

SUPREME COURT OF QUEENSLAND

CITATION: *Budulica v Budulica* [2017] QSC 60

PARTIES: **SLAVICA BUDULICA (ALSO KNOWN AS SYLVIA BUDULICA)**
(applicant)
v
STANISLAV BUDULICA (ALSO KNOWN AS STAN BUDULICA) AS EXECUTOR OF THE ESTATE OF THE LATE KATICA BUDULICA (ALSO KNOWN AS KAJA BUDULICA AND KATA BUDULICA), DECEASED
(respondent)

FILE NO: BS1740 of 2016

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 21 April 2017

DELIVERED AT: Brisbane

HEARING DATE: 30-31 January 2017

JUDGE: Mullins J

ORDER: **1. The originating application is dismissed.**
2. The application for relief in paragraphs 3 to 6 filed on 23 June 2016 in proceeding BS5632 of 2015 is dismissed.

CATCHWORDS: SUCCESSION – PERSONAL REPRESENTATIVES – TITLE AND ESTATE – REMOVAL AND DISCHARGE – GENERALLY – where the respondent was appointed the executor and trustee under his mother’s will – where the whole of the estate was given on trust for the applicant (who was the respondent’s sister) and the respondent in equal shares – where the applicant and the respondent were estranged – where the estate mainly comprised two real properties which were rented – where the respondent collected rents in cash and paid for expenses in cash – where there were delays in the administration of the estate – where the applicant complained about the lack of information and documents provided to her about the estate, the expenses incurred by the respondent, and other matters – where the administration of the estate was significantly advanced – whether the conduct of the respondent justified his removal as the executor and trustee

Succession Act 1981 (Qld), s 6, s 49

Uniform Civil Procedure Rules 1999 (Qld), r 642, r 645

Baldwin v Greenland [2007] 1 Qd R 117; [\[2006\] QCA 293](#), considered

Budulica v Budulica [2016] QSC 184, related

Re Greif; Kantor v Wilding [2005] VSC 266, considered

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

COUNSEL: The applicant appeared in person
A B Fraser for the respondent

SOLICITORS: Mitchells Solicitors for the respondent

- [1] Ms Slavica Budulica who is the applicant and Mr Stanislav Budulica who is the respondent are the children of Mrs Katica Budulica who died on 8 December 2013. Mrs Budulica's husband, Mr Stanko Budulica, who was the father of the applicant and the respondent, had died on 1 January 2001. The respondent was appointed the executor and trustee of Mrs Budulica's last will dated 20 December 2000 and the whole of her estate was given on trust for the applicant and the respondent in equal shares. Probate of the deceased's last will was granted to the respondent on 25 August 2014.
- [2] By originating application filed on 18 February 2016, the applicant seeks the removal of the respondent as the executor and trustee of Mrs Budulica's will pursuant to s 6 of the *Succession Act* 1981 (Qld) (the Act) and/or r 642 of the *Uniform Civil Procedure Rules* 1999 (Qld) and ancillary relief in relation to the appointment of a substitute administrator and trustee and other orders in relation to the administration of Mrs Budulica's estate.
- [3] The applicant had commenced another proceeding BS5632 of 2015 against the respondent applying for further provision from her mother's estate and an extension of time to make the family provision claim. That application was dismissed: *Budulica v Budulica* [2016] QSC 184. The applicant has appealed against the dismissal of the application to extend the time for the applicant to make the family provision claim and the decision on the appeal has not yet been made.
- [4] The applicant filed an application on 23 June 2016 (the June 2016 application) that was placed on the file relating to the family provision proceeding, but which related to the proceeding to remove the respondent as executor. On 7 October 2016, it was ordered that paragraphs 3 to 6 of the June 2016 application be consolidated with proceeding BS1740 of 2016. The hearing on 30 and 31 January 2017 was therefore in relation to those matters that remain extant between the parties in respect of the application to remove the respondent as executor and trustee and the ancillary application for the orders sought in paragraphs 3 to 6 of the June 2016 application.
- [5] The relief sought in paragraph 5 of the June 2016 application is for the immediate removal of the respondent as the executor of Mrs Budulica's estate and the appointment

of an independent lawyer in his stead and therefore overlaps with the application in the current proceeding. The relief sought in paragraph 3 of the June 2016 application for the disclosure of any bank accounts, whether jointly or otherwise, of Mrs Budulica and the dates on which they were opened is similar to the relief sought in paragraph 1(a) of the applicant's application filed in this current proceeding that was dismissed on 10 February 2016. By paragraph 4 of the June 2016 application, the applicant is seeking information on the use of Mrs Budulica's furniture by the respondent. The applicant in paragraph 6 of the June 2016 application seeks an interim distribution of the estate for the purpose of assisting her with payment of legal fees.

- [6] The applicant appeared on her own behalf at the hearing on 30 and 31 January 2017.

The nature of the estate

- [7] According to the respondent, the significant assets in the deceased's estate are the two real properties situated at Stuart Street, Bulimba and Barton Road, Hawthorne. The Stuart Street property is improved by a brick building that comprises four units. There is a four bedroom stucco brick dwelling house on the Barton Road property that was built in or about the 1930s. The respective titles to those properties were transmitted to the respondent as personal representative on 2 November 2016.
- [8] There is a dispute between the parties on whether their mother had a beneficial interest in another real property situated at Jamieson Street, Bulimba that was purchased under a contract dated 15 November 1986 by the respondent and his father who were registered on the title as joint tenants. It is the existence of that dispute that comprises one of the grounds on which the applicant seeks the respondent's removal as the executor and trustee of their mother's estate.
- [9] Although there was some evidence adduced at the hearing in relation to the purchase and ownership of the Jamieson Street property and how the respondent and his parents dealt with the income and expenses from that property over the years which did not conform with the interests reflected by the registered title, the issue about the ownership of that property could not properly be decided on the application to remove the respondent as executor and trustee. The respondent is adamant that it was their father's intention that he and his father owned the property as joint tenants. Mr Fraser of counsel on behalf of the respondent submitted that, if the applicant were advised to pursue the ownership of the Jamieson Street property as an estate asset, she could apply to the court for leave pursuant to s 49(2) of the Act to seek a declaration on behalf of the estate that the respondent holds the Jamieson Street property on trust for the estate to the extent that the evidence relied on by the applicant supports the estate's interest in that property.

The administration of the estate

- [10] The applicant and the respondent are estranged. On 21 March 2014 the applicant obtained a temporary protection order against the respondent. On the return date of the application for a protection order, the respondent consented, without admissions, to the making of a protection order against him. The order was made for two years

commencing on 2 April 2014. The respondent was ordered to be of good behaviour towards the applicant and not commit domestic violence against her and was prohibited from approaching to within 100 metres of the applicant or her usual place of residence. The respondent was also prohibited from contacting or attempting to contact or asking someone else to contact the applicant, except by and through a legal representative acting for the respondent in any pending litigation or matters associated with the estate of Mrs Budulica. There were also orders prohibiting the respondent from using the internet or any communication device or telephone to communicate with the applicant.

- [11] The respondent continued managing the rented properties of Mrs Budulica at Stuart Street and Barton Road in the same manner in which his mother had before she died. This included collecting the rents from the tenants in cash and then using the cash to pay expenses related to the properties and the estate. The respondent has advanced funds to the estate to cover expenses not met by the income of the estate.
- [12] The respondent engaged solicitors to act on his behalf to deal with the correspondence from the applicant's solicitors that commenced on 28 March 2014. An offer was made by the respondent to the applicant in the respondent's solicitors' letter of 4 April 2014 that she choose one of the real properties, so that they could be transferred *in specie* to the applicant and the respondent respectively. It took the applicant through her solicitors five months to respond to this offer. Although in September 2014 the applicant was prepared to take the transfer of the Barton Road property, that did not proceed, because of the applicant's concern about capital gains tax implications of such a transfer. The solicitors for the respondent also foreshadowed in their letter of 22 October 2014 to the applicant's solicitors that the respondent had been unable to locate the title deeds for both properties and that an application may need to be made to the Titles Office to dispense with production of them. (The title searches showed that certificates of title had been issued in respect of both properties.)
- [13] The respondent did not inform the Commonwealth Bank formally of Mrs Budulica's death until October 2014 and opened an account in the estate's name on 25 November 2014 to which he paid the balance of Mrs Budulica's Travel Card of \$21.52. That was quickly reduced by account fees and some rents were deposited by the respondent to that account from 4 August 2015. After the hearing of this proceeding before Byrne SJA on 11 July 2016, the respondent caused all rents received from the Stuart Street and Barton Road properties to be paid into the estate bank account.
- [14] It is unnecessary to recite the content of all the correspondence that has passed between the parties' lawyers subsequent to April 2014, as many claims have been made on behalf of the applicant for information, documents or procedures to which the applicant was not entitled at the time the claim was made (such as an estate accounting) or the claims were irrelevant to this application, such as an inquiry as to the use by the respondent of the power of attorney in his favour from Mrs Budulica while she was alive, when the respondent had not relied on the power of attorney in respect of any transaction. In respect of other matters the subject of correspondence, some issues have been resolved by explanation or action.
- [15] By 7 April 2015, the applicant was requesting an interim distribution. On the basis the expenses in the estate had exceeded income by a significant amount, the respondent's

solicitors advised the applicant's solicitors on 7 May 2015 that there were no funds available for any interim distribution.

- [16] The respondent has lodged tax returns on behalf of the estate. The administration of the estate can be fairly described as significantly advanced.
- [17] The completion of the administration of the estate has been held up by the family provision proceeding and the application for removal of the respondent as the executor and trustee and ancillary relief. Even if the family provision proceeding does not proceed, the administration of the estate could be further delayed by what course of action the applicant may seek to take in attempting to prove that the Jamieson Street property is an estate asset. At the conclusion of the hearing on 31 January 2017, the applicant who had confirmed she could not afford to take one of the properties in *specie* consented to the Barton Road property being sold by the respondent to facilitate an interim distribution being made to the applicant.

The grounds for the application

- [18] The material relied upon by the applicant at the hearing was extensive and traversed many matters that had been raised with the respondent and addressed during the course of the administration and have no continuing direct relevance for the current application. These include that the respondent did not identify Mrs Budulica's Travel Card account at the outset of the administration, but ultimately ascertained it had a credit amount only of \$21.52; that the respondent claimed his legal expenses of \$1,500 in responding to the protection order application as an estate expense, on the basis the expenditure arose out of his attempting to undertake executorial duties, but subsequently reversed that expense; and that the respondent did not treat the Toyota Corolla motor vehicle registered in Mrs Budulica's name as an estate asset, because the respondent withdrew the funds from his personal home loan account to purchase the vehicle and he made the repayments on his home loan account, but ultimately to avoid dispute with the applicant, the respondent agreed to treat the vehicle as an estate asset, as was advised by the respondent's solicitors in their letter dated 8 March 2016.
- [19] Apart from the issue of whether any part of the Jamieson Street property is held on trust by the respondent for the estate, the two main grounds relied on by the applicant to support removal of the respondent as the executor and trustee were the delay in the administration of the estate and the failure of the respondent to bank all the rents collected from tenants of the Stuart Street and Barton Road properties until July 2016. The applicant alleges she is significantly prejudiced by the delay due to her circumstances. She describes herself "in dire financial circumstances" and "unable to work as a result of significant health problems".

The respondent's conduct of the administration

- [20] Both in his affidavits and oral evidence the respondent offered explanations for the manner in which he conducted the administration from the time of Mrs Budulica's death and accepted that he was derelict in not opening and using an estate bank account from the time of Mrs Budulica's death. He has produced spreadsheets, however, that itemise

all the rents he collected in cash and the expenses which he paid from that cash. As at 18 January 2017, the respondent's records show that the estate expenses exceed income by some \$130,000.

- [21] One aspect of the applicant's complaints about the administration was that two of the units in the Stuart Street property were left vacant for too long. Unit 2 was vacant between 12 July 2014 until 12 December 2015. When the tenant vacated the unit in July 2014, the respondent was unable to let the property, because it required extensive renovations due to 10mm gaps in the walls from the movement of the building on clay foundations. The respondent had difficulties in obtaining quotations from relevant tradespeople and then in getting tradespeople to carry out the work. He ended up doing the work himself and made no claim on the estate for his labour. He was able to rent the unit at \$360 per week, when it had previously been rented at \$200 per week. Unit 4 at the Stuart Street property was vacant from 25 October 2014 until 14 March 2015. The respondent explained it was necessary to carry out a range of repairs and maintenance after the tenant left in October 2014. For the same reasons that he ended up carrying out the work on unit 2, he carried out the work himself on unit 4. The work was completed in or about November 2014 and an agent was engaged to let the unit. It took longer to obtain a new tenant which the respondent blamed on an oversupply in the market at the relevant time. Unit 4 was let on 27 March 2015 for \$350 per week, when it had previously been let for \$300 per week.
- [22] In his own right, the respondent owns a number of properties from which he earns rental income, and he was challenged in cross-examination on whether he was charging the estate for expenses that related to his own properties. On this and other matters on which he was cross-examined by the applicant (and subject to his acknowledged omission until July 2016 in banking all funds belonging to the estate), the applicant provided responses which I considered satisfactory in the circumstances as to his conduct of the administration of the estate. It is apparent that the applicant may have approached the management of the estate properties differently to the respondent, but that does not mean that what the respondent has done did not amount to prudent or proper administration of the estate.
- [23] The respondent has provided the applicant information and documents in relation to all the deceased's accounts that were in her name. The respondent takes the point that the joint account which the deceased had at the date of her death with the respondent resulted in those funds belonging to the respondent by survivorship and they were never part of the deceased's estate. The respondent has not provided copies of the joint account statements to the applicant, but that was not required of him as executor.
- [24] The respondent not unreasonably attributes some of the delays in the administration of the estate as due to the necessity to respond to the continuing requests made by the applicant or on her behalf for substantial information and documents in respect of the estate. The progress had also been affected by the fact that the applicant had initially accepted the proposal to take the transfer of one of the real properties, but then resiled from that arrangement.
- [25] In September 2016 the respondent instructed his solicitors to lodge transmissions by death in respect of the two properties and, if necessary, apply to dispense with the title

deeds which had not located. Shortly afterwards, the respondent was advised by a representative of the Queensland Law Society that the Society had received the original certificates of title for the properties after the firm of Potts & Co went into receivership. That was a firm of which the respondent had made inquiries in April 2014, as to whether they had the certificates of title and had been told in January 2015 that the firm held no original documents on behalf of Mrs Budulica. The original certificates of title were produced to enable the transmissions by death of the two properties to be registered in favour of the respondent as personal representative on 2 November 2016. The applicant was sceptical about these title deeds being lost for over two years, but there is no reason to doubt, or material that casts doubt on, the respondent's explanation.

The applicable law

- [26] Although the applicant relies on r 642 of the *UCPR* in her application, none of the circumstances specified in paragraph (a) or (b) of r 642(1) applies to the respondent. The applicant therefore relies on the jurisdiction conferred under s 6(1) of the Act on the court to revoke a grant of probate "as may be convenient". The jurisprudence that has developed in relation to the exercise of this discretionary power has as its starting point that a court will not interfere lightly with the testator's choice of an executor: *Baldwin v Greenland* [2007] 1 Qd R 117 at [44]:

"The jurisdiction, both statutory and inherent, is a supervisory and a protective one. It is always appropriate and necessary for a court asked to exercise it to have regard to the testator's wishes as to the identity of an executor or trustee. The testator's choice may be based on loyalty, or on respect, or on necessity, or on the profession of the chosen person, or on other matters the testator knew about the chosen person; the reason for the choice might never be clear to a court. The overriding assumption must be that the testator thought the person chosen was worthy of trust, even when well aware when making a choice of existing hostility (from family members) toward the chosen executor or trustee, or of other grounds for doubt about the wisdom of the choice. The decision in *Gowans v Watkins*, to which Mr Stephens referred, is an example of a court respecting a testator's wishes, where no great mischief in administering the estate had been done by the person chosen by the testator, and where there were serious family hostilities. But the overriding object of the power remains the due and proper administration of estates." (footnote omitted)

- [27] The jurisdiction to remove an executor and trustee is usually exercised only where there are grounds for removal, such as misconduct in the administration.
- [28] Where an executor has fallen short of conduct required of an executor, it is not irrelevant to consideration of whether to remove the executor that, when that has been pointed out to the executor, the executor shows a willingness to conform with the obligations of an executor: *Williams v Williams* [2005] 1 Qd R 105 at [47].
- [29] The stage of the administration at which the application is made is also relevant: *Re Greif; Kantor v Wilding* [2005] VSC 266 at [17]-[18] where the fact that little remained to be done in the estate and the cost of the introduction of a new administrator at that

late stage would be a burden on the estate enabled the court to refuse to remove the administrator.

Should the respondent be removed as executor and trustee?

- [30] It could never be an acceptable justification of the respondent's failure to open a bank account in the estate's name to deposit the rents and other moneys he collected on behalf of the estate that he was continuing the practice of his mother in managing her properties.
- [31] The willingness of the respondent by July 2016 to address the shortcomings in this manner in which he had administered the estate, however, and what that indicates about his approach to completing the administration of the estate in a proper manner are relevant considerations on this application. It is also relevant that the respondent has personally undertaken the day to day management of the rented properties and applied his experience in managing properties, in order to preserve the income from the estate properties. The applicant herself by her demands and conduct has contributed to the delays in the administration of the estate.
- [32] Even though the applicant remains largely unsatisfied with the spreadsheets prepared by the respondent to show the income and expenses of the estate and the steps he has undertaken in the course of the administration of the estate, the respondent has managed eventually from the viewpoint of the court, even if not from the applicant's viewpoint, to respond sufficiently to this stage of the administration to inquiries made by the applicant in relation to the estate that were appropriate to address. Ultimately, the respondent must be prepared to file estate accounts for assessment and passing, if the applicant applies successfully for an order for that to occur. The fact that r 645 of the *UCPR* may permit such an application to be made may operate as another check on the respondent's administration.
- [33] If the applicant is so advised in relation to the making of any application in respect of the Jamieson Street property, there is a process by which that may be done pursuant to s 49(2) of the Act, even if the respondent remains as the executor and trustee of the estate.
- [34] It was the choice of Mrs Budulica to appoint the respondent as her executor and trustee. The antipathy between the respondent and the applicant has not prevented the respondent from carrying out his duties as executor. I am not satisfied that the applicant has discharged the onus she bears to prove that, at this stage of the administration, there are grounds that make it necessary or desirable to remove the respondent as the executor and trustee. The advantages to the respondent continuing in his role as executor and trustee outweigh any disadvantage.
- [35] It was vexatious for the applicant to make a further application for the disclosure of Mrs Budulica's bank accounts when an application for similar relief had previously been unsuccessful. The issue about Mrs Budulica's personal effects had been exhaustively traversed in the correspondence between the parties' solicitors and the applicant has not shown why the court should interfere at this late stage over the personal effects some of which are held by each of the parties. Until one of the real properties is sold, there are

no liquid funds in the estate for making any interim distribution to the applicant. It is therefore not appropriate to grant any of the ancillary relief sought in paragraphs 3 to 6 of the June 2016 application.

Orders

- [36] It follows the orders which should be made are:
1. The originating application is dismissed.
 2. The application for relief in paragraphs 3 to 6 filed on 23 June 2016 in proceeding BS5632 of 2015 is dismissed.
- [37] I will hear the parties on the appropriate order for costs. In the meantime I make the following observations. Some of the complaints of the applicant made in the course of this proceeding resulted in a change in the manner in which the respondent conducted the administration, but by the time this application was due to be heard, the manner in which the respondent was endeavouring to carry out his duties was unlikely to result in his removal. The oppressive manner in which the applicant has conducted her case that was heard on 30 and 31 January 2017 has no doubt contributed to additional costs being incurred by the respondent in the matter which reduces the net residuary estate available for distribution to both parties. I have considered whether I should make an order that limits the costs the respondent can recover from the estate, in order to give some recognition to the fact that the bringing of this application contributed to the respondent regularising some aspects of the administration of the estate. My inclination in relation to the costs is therefore to limit the indemnity the respondent would otherwise be entitled to from the estate in respect of the costs of the originating application to 90 per cent of the respondent's costs of the originating application. I would not put any such limitation on the respondent's costs in respect of the June 2016 application.