# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Re McLennan* [2018] QSC 124 |
| PARTIES: | **IN THE WILL OF LLOYD JOHN WILSON MCLENNAN (dec'd)**<br>**MARGARET ISOBEL SPEED**<br>(applicant) |
| FILE NO/S: | No 4923 of 2017 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 1 June 2018 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 May 2018 |
| JUDGE: | Davis J |
| ORDER: | **1. Pursuant to section 6 of the *Succession Act* 1981 (Qld), Margaret Isobel Speed and David Lloyd McLennan be removed from the office of executor.**<br>**2. Pursuant to section 6 of the *Succession Act* 1981 (Qld), the Grant of Probate issued to Margaret Isobel Speed and David Lloyd McLennan be revoked.**<br>**3. Michael Karl Klatt be appointed an Administrator with the Will of the estate of Lloyd John Wilson McLennan in place of the executors Margaret Isobel Speed and David Lloyd McLennan.**<br>**4. Letters of Administration with the Will dated 2011 be granted to Michael Karl Klatt, subject to the formal requirements of the Registrar.**<br>**5. Any requirement for advertising the intention of Michael Karl Klatt to obtain a grant of Letters of Administration with the Will be dispensed with.**<br>**6. Michael Karl Klatt as Administrator with the Will receive no personal remuneration, but be entitled to engage his employers from time to time as his solicitors and that their fees be assessed by an independent cost assessor pursuant to** |

**the Supreme Court Scale, as varied from time to time, on an indemnity basis, those fees to be assessed at approximately two monthly intervals and on completion of the administration.**

7. **Pursuant to sections 82 and 90 of the *Trusts Act* 1973 (Qld), all property of the estate in the name of David Lloyd McLennan and Margaret Isobel Speed as personal representative vest in Michael Karl Klatt as Administrator with the Will.**

8. **Michael Karl Klatt as Administrator with the Will be registered as the proprietor of any real property of the deceased pursuant to section 114 of the *Land Title Act* 1994 (Qld).**

9. **Liberty be granted to Michael Karl Klatt as Administrator with the Will to apply.**

CATCHWORDS: SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – ALTERATION AND REVOCATION OF GRANTS – GENERALLY – where the two executors are the children of the deceased – where the applicant is one of the executors and applies to replace the executors with an administrator – where a beneficiary who is not an executor supports the application – where the application is opposed by the other executor – where there has not been misconduct or unfitness demonstrated – whether the grant of probate should be revoked and an administrator appointed

*Succession Act* 1981 (Qld) s 6, s 49
*Uniform Civil Procedure Rules* 1999 (Qld) r 642

*Baldwin v Greenland* [2007] 1 Qd R 117, followed
*Budulica v Budulica* [2017] QSC 60, cited
*Chesney & Anor v Tognola & Anor* [2011] QSC 340, cited
*Gowans v Watkins* (Unreported, Supreme Court of Victoria, Teague J, 21 February 1996), considered
*Mataska v Browne* [2013] VSC 62, cited
*Re Greif; Kantor v Wilding* [2005] VSC 266
*Richards v Reardon* [2006] NSWSC 1252, cited
*Williams v Williams* [2005] 1 Qd R 105, cited
*Ziesemer v Ziesemer* [2011] QSC 214, cited

COUNSEL: D J Morgan for the applicant
C A Brewer for David Lloyd McLennan
S W Trewavas for Peter John McLennan

SOLICITORS: Fredriksen Legal for the applicant
Creevey Russell for David Lloyd McLennan
Marland Law for Peter John McLennan

[1] The applicant, Ms Margaret Isobel Speed (Ms Speed), is one of two executors of the deceased estate of Lloyd John Wilson McLennan (Mr McLennan Senior) who died on 18 September 2016. David Lloyd McLennan (Mr David McLennan), who is one of the respondents to the application, is the other executor. Both executors, and Peter John McLennan (the other respondent to the application, referred to as Mr Peter McLennan) are the children of Mr McLennan Senior, who left a will dated only "2011" (the Will). Probate was granted to Ms Speed and Mr David McLennan by this Court on 6 June 2017.

[2] Ms Speed seeks orders revoking the grant of probate to her and Mr David McLennan,[1] the appointment of Michael Karl Klatt (Mr Klatt) as administrator of the estate, and consequential orders. Mr David McLennan opposes the application. Mr Peter McLennan supports it. It is common ground that if the result of the application is that the executors ought to be removed, then Mr Klatt is a suitable person to administrator the estate and should be appointed administrator.

**Background**

[3] The Will contains various bequests and some operate as alternatives to other bequests depending upon which beneficiaries survived Mr McLennan Senior. Each of Ms Speed, Mr David McLennan and Mr Peter McLennan survived Mr McLennan Senior but Mr McLennan's wife, Olive Isabel McLennan (Mrs McLennan), predeceased him.

[4] The operative bequests then, according to the terms of the Will, are as follows:

(i) Mr McLennan Senior's interests in the property "Eurombah East" and the stock depastured on that property pass to Mr David McLennan.[2]

(ii) All shares held by Mr McLennan Senior and all dividends paid after his death pass to Ms Speed;[3]

---

1 Pursuant to *Succession Act* 1981 (Qld) s 6.

2 Clauses 3.2 and 3.6.5 of the Will.

3 Clause 3.4 of the Will.

(iii) Mr McLennan Senior's interests in a property at Bonner Street, Taroom and the furniture and other contents therein pass to Ms Speed;[4]

(iv) Any debts owed to Mr McLennan Senior by Mr Peter McLennan or any entity to whom Mr Peter McLennan owes a corresponding debt are forgiven.[5]

(v) Stock depastured on a property described as "Richon" in Taroom pass to Mr Peter McLennan and Ms Speed in equal shares.[6]

(vi) The plant and equipment on the property "Eurombah East" pass to Mr David McLennan;[7]

(vii) The rest and residue passes to Mr David McLennan.[8]

[5] A condition of the bequest to Mr David McLennan of the stock on "Eurombah East" is that Mr David McLennan is to pay Ms Speed $100,000 by instalments over two years. The stock is charged with a debt in that sum owing by Mr David McLennan to Ms Speed. The debt arises upon acceptance by Mr David McLennan of the bequest of the stock.[9]

[6] It can be seen that the Will favours Mr David McLennan over Mr Peter McLennan and Ms Speed. This is explained in the Will as follows:

> "**4 Declaration regarding Peter John McLennan & Margaret Isobel Speed**
>
> 4.7 I declare that I have made less provision for my son **Peter John McLennan** and my daughter **Margaret Isobel Speed** than I have for my son **David Lloyd McLennan** not through any lack of any affection towards him or her but because I consider that I have made adequate provision for both **Peter John McLennan** and **Margaret Isobel Speed** during my lifetime."[10]

---

4 Clause 3.6.1 of the Will.

5 Clause 3.6.2 of the Will.

6 Clause 3.6.3 of the Will.

7 Clause 3.6.4 of the Will.

8 Clause 3.6.6 of the Will.

9 Clause 3.6.5 of the Will.

10 Emphasis in original.

[7] As the Will appoints the two executors jointly, the powers of the executors must be exercised by them jointly.[11]

[8] Although it was the obvious intention of Mr McLennan Senior expressed in the Will that "Eurombah East" should pass to Mr David McLennan upon Mr McLennan Senior's death, interests in that property were transferred to Mr David McLennan by transfers in 2011 and 2013.

[9] By transfer dated 10 October 2011 Mrs McLennan transferred a one-quarter interest in "Eurombah East" to Mr David McLennan. That left Mr McLennan Senior and Mr David McLennan as tenants in common. Later, in March 2013, "Eurombah East" was transferred by Mr McLennan Senior and Mr David McLennan to themselves as joint tenants. The effect of this was that Mr McLennan Senior and Mr David McLennan then held equal joint interests in the property and, importantly, the doctrine of survivorship would operate in favour of Mr David McLennan upon the death of Mr McLennan Senior. Upon Mr McLennan Senior's death his interest in "Eurombah East" did not fall to his estate but passed to Mr David McLennan independently of the Will.

[10] The inter vivos transfer of the property to Mr McLennan Senior and Mr David McLennan as joint tenants in 2013 might be seen to be of little moment. The effect of the transfer was that upon Mr McLennan Senior's death the property automatically passed to Mr David McLennan. That was clearly the intention of Mr McLennan Senior by the terms of the Will in any event.

[11] However, in June 2017, Mr Peter McLennan made application for family provision.[12] Ms Speed has joined in that application and seeks provision herself. But for the transfer of the property in 2013, Mr McLennan Senior's interest in the property (as it then stood) would have fallen to the estate and would be available to make provision to Ms Speed and Mr David McLennan.

[12] In December 2016, Dr Vasuthan Sellathurai, a general practitioner with Taroom Medical Pty Ltd, which practice had treated Mr McLennan Senior, wrote to Creevey Russell, lawyers then acting on behalf of the two executors in these terms:

---

[11] *Succession Act* 1981 (Qld) s 49(4).

[12] Pursuant to Part 4 of the *Succession Act* 1981 (Qld).

> "I refer to your letter making an enquiry regarding Mr McLennan[13] consulting a doctor at this practice to discuss his capacity prior to signing his will.
>
> Mr McLennan did not consult a doctor at this practice regarding his capacity.
>
> A search of his medical history reveals that he was assessed and diagnosed with dementia in August 2013 by a doctor who is no longer at this practice."[14]

[13] August 2013 was well after the making of the Will but only five months after the transfer of "Eurombah East" to Mr McLennan Senior and Mr David McLennan as joint tenants.

[14] In October 2017, Ms Speed purported to resign as an executor. It is common ground that Ms Speed's proposed resignation was ineffective as she could not resign without order of the Court once probate had been granted to her.[15]

[15] Creevey Russell solicitors acted for both executors until 31 January 2017. On that day Ms Speed told Creevey Russell that she did not wish them to act on her behalf. That prompted Creevey Russell, quite properly, to point out to Ms Speed that steps they were taking on behalf of the estate had to be suspended. They pointed out to Ms Speed:

> "As you and David[16] have been appointed as executors we require joint instructions to proceed. Unless we have joint instructions, we are not able to continue to act."[17]

[16] In January 2018 solicitors Fredriksen Legal began acting for Ms Speed. Marland Law act on behalf of Mr Peter McLennan in the family provision applications.

[17] A settlement conference was scheduled to be held between the parties on 23 January 2018. On 10 January 2018, Fredriksen Legal, for Ms Speed, wrote to Creevey Russell requesting information concerning various things including questions concerning the two transfers of interests in "Eurombah East".[18] Creevey Russell then advised the other parties on 16 January 2018 that the without prejudice conference would be postponed. Correspondence has since

---

[13] Clearly a reference to Mr McLennan Senior.

[14] Affidavit of Margaret Isobel Speed filed 9 April 2018, CFI 9, exhibit C (Ms Speed's affidavit).

[15] *Uniform Civil Procedure Rules* 1999 (Qld) r 642.

[16] Clearly a reference to Mr David McLennan.

[17] Ms Speed's affidavit, exhibit MIS-4.

[18] Ms Speed's affidavit, exhibit MIS-7.

passed between the various solicitors. In a letter dated 7 February 2018 from Creevey Russell to Fredriksen Legal, the former pointed out to the latter that given the fact that Ms Speed had renounced her position as executor:

> "In the circumstances, it is not permissible for your client to contact the estate's accountant directly, nor access the estate's account in the purported capacity as executor."[19]

[18] This correspondence and the letter from Creevey Russell to the accountant refusing consent for the accountant to release information to Ms Speed[20] are examples of the escalating tensions between the siblings.

[19] A statement of assets and liabilities of the estate was provided to Mr David McLennan and Ms Speed by Creevey Russell on 7 February 2017.[21] That statement of assets and liabilities, which appears to be the latest version, is as appears on the following page of these reasons.

---

[19] Ms Speed's affidavit, exhibit MIS-17.

[20] Ms Speed's affidavit, exhibit MIS-19.

[21] Affidavit of Usha Birgit Praser, filed by leave on 16 May 2018, exhibit UBP-2. An earlier statement of assets and liabilities can be found at exhibit UBP-1.

**ASSETS & LIABILITIES**

Assets

| Description | | Value | | |
|---|---|---|---|---|
| **Bank Accounts** | | | | |
| CBA Account #06 4428 10227803 | | $ 83,655.23 | | |
| BOQ Bank Account #124955 20616174 | | $ 28,152.10 | | |
| BOQ Bank Account #124955 100052788 | | $ 586,817.38 | | |
| | | | $ | 698,624.71 |
| **Shares (indicative value only)** | | | | |
| AMP Limited (581) | E | $ 2919.52 | | |
| CBA (3,852) | E | $ 316,095.12 | | |
| GUD Holdings Limited (570) | E | $ 5,700.00 | | |
| Santos (1,000) | E | $ 3,920.00 | | |
| Suncorp Group Limited (3,940) | E | $ 51,653.40 | | |
| Telstra Corporation Limited (2,770) | E | $ 14,182.40 | | |
| Westpac Banking Corporation (800) | E | $ 25,640.00 | | |
| Wilson Group Limited (2,000) | E | $ 3,560.00 | | |
| Spark Infrastructure (3,500) | E | $ 8,260.00 | | |
| | | | E $ | 431,930.44 |
| **Plant & Equipment** | | | E $ | 120,000.00 |
| **Livestock** | | | E $ | 900,000.00 |
| **Loans** | | | | |
| Mr PJ McLennan | | | $ | 995,000.00 |

| | | | | |
|---|---|---|---|---|
| **TOTAL ASSETS** | | | E | **$ 3,145,555.15** |
| | Liabilities | | | |
| **Loans** | | | | |
| Mr DL McLennan | | $ 249,024.00 | | |
| **Other** | | | | |
| ATO Liabilities | | Unknown | | |
| Accountant's Fees | | Unknown | | |
| Legal Fees - Administration of Estate | E | $ 10,000.00 | | |
| Legal Fees - Potential Litigation | E | $ 100.000.00 | | |
| **TOTAL LIABILITIES** | | | E | **$ 359,024.00** |

[20] Obviously "Eurombah East" is not listed as an asset of the estate as any interest of Mr McLennan Senior in that property has passed to Mr David McLennan. There is cash in the sum of $698,624.71, which falls to residue as there is no specific bequest of that money. The shares, with an approximate value of $431,930.44, are the subject of a specific bequest to Ms Speed.[22] The loan to Mr Peter McLennan of $995,000 is no doubt the liability which is to be forgiven.[23] No evidence before me explains the indebtedness of the estate to Mr David McLennan.[24] Presumably the plant and equipment shown in the statement is that situated at "Eurombah East".[25] It is impossible to tell whether the stock[26] is that situated at "Eurombah East"[27] or at "Richon".[28]

---

[22] Clause 3.4 of the Will.

[23] Clause 3.6.2 of the Will.

[24] In the sum of $249,024.00.

[25] Subject of clause 3.6.4 of the Will.

[26] With an estimated value of $900,000.00.

[27] Subject of clause 3.6.5 of the Will.

[21] There is no mention in the statement of assets and liabilities, or in any of the correspondence, of the property at Bonner Street, Taroom.[29] Whether that has been transferred to Ms Speed or otherwise disposed of before the death of Mr McLennan Senior is not apparent from the material before me.

[22] It is obvious that the inclusion of "Eurombah East" as an asset of the estate would have a significant impact on any family provision applications.

**Positions of the various parties**

[23] Ms Speed's submissions through Mr Morgan of counsel were that Mr Klatt should be appointed as administrator and she and Mr David McLennan removed as executors for the following reasons:

(i) As she and Mr David McLennan are joint executors, they must act jointly. However, they are now in conflict with each other, in particular by him denying her access to information concerning the estate despite the fact that it is common ground that Ms Speed's purported resignation as executor was not effective.

(ii) There are matters to be investigated concerning the two transactions involving "Eurombah East".

(iii) The family provision application brought by Mr Peter McLennan has not been defended in compliance with the relevant Practice Direction; in particular, the proposed settlement conference was aborted by Mr David McLennan.

(iv) Mr David McLennan's actions potentially leave Ms Speed open to liability for failure to comply with the family provision application procedure.

(v) There are taxation and other liabilities which have not been met so Ms Speed is exposed.[30]

---

[28] Subject of clause 3.6.3 of the Will.

[29] Subject of clause 3.6.1 of the Will.

[30] The statement of assets and liabilities mentions the income tax liability as "unknown".

(vi) Creevey Russell are in a position of conflict as they now act on behalf of Mr David McLennan but had previously acted on behalf of both executors.

(vii) The discretion to remove executors arises without finding of fault, but arises when removal is in the interests of the expeditious administration of the estate, and that is the case here.

[24] Mr David McLennan's submissions through Ms Brewer of counsel were:

(i) The Court ought not lightly remove a testator nominated by a deceased in a will.

(ii) It is necessary before removal is ordered for the executor to be proven to be unfit by way of proven misconduct.[31]

(iii) The complaint about the failure to provide information is not grounds to remove an executor, but a complaint which should be addressed in the family provision proceedings.

(iv) Any delay in advancing the family provision applications is the fault of Mr Peter McLennan and Ms Speed.

(v) Blame for some of the delay also falls at the feet of Ms Speed given that she sought to renounce her position as executor but then changed her mind about that.

(vi) If there is a dispute between individual beneficiaries, those beneficiaries can litigate that dispute between themselves without involving the executors in their capacity as executors.

(vii) The appointment of an administrator will incur additional expense to the estate.

[25] The submissions advanced on behalf of Mr Peter McLennan through Mr Trewavas of counsel, in support of Ms Speed's application, were:

---

[31] This submission was in the end more subtle, as later explained.

(i) Mr Peter McLennan has lost trust and confidence in the administration of the estate by the executors given, it seems, the general lack of progress and the failure to provide information which has been sought.

(ii) There is a conflict of interest between Mr David McLennan's personal interests and his duties to the estate.

[26] Mr Trewavas' submission that a lack of progress in the administration of the estate is a relevant consideration is supported by the decision of A Lyons J in *Ziesemer v Ziesemer*.[32]

**Discussion**

[27] It can be seen that there is dispute between the applicant and Mr David McLennan as to the nature of the discretion to remove an executor. As already observed, Mr Morgan, on behalf of Ms Speed submits that the overriding consideration is the due and proper administration of the estate. Ms Brewer at least in oral submissions placed the bar somewhat higher.

[28] In her written outline, Ms Brewer made the following submissions:

> "8. Whilst the Court has power to remove an executor, the Court will not lightly interfere with a testator's appointment of executors. Its ultimate concern must be with the due administration of the estate in the interests of creditors and beneficiaries."[33]

[29] Then later Ms Brewer submitted:

> "11. Before the Court will act in any situation of conflict of duty and interest so as to hold that the executor has been proved unfit to act as executor, either that situation must have already given rise to mischief on a level of seriousness that is reasonably high, or there must be a reasonably high level of risk of such mischief arising in the future."[34]

[30] Later in the written submissions:

---

[32] [2011] QSC 214 at [42].

[33] Outline of submissions on behalf of David Lloyd McLennan at [8], citing *Mataska v Browne* [2013] VSC 62 ("Mr David McLennan outline").

[34] Mr David McLennan outline at [11], citing *Gowans v Watkins*, unreported, Supreme Court of Victoria, Teague J, 21 February 1996.

> "(d) Although a person who has so misconducted himself may be found not to be a proper person to be entrusted with the estate's administration, it is necessary for the misconduct to be proved, rather than just pleaded; and it would highly undesirable that the administration of estates were delayed by having to determine in prior proceedings disputed claims of unconscionable conduct against putative executors."[35]

[31] Therefore, in Ms Brewer's written submissions, there is an emphasis on misconduct and unfitness, although she conceded that the governing consideration is the due administration of the estate.[36]

[32] During oral submissions this exchange occurred:

> "HIS HONOUR: Now, you say there has to be fault before there is removal of an executor.
>
> MS BREWER: Well, at least some risk of it, your Honour.
>
> HIS HONOUR: Well, no, hang on. Firstly as a matter of law, is fault necessary?
>
> MS BREWER: The cases that I referred to in my submissions say that they are."[37]

[33] Ms Brewer then went to some of the cases in her outline.[38]

[34] True it is that the cases referred to by Ms Brewer are examples of cases where misconduct of some type was alleged against the executors. However, the power to remove an executor is a discretionary one. It is not necessarily productive to compare examples of the exercise of discretion in different cases. What is necessary is to identify the relevant principles governing the exercise of the discretion. In the end, I regard Ms Brewer as submitting that the overriding consideration is the due administration of the estate in the interests of the beneficiaries and creditors,[39] but often the application of that principle will result in dismissal of an application to remove an executor unless there is misconduct or fault by the executor. In that light, Ms Brewer's submission is quite consistent with the submission made by Mr Morgan for Ms Speed

---

[35] Mr David McLennan outline at [12(d)]. Emphasis in original

[36] Mr David McLennan outline at [8].

[37] Transcript at 1-13 lines 28–36. Ms Brewer clearly meant "that is", rather than "they are".

[38] Transcript at 1-13 line 40 and following.

[39] *Mataska v Browne* [2013] VSC 62, cited by Ms Brewer.

and by Mr Trewavas for Mr Peter McLennan and is consistent with the legislation and the authorities[40] to which I will now turn.

[35] Section 6 of the *Succession Act* 1981 (Qld) expressly gives jurisdiction to the Court to revoke probate of a will. That section is in these terms:

> "**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.
>
> (2) The court may in its discretion grant probate of the will or letters of administration of the estate of a deceased person notwithstanding that the deceased person left no estate in Queensland or elsewhere or that the person to whom the grant is made is not resident or domiciled in Queensland.
>
> (3) A grant may be made to such person and subject to such provisions, including conditions or limitations, as the court may think fit.
>
> (4) Without restricting the generality of subsections (1) to (3) the court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the Trusts Act 1973 .
>
> (5) This section applies whether the death has occurred before or after the commencement of this Act."

[36] As explained by Wilson J in *Williams v Williams,*[41] the Court probably also has an inherent power to remove executors,[42] but her Honour did not finally determine that question.[43]

---

[40] See *Budulica v Budulica* [2017] QSC 60 at [27].

[41] [2005] 1 Qd R 105.

[42] At [11], but also see the comments of McMurdo P in *Baldwin v Greenland* [2007] 1 Qd R 117 at [3].

[43] *Williams v Williams* [2005] 1 Qd R 105 at [15].

[37] At least where there is default by an executor, s 52(c) of the *Succession Act* may also be a source of power to remove an executor[44] but that issue seems not to have been authoritatively determined.[45] Section 52 is in these terms:

> "**52 The duties of personal representatives**
>
> (1) The personal representative of a deceased person shall be under a duty to—
>
> (a) collect and get in the real and personal estate of the deceased and administer it according to law; and
>
> (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court; and
>
> (c) when required to do so by the court, deliver up the grant of probate or letters of administration to the court; and
>
> (d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be; and
>
> (e) pay interest upon any general legacy—
>
> (i) from the first anniversary of the death of the testator until payment of the legacy; or
>
> (ii) in the case of a legacy that is, pursuant to a provision of the will, payable at a future date—from that date until payment of the legacy;
>
> at the rate of 8% per annum or at such other rate as the court may either generally or in a specific case determine, unless any contrary intention respecting the payment of the interest appears by the will.
>
> (1A) Nothing in subsection (1) abrogates any rule or practice deriving from the principle of the executor's year or any rule or practice under which a beneficiary is entitled to receive interest upon any legacy from the date of the testator's death.
>
> (2) If the personal representative neglects to perform his or her duties as aforesaid the court may, upon the application of any person aggrieved by such neglect, make such order as it thinks fit including an order for damages and an order requiring the personal representative to pay interest on such sums of money as have been in the personal representative's hands and the costs of the application."

---

[44] At [14].

[45] Also at [14].

[38] The discretion under s 6 is obviously a broad one.[46] In *Baldwin v Greenland*,[47] Jerrard JA observed:

> "[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."[48]

[39] *Gowans v Watkins*,[49] referred to by Jerrard JA, was a case concerning the estate of the late Sir Urban Gregory Gowans, a judge of the Supreme Court of Victoria. The case is relied upon by Ms Brewer. That was a case where there was disharmony between beneficiaries and one of the executors. Importantly Teague J, after analysing a decision of Ashley J in *Monty Financial Services Ltd & Anor v Delmo*,[50] where the distinction between the offices of executor and trustee were analysed, said:

> "While I am satisfied that my focus ought to be only on the question arising under S34(1) of the Administration and Probate Act of whether George Watkins is unfit to act in the office or executor, the existence of the remedies as against trustees as noted and the similarities in so many of the duties applicable to both executors and trustees warrant my looking where appropriate, as Ashley J did in the Delmo case to observations made in cases concerned not with applications to remove executors but applications to remove trustees."[51]

---

[46] *Richards v Reardon* [2006] NSWSC 1252 at [16]; *Baldwin v Greenland* [2007] 1 Qd R 117 at [3].

[47] [2007] 1 Qd R 117.

[48] At [44]. On the related but different issue of removal of a trustee, see *Miller v Cameron* (1936) 54 CLR 572 at 580–581.

[49] Unreported, Supreme Court of Victoria, Teague J, 21 February 1996 ("*Gowans*").

[50] Unreported, Supreme Court of Victoria, Ashley J, 11 September 1995.

[51] *Gowans* at 11.

[40] Section 34(1) of the *Administration and Probate Act* 1958 (Vic), which was being considered by Teague J was in these terms, relevantly:

> "34(1) … where an executor … to whom probate … has been granted … (c) after such grant … is unfit to act in such office … the court upon application … may order the discharge or removal of such an executor."

[41] Teague J was therefore exercising a discretion which arose upon a finding of unfitness to act. However, in *Baldwin v Greenland*,[52] the Court of Appeal held that a finding that the executor was not a fit and proper person to carry out the duties of executor was not a prerequisite to the exercise of the discretion to remove the executor. Of course, misconduct or unfitness is a ground for removal.[53]

[42] In *Re Greif; Kantor v Wilding*,[54] it was held that a relevant consideration in the exercise of the discretion to remove an executor was consideration of the stage the administration had reached by the time the application for removal was made.[55]

[43] Here there is a clear conflict between Mr David McLennan's interests and his duty as executor in the sense that:

(i) Mr David McLennan is a registered proprietor of "Eurombah East" by virtue of an inter vivos transfer;

(ii) a doubt[56] at least warranting investigation has been raised as to whether Mr McLennan Senior had capacity at the time of the inter vivos transfer in 2013;

(iii) if the transfer can be set aside, then that interest will at least be potentially available to Ms Speed and Mr Peter McLennan to meet any claim for family provision.

---

[52] [2007] 1 Qd R 117.

[53] *Colston v McMullen* [2010] QSC 292 at [39]–[40].

[54] [2005] VSC 266 at [17]–[18].

[55] This was cited with approval by Mullins J in *Budulica v Budulica* [2007] QSC 60 at [29].

[56] At least evidenced by the letter from Dr Sellathurai.

[44] A conflict per se is of course not determinative.[57] The real question is the effect of any conflict upon the administration.[58]

[45] There is also evidence that the beneficiaries have asked Mr David McLennan (by his solicitors) for information concerning the estate and this has not been forthcoming. While delay in the administration of the estate can be attributed in part perhaps to the fact that Peter McLennan and Ms Speed have not progressed their family maintenance applications as quickly as they might, the administration has, with the current executors in place, not proceeded far. At this early stage of the administration the two executors are at loggerheads and questions are being asked about the validity of an inter vivos transfer of property from Mr McLennan Senior to one of them.

[46] Ms Brewer submitted that any dispute between the beneficiaries can be litigated between them, rather than involving the estate. That might be so but both executors would most probably be parties to any litigation.

[47] It is not necessary to determine whether Mr David McLennan is at fault in the administration, or whether he is fit or otherwise to occupy the office of executor. Even taking into account the respect which should be shown to Mr McLennan Senior's choice of executors and taking into account the costs which will be incurred by an appointment of Mr Klatt, a solicitor, as trustee, the due and proper administration of the estate is best served by the removal of the two executors named in the Will and the appointment of Mr Klatt.

[48] There were no submissions on behalf of either Mr David McLennan or Mr Peter McLennan that, should the executors be removed and Mr Klatt appointed administrator, the consequential orders in the application ought not be made. They are appropriate and I will make those orders.

[49] I will hear the parties on costs.

**Orders**

---

[57] *Chesney & Anor v Tognola & Anor* [2011] QSC 340.

[58] At [7]–[15].

[50] The orders of the Court are as follows:

1. Pursuant to section 6 of the *Succession Act* 1981 (Qld), Margaret Isobel Speed and David Lloyd McLennan be removed from the office of executor.

2. Pursuant to section 6 of the *Succession Act* 1981 (Qld), the Grant of Probate issued to Margaret Isobel Speed and David Lloyd McLennan be revoked.

3. Michael Karl Klatt be appointed an Administrator with the Will of the estate of Lloyd John Wilson McLennan in place of the executors Margaret Isobel Speed and David Lloyd McLennan.

4. Letters of Administration with the Will dated 2011 be granted to Michael Karl Klatt, subject to the formal requirements of the Registrar.

5. Any requirement for advertising the intention of Michael Karl Klatt to obtain a grant of Letters of Administration with the Will be dispensed with.

6. Michael Karl Klatt as Administrator with the Will receive no personal remuneration, but be entitled to engage his employers from time to time as his solicitors and that their fees be assessed by an independent cost assessor pursuant to the Supreme Court Scale, as varied from time to time, on an indemnity basis, those fees to be assessed at approximately two monthly intervals and on completion of the administration.

7. Pursuant to sections 82 and 90 of the *Trusts Act* 1973 (Qld), all property of the estate in the name of David Lloyd McLennan and Margaret Isobel Speed as personal representative vest in Michael Karl Klatt as Administrator with the Will.

8. Michael Karl Klatt as Administrator with the Will be registered as the proprietor of any real property of the deceased pursuant to section 114 of the *Land Title Act* 1994 (Qld).

9. Liberty be granted to Michael Karl Klatt as Administrator with the Will to apply.