already given ("if agreed upon by all parties"), the matter should be adjourned so that his unqualified consent may be sought.
- [25] The application is accordingly adjourned to a date to be fixed. Costs are reserved.