

Geoffrey, was appointed his executor and trustee, and secondly, that the deceased's net residuary estate, which had an estimated value of about \$300,000, was to be divided equally amongst the five sons, after repayment to his son Graeme of a loan of \$30,000. The will included as a specific provision at para [6] the following:

6. I EXPRESS THE WISH that my body be buried next to my late wife BEVERLEY at Victoria Valley Cemetery. If this is not possible then I EXPRESS THE WISH to be buried at my reserved plot I Waipapakauri Cemetery. Either way, I EXPRESS THE WISH that my said late wife's headstone be amended to replace "partner of Dick" with "wife of Brian".

[4] In this proceeding, the applicants David, Philip and Allen seek an order removing Geoffrey as the executor and trustee of the deceased's estate and appointing the New Zealand Guardian Trust Company Ltd (trading as Perpetual Guardian) in his place.

[5] Removal of Geoffrey is sought pursuant to either s 21 of the Administration Act 1969, or alternatively pursuant to s 51 of the Trustee Act 1956 and under the inherent jurisdiction of the Court.

[6] The application is opposed by Geoffrey. It seems also from an affidavit sworn 26 May 2017 and filed on 8 June 2017 from his brother Graeme, that effectively he supports Geoffrey's position and also opposes the present application.

Grounds for application

[7] In the present application before the Court to remove Geoffrey as executor and trustee of the deceased's will, specified grounds are outlined as follows:

2. (f) In correspondence with the applicants Geoff has said, inter alia, that he may "dock" the shares of the applicants in the estate arbitrary amounts that he will determine, including in respect of exemplary damages, such that some or all of the applicants will receive nothing by way of inheritance.
- (g) Geoff instructed the Auckland law [firm] Schnauer and Co to act in administration of the estate, however, Schnauer and Co subsequently terminated the retainer, it is understood because of difficulties it had encountered obtaining appropriate instructions from [Geoff]. In their place, it is understood that the Tauranga branch of Public Trust has been instructed.

- (h) Geoff has a history of attempting to mount unmeritorious legal “*crusades*”, some of which have resulted in him being declared a vexatious litigant pursuant to the Vexatious Litigants Act 1981 (Queensland, Australia).
- (i) Geoff resides in Queensland, Australia and, to the best of the applicants’ knowledge has not been to New Zealand for over 30 years.
- (j) Geoff is not a fit person to have charge of administration of the estate and an order is sought removing him accordingly and appointing the New Zealand Guardian Trust Company Limited (trading as Perpetual Guardian) as executor of the estate.
- (k) The New Zealand Guardian Trust Company Limited (trading as Perpetual Guardian) has consented to such appointment.
- (l) Geoff has been requested to either renounce the appointment as executor or consent to the making of an order for removal, however, he has declined to do so.

Jurisdiction

[8] As I have noted above, the application is made initially in reliance on s 21 Administration Act 1969. This provides relevantly:

21 Discharge or removal of administrator

- (1) ...where it becomes expedient to discharge or remove an administrator, the court may discharge or remove that administrator, and may if it thinks fit appoint any person to be administrator in his or her place, on such terms and conditions in all respects as the court thinks fit.

[9] In s 2(1) Administration Act 1969, however, “administrator” is defined to mean:

any person to whom administration is granted; and includes a trustee corporation in any case where it is deemed to be an executor or administrator by reason of having filed an election to administer

[10] This s 2(1) goes on to define “administration” to mean:

probate of the will of a deceased person and to include letters of administration of the estate of a deceased person...

[11] In the present case, despite the deceased having died over seven months ago, no application for probate of his will has been made and therefore at this point it cannot

be said formally that Geoffrey has the position of “administrator” of the estate in terms of s 21 of the Administration Act 1969. It is arguable therefore that s 21 does not assist the applicants here. I leave on one side, however, the requirement in s 19 of the Administration Act which enables proceedings to be brought in the event that a named executor such as Geoffrey in this case does not within three months from the death of the testator seek from the Court a grant of probate of the will. Although Geoffrey’s delay in seeking probate of the will appears generally to be unexplained, the application before me is not one made in terms of s 19 and therefore I do not address that aspect here.

[12] Turning now to the alternative basis for the present application, removal of Geoffrey is also sought pursuant to s 51 of the Trustee Act 1956 or under the inherent jurisdiction of the Court. In this regard, s 51 provides:

51 Power of court to appoint new trustees

- (1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.
- (2) In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who—
 - (a) has been held by the court to have misconducted himself in the administration of the trust; or
 - (b) is convicted of a crime involving dishonesty as defined by section 2 of the Crimes Act 1961; or
 - (c) is a mentally disordered person within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992, or whose estate or any part thereof is subject to a property order made under the Protection of Personal and Property Rights Act 1988; or
 - (d) is a bankrupt; or
 - (e) is a corporation which has ceased to carry on business, or is in liquidation, or has been dissolved.
- (3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees

under any power for that purpose contained in any instrument would have operated.

- (4) Nothing in this section shall give power to appoint an executor or administrator.
- (5) Every trustee appointed by the court shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

[13] Linked to this application under s 51 of the Trustee Act 1956 is the use by this Court of its inherent jurisdiction. In this regard, in *Equity & Trusts in New Zealand*¹ the learned authors state:

The Court may also remove a trustee under its inherent jurisdiction. This jurisdiction is ancillary to the Court's principal duty to see that a trust is properly executed and, although there are no hard and fast rules, the main guide is the welfare of the beneficiaries. It is probably wider than the statutory jurisdiction. Whereas s 51 cannot be used to appoint by way of substitution in the face of opposition from the trustee who is able and willing to continue, where proper execution of the trust requires this course of action there would seem to be no reason not to resort to the inherent jurisdiction.

[14] In considering authorities on this Court's inherent jurisdiction in equity to remove old trustees and substitute new ones, such as the decision of the Privy Council in *Letterstedt v Broers*² applied by the Court of Appeal in New Zealand in *Hunter v Hunter*,³ Associate Judge Osborne in his oft cited decision *Crick v McIlraith*⁴ noted the following:

[15] The intensely discretionary nature of the jurisdiction has been repeatedly recognised in the case law...

[16] The principles which I adopt on the basis of these authorities are:

- (a) this jurisdiction involves a large discretion which is heavily fact dependent;
- (b) the starting point is the Court's duty to see estates properly administered and trusts properly executed;
- (c) the welfare of the beneficiaries is the "litmus" test; and

¹ *Equity & Trusts in New Zealand*, 2nd Ed, A S Butler & Ors, at para 5.2.8(3).

² *Letterstedt v Broers* (1884) 9App Cas 371(PC).

³ *Hunter v Hunter* (1938) NZLR 520 (CA).

⁴ *Crick v McIlraith* [2012] NZHC 1290 at [14] and [15].

- (d) hostility as between administrators or trustees and their beneficiaries is not of itself a reason for removal. It will assume relevance if it prejudices the interests of the beneficiaries. An example of where hostility is such that the trustee may be described as being “out of sympathy” with the beneficiaries is seen in the judgment of Panckhurst J in *Kain v Hutton* HC Christchurch M198/00, 3 December 2004, at [249].

[15] And finally, it must be borne in mind as noted by the Court of Appeal in *Frickleton v Frickleton*:⁵

...expedience is the touchstone of the Courts’ jurisdiction under both s 21 of the Administration Act and s 52 of the Trustee Act (power of Court to appoint new trustees).

Parties’ arguments and my decision

[16] The approach by the applicants in this matter is that for a number of reasons it has become “expedient” and indeed entirely necessary here to remove their brother Geoffrey as executor and trustee in the deceased’s estate.

[17] This is because it is alleged Geoffrey has acted quite inappropriately in that he has:

- (a) Made repeated threats to reduce the shares in the estate of each of the applicants David, Philip and Allen because he believes that they have played some part in misplacing or misappropriating some of the deceased’s household items. Geoffrey contends that these items should either have been placed in storage or shipped to him in Queensland, Australia, here he lives. The applicants’ position in turn is that these household items in question were largely old, worn out and of no commercial value. Geoffrey however seems to disagree. He maintains they were of considerable value but the applicants argue this is entirely untrue and significantly, the claim is made despite the fact that Geoffrey had not visited his father’s home for about 35 years and had no personal knowledge of such matters.

⁵ *Frickleton v Frickleton* [2016] NZCA 408 at para [36].

- (b) Next, the applicants suggest that Geoffrey has claimed he will levy an amount by way of “exemplary damages” in respect of this action by the applicants relating to the household items. This would further reduce their respective entitlements from the estate. It is said by the applicants this is entirely wrong and inappropriate.
- (c) Geoffrey on a number of occasions has stated he intends to use estate money to fund litigation seeking to change the wording of the inscription on their mother’s headstone so that it refers to her as having been the deceased’s wife Beverley. This is despite the fact that the deceased and Beverley had separated about six years prior to her death in 2010 and Beverley having entered into a new relationship and made known to family and friends, it is said, the inscription wording she would like.
- (d) Finally, the applicants contend that Geoffrey has shown entirely questionable judgment throughout, no doubt in part by delaying any application for probate which presumably has had a corresponding detrimental effect on the ability of the estate to complete settlement of the sale of the deceased’s property. This is in line too with the circumstances that exist whereby Geoffrey in the past has been declared by the Supreme Court of Queensland to be a vexatious litigant.

[18] I turn now to consider each of these allegations in turn.

Threats to reduce shares and claim to levy “exemplary damages”

[19] It does not seem to be in dispute that Geoffrey has made a number of threats to the applicants to the effect that their respective shares in the residuary estate would be reduced by significant amounts. This is to adjust for what Geoffrey said was their perceived wrongdoing in allegedly disposing of various items of the deceased’s furniture, household items and the like.

[20] Examples of these threats are before the Court. They include the following:

(a) Geoffrey's email to Philip dated 6 November 2016:

I am not suggesting that David would be unreasonable and would have everything taken away in rubbish trucks and dumped, as he in fact suggested to me a couple of weeks ago that he might do. Supposed (sic) he did this, and I formed the view that the value of the dumped property was \$20,000. Then I would deduct \$20,000 from his share of the estate.

(b) Geoffrey's letter to Philip dated 19 December 2016:

Should this not be done (retrieving and putting in storage or sending to Geoffrey Bird all of the household contents), you will be liable for conversion, detinue and breach of contract. Under the circumstances, I should think you would be liable for exemplary damages, which is essentially a hefty fine which depends on how wealthy the wrongdoer is.

...

Further, I can deduct the estimated exemplary damages. Even without the exemplary damages you would probably not inherit anything.

(c) Geoffrey's email to David on 14 December 2016:

Not exactly a shrewd idea to piss off an executor, especially not one who has studied law. If this was Saudi Arabia, Phil would get his hand chopped off. Maybe Phil will get nothing and we'll all get \$60,000. This will give me some leverage against Phil to get the inscription on Mum's headstone changed if he wants to inherit a cent.

[21] In addition to these matters, in his affidavit sworn in this proceeding dated 26 April 2017, Geoffrey contends that Allen has "unclean hands" in this whole matter. This is because Geoffrey says Allen is refusing to repay a personal debt of \$10,000 he owes to his brother Graeme (who as I have noted at [6] above supports Geoffrey in his opposition to the present application) and Geoffrey alleges at para [54] of that affidavit:

[54] Allen has joined this application to have me removed as executor in order to escape justice and avoid having to repay Graeme the \$10,000 that Allen owes him.

[22] And at para [53] of that affidavit Geoffrey states:

[53] I have subsequently become aware that I cannot legally deduct someone else's debt from an amount payable by the estate. However I can buy the debt from Graeme on behalf of the estate and deduct it from Allen's share of the estate, which amounts to the same thing. *I propose to do this*, having regard to Graeme's exemplary level of co-operation... (emphasis added)

[23] Before me the applicants made it clear that they are quite happy for the issue of any disposal of estate household items to be investigated and for a determination to be made of whether their actions were appropriate. This however should be conducted by the new trustee, The New Zealand Guardian Trust Company Ltd, and not Geoffrey, given what they say are his comments and bias in this matter.

[24] On all these issues, there seems little doubt that there has been a major dispute and impasse between the parties here. It is most unfortunate that in this case the five brothers seem to have divided into two factions. The applicants, David, Philip and Allen, state that all they want is for the estate to be properly administered in an even-handed manner and for the distributions their father wanted to be made without further delay.

[25] Geoffrey, and it seems to an extent supported by Graeme, appears to me to have a different agenda altogether. His antagonism towards his three brothers David, Philip and Allen, is patent. This is apparent from the range of matters which are before the Court. It is also clearly exhibited in the various email messages I have outlined above. Geoffrey's delay in seeking probate, and what I understand is the continuing default in completing settlement of the estate's house sale, linked to the other threats which have been made, in my view, would tend to suggest that it is expedient in all the circumstances here for him to be removed as executor and trustee of his father's estate. This is notwithstanding the clear wish which the deceased expressed in his will that Geoffrey should be his executor and trustee and the fact that the Court will not lightly interfere with the choice the deceased has made. The unfortunate split between the five brothers that has occurred in this family however, and the lack of a degree of objective even-handedness exhibited by Geoffrey here, in my judgment mean that there seems little choice but that an independent trustee is required to be appointed in this case. A degree of hostility has developed between Geoffrey and the applicants which I am satisfied prejudices the interests of all the beneficiaries. As the Court's

duty in a case such as this must be to ensure that the estate is properly administered and the welfare of the beneficiaries provides the “litmus” test, this family has reached a point where the Court must intervene and appoint a new independent trustee.

Proposed litigation

[26] Turning now to this second matter, Geoffrey in his reply affidavit refers specifically to his wish to bring proceedings on behalf of his father’s estate to seek an order to compel the Committee of the Victoria Valley Cemetery Trust (which operates the cemetery where Beverley, the parties’ late mother, is buried), to vary the inscription on her headstone so that this refers to her having been the deceased’s wife and deleting any reference to her being his current partner at the time.

[27] Geoffrey, in passing, has suggested that he is likely to make an application pursuant to s 31 of the Wills Act 2007 to rectify the deceased’s will. As I understand it, no such application is yet before the Court. However, in support of what Geoffrey proposes concerning the inscription wording, he has put before the Court a draft he has prepared of a reworded will for his late father, presumably to form the basis of a proposed rectification application. In this draft Geoffrey proposes that Philip, who was the executor and trustee of his late mother’s estate, be required to appoint Geoffrey as his attorney for the purposes of administering their mother’s estate under threat of his not receiving anything under his father, the deceased’s will, should he fail to do so. The draft then goes on to require each one of Geoffrey’s siblings to sign a declaration to the effect that they agree to the headstone inscription for their late mother being varied. Should they refuse, it is stated that any interest they have in the deceased’s estate, would be extinguished.

[28] Finally, clause 11 of the draft will Geoffrey has prepared, purports to authorise the executor to:

... spend such sums of my estate as appear convenient... for bringing the legal proceeding that I had envisaged in which I was going to seek judicial review of the decision of the Victoria Valley Cemetery Trust not to change my late wife’s headstone inscription, and any other legal proceedings as may appear necessary or convenient to give effect to the wishes expressed in this will.

[29] All this, as I see the position, is in spite of the specific direction made by the deceased in his will at paragraph 6. This simply expressed “the wish”:

...that my said late wife’s headstone be amended to replace “partner of Dick” with “wife of Brian”.

[30] The Concise Oxford English Dictionary, (Eleventh Edition), in part defines “wish” to mean:

1 desire something that cannot or probably will not happen. **2** want to do something. ➤ ask (someone) to do something or that (something) be done. **3** express a hope that (someone) has (happiness or success). ... a desire or hope, or an expression of this ... a thing wished for.

[31] The Chambers Dictionary, 11th Edition, similarly defines “wish” in part to mean:

... to want or require, as in *anything you wish*, or (*dialect*) *wish a cup of tea*; *to desire*, esp vainly or helplessly, as in *wish you’d told me*; to express a desire for (luck, happiness, etc) to come to; ... to desire ... to bid or request; to hope ... to recommend ...

[32] In this case, the deceased clearly has expressed his desire or hope (and nothing more) that the inscription on his late wife Barbara’s headstone might be altered. He did not go further and require additional action to be undertaken or that specific estate moneys would be spent in this pursuit. This is also in spite of the fact that the deceased and Barbara, as I understand it, had separated some six years before she died in 2010 and, subsequent to that time, she had formed another relationship. There are claims before the Court that the inscription on Barbara’s headstone is entirely in accordance with her wishes, but at this point I do not think it useful to embark upon a debate relating to that aspect. Suffice to say it is, in my view, proper for an executor in complying with this particular request from the deceased to simply communicate with the Victoria Valley Cemetery Trust the deceased’s firm request in his will to alter the headstone inscription. As I understand the position, that is what has occurred here. If Geoffrey then proposes that personally he take the matter further through some form of litigation action, whether that is appropriate or not, then he is free to do so, but at his own expense. To insist that this might occur at the cost of the estate in light of strong opposition from the applicants, with the direct impact it would have on their entitlement from the deceased’s estate, is inappropriate.

[33] Geoffrey's obligation as executor and trustee of the deceased's will is to implement and carry out its terms promptly and impartially and not to act in this capacity for an ulterior motive or in bad faith or capriciously. He has a duty to act fairly by all the beneficiaries. He must also act impartially which requires him to refrain from siding with one group of beneficiaries against another group if there may be a dispute between them as to the proper interpretation of the will.⁶

[34] Geoffrey is an equal residuary beneficiary with his brothers in the deceased's estate. In addition, however, he has a paramount duty of neutrality as trustee of the estate.

[35] Issues clearly arise here over all these obligations and Geoffrey's actions since the death of his father.

Vexatious Litigant

[36] Before me, the applicants contended that, in addition to the express threats that Geoffrey has made to the effect that he would reduce the applicants' shares in the estate and use estate money to pursue litigation relating to his late mother's headstone, Geoffrey has a history of conducting himself in an unorthodox manner in relation to legal matters. It is noted that in 2003 the Crown Solicitor for the State of Queensland successfully applied to have Geoffrey declared as a vexatious litigant, pursuant to the Vexatious Litigants Act 1981 (Queensland). In particular too, the applicants state that Geoffrey has recently commenced multiple and seemingly misconceived court proceedings in Queensland, by which he has sought to validate his views in respect of health issues concerning a female acquaintance and her daughter.

[37] With regard to a whole range of matters, the applicants also maintain that as recently as 2015, Geoffrey applied to the Queensland Supreme Court for leave to commence multiple proceedings by which he apparently sought to address concerns with regard to his partner's mental health status. Leave was declined by the Supreme Court and in doing so the Court indicated:

⁶ *Re Schroder's Will Trusts* [2004] 1NZLR 695 at 706.

Mr Bird did not identify any reasonable grounds for his application. Much of what he wants to argue is based on grounds which could not even be described as tenuous. The relief sought and the arguments advanced are fanciful. The proposed application would be vexatious. The application is refused.

[38] Before me the applicants voiced their concern that what they describe as Geoffrey's obsessive nature and distorted view of matters render him entirely unsuitable to the task of properly administering their father's estate, an estate which they say in reality is a relatively straightforward and not particularly substantial estate.

[39] Whilst these matters may also be of some concern here, in my view it is not necessary in all the circumstances to pursue them further. Simply because Geoffrey may once have been declared a vexatious litigant, does not necessarily make him unfit to act in the role of executor and trustee of the deceased's will, particularly as his late father chose specifically that Geoffrey was to adopt this role.

[40] I am aware too that suggestions have been made that whilst the deceased was alive, Geoffrey employed some strategy and exerted a degree of influence on his father to have him include certain provisions in his will, a will which was made only a matter of months before his death. These suggestions, however, were not pursued in any real way before me. I take them no further, and put all this to one side in this decision.

[41] Nor at this stage, as I have noted above, am I prepared to throw into the mix issues of Geoffrey once having been declared a vexatious litigant in Queensland, Australia. There is simply no need, in my view, to go this far. I also place this aspect on one side.

Geoffrey's "parting company" with law firms involved in the administration of the estate.

[42] Lastly, before me the applicants also raised a further issue. This was that in the space of just a few months, Geoffrey parted company with two law firms he had instructed to be involved in the proposed administration of the estate, and now indeed he has consulted with the Public Trustee to provide some assistance for this administration.

[43] Again, I also leave on one side this fact that Geoffrey may have dispensed with the services of law firms regarding administration of the estate. The reasons for that it seems are disputed. It is not of assistance here for that aspect to be debated.

[44] What is useful to note, however, is that Geoffrey has consulted with the Public Trustee regarding certain aspects of the estate's administration. Geoffrey resides in Brisbane, Australia and although this does not disqualify him from being a trustee of the deceased's estate, obviously with the distance involved, it can cause some logistical problems. Presumably this is the reason why some assistance had been sought from the Public Trustee.

[45] In doing this, however, it seems to me to be at least in part some sort of acknowledgment by Geoffrey that he needs a degree of assistance in properly carrying out aspects of the administration of the estate.

[46] Certainly this factor, but linked especially with my findings noted above that Geoffrey has not displayed an even-handed approach with all the beneficiaries in the estate, nor perhaps properly and promptly taken steps to obtain probate, complete settlement of the house sale, and administer the estate with payments to be made to the beneficiaries of their entitlements, would tend to support the view that an independent trustee is needed here an arms-length consideration and administration of the estate.

[47] First, threats by Geoffrey to "dock" three of his brothers' shares in the estate by arbitrary amounts, and to levy such amounts as he may choose by way of "exemplary damages", and secondly, his unsubstantiated complaints alleging theft or conversion in respect of estate household items, must be matters of significant concern here. Thirdly, Geoffrey's stated intention to pursue, and use estate funds to litigate, the headstone inscription issue must also be seen as a further matter of concern.

[48] As I have outlined earlier, the starting point in matters of this type must always be the Court's duty to see that an estate is properly administered. In this case, there seems to be a significant degree of hostility between Geoffrey and his three brothers who are the applicants. I am satisfied this hostility is such that so far as Geoffrey as

trustee is concerned it must be seen as prejudicing the interests of a number, if not all, of the beneficiaries in the estate. The welfare of all beneficiaries as recorded above provides the “litmus” test in cases such as this and when considering whether it is expedient to remove and appoint a new executor and trustee.

[49] All of this, in my view, raises serious questions as to Geoffrey’s suitability to continue as executor and trustee of the estate. His removal here, in my view, is expedient. It is in the interests of all concerned to have matters for this estate finally dealt with and independently resolved. A new corporate trustee is also able to independently investigate any estate issues which are properly raised in a neutral way.

[50] No issue is taken with the suitability of The New Zealand Guardian Trust Company Ltd (Perpetual Guardian) as an alternative trustee. That company has agreed to accept appointment. Through its Regional Manager, Southern, counsel for the applicants have been advised that Perpetual Guardian’s work would be undertaken on an hourly rate basis, and the usual percentage based commission would not apply.

Result

[51] For all the reasons I have outlined above, the application before me succeeds. Geoffrey is now removed as executor and trustee of the deceased’s estate and the New Zealand Guardian Trust Company Limited (Perpetual Guardian) is appointed in his place.

[52] As to costs, the applicants have succeeded here and I see no reason why costs should not follow the event in the usual way. Nevertheless, counsel for the applicants has requested that at this point costs be reserved in this case. Costs are so reserved.

[53] In the event that the parties are unable to resolve this issue of costs directly between them, then memoranda may be filed sequentially on this issue, which memoranda are to be referred to me, and I will decide the question of costs based on the material then before the Court.

.....
Gendall J

Solicitors:
Meares Williams, Christchurch

Copy to Respondent Mr Geoffrey Bird