SUPREME COURT OF QUEENSLAND

CITATION:	*Chesney & Anor v Tognola & Anor* [2011] QSC 340
PARTIES:	**SANDRA WINNIFRED THELMA CHESNEY** (first applicant) **PATRICK NEIL BOLGER** (second applicant) and **BARRY JAMES TOGNOLA (as executor of the will of ESTELLE PATRICIA BOLGER deceased)** (first respondent) **DAVID ROBERT GLASGOW (as executor of the will of ESTELLE PATRICIA BOLGER deceased)** (second respondent)
FILE NO/S:	BS738/10
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	21 November 2011
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	13 July 2011
JUDGE:	Douglas J
ORDER:	**Application dismissed.**
CATCHWORDS:	SUCCESSION – EXECUTORS AND ADMINISTRATORS – PROCEEDINGS AGAINST EXECUTORS AND ADMINISTRATORS – where application for removal of executors – where relationship between executors and a son of deceased person – where related proceedings on foot – where executors likely to be called upon to give evidence in other proceedings regarding impugned share transactions – where no evidence suggestive of executors' inability to fulfil duties as executors – whether conflict exists between executors' interests and duties – where overriding object of power to remove executors is due and proper administration of estate – whether court's discretion pursuant to s 6 of the *Succession Act 1981* (Qld) ought be exercised *Succession Act* 1981 (Qld), s 6 *Baldwin v Greenland* [2007] 1 Qd R 117 cited *Gowans v Watkins*, Supreme Court of Victoria, No. 6131 of 1995, Teague J, 21 February 1996, BC9601257, unreported cited

Monty Financial Services Ltd v Delmo [1996] 1 VR 65 cited
Williams v Williams [2005] 1 Qd R 105 referred

COUNSEL: R N Traves SC with C K George for the applicants
A J Moon for the respondents

SOLICITORS: Emanate Legal for the applicants
Roberts Nehmer McKee for the respondents

[1] **Douglas J**: This is an application to remove the executors of the will of Estelle Patricia Bolger and to appoint a solicitor in their stead with a limited grant of administration of the estate under the court's powers pursuant to s 6 of the *Succession Act* 1981 (Qld).[1] The rationale for the application stems from the relationship between the executors and a son of the deceased, Terrance Bolger. They were his professional advisors as his solicitor and accountant and, on the evidence, close friends.

Background

[2] The applicants, Sandra Chesney and Patrick Bolger, are Terrance Bolger's sister and brother. They are parties to proceedings requiring the proof in solemn form of their mother's will executed in 2009. They are also applicants in a separate application for further provision from their mother's estate and in a third proceeding where they seek to set aside three share transactions made between 1996 and 1998 by which the deceased transferred shares, said to be then worth more than $9 million dollars, in a company called Over-Nite Holdings Pty Ltd to Terrance Bolger. Over-Nite Holdings is a company established and managed by Mr Frank Bolger, the husband of the deceased, and the deceased. After Frank Bolger's death the evidence suggest the company was managed principally by Terrance Bolger with his mother's involvement.

[3] The respondents are expected to be relevant witnesses in respect of the impugned share transactions and one of them, at least, Mr Tognola, may be a relevant witness in respect of the validity of the will. One of the complaints about the will is that Terrance Bolger's entitlements under it far outweigh those of his brother and sister. The validity of the will requires an examination of the testamentary capacity of the deceased. The only medical evidence I have seen touching on her mental state suggests she had normal capacity around the time the will was executed.[2] The applicants' observations as lay people were to the contrary. I am in no position to resolve such contested questions of fact on this application.

[4] The validity of the share transactions will depend on whether it can be proved that Terrance Bolger exercised undue influence over or behaved unconscionably towards his mother. The applicants' case is that he did and that the respondents' conduct, as professional advisors to Terrance Bolger during the period from 1996 to 1998, will come under scrutiny. The argument is that they will have an interest in supporting their actions then which will be in conflict with their duty as executors to get into the estate the maximum amount to which the deceased was entitled on her death.

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1 See *Williams v Williams* [2005] 1 Qd R 105, 108-109 at [12] – [13]

2 See the letter of Dr Cairns exhibited to the affidavit of Brian Tognola filed 24 August 2010 in matter 119 of 2010.

[5] The applicants also argue that the conduct of the respondents so far in administrating the estate does not suggest that they are disinterested or even-handed in their dealings with the applicants.

[6] I shall discuss each of those issues, whether the respondents are in a position of conflict and how their conduct to the applicants should be characterised, in that order.

Conflict between the executors' interests and their duties?

[7] The executors' involvement in the share transfers was as advisors. They have no continuing interest in the transactions themselves otherwise than as potential witnesses to the events surrounding those transactions. The applicants' argument is that it will be in their interest to contend that any advice given by them was appropriate but that it is in the interest of the estate that the transactions be set aside.

[8] It is difficult to see how this situation will affect them in their roles as executors on the assumption that I think I should make, in the absence of evidence to the contrary, that their evidence of the events relating to those transactions would be the same whether they continued as executors or not.

[9] There is no realistic suggestion that they are unable to carry out their roles as executors. One was an experienced solicitor and then a magistrate before he retired from that position. The other is an experienced accountant. Each of them had been an advisor of the deceased, and, prima facie, appears to be well qualified to handle the duties of an executor. The applicants do not appear to regard them highly professionally but there is no objective evidence of any significance to support those views and none that suggests that they are incapable of handling the duties of an executor.

[10] They were also criticised for not swearing affidavits dealing with the facts surrounding the share transfers between 1996 and 1998 on an earlier occasion when they sought the summary dismissal of the applicants' application for further provision out of their mother's estate. That was said to be a further illustration of the potential for conflict between their interest in the maintenance of those transactions and what Mr Traves SC described as the estate's interest in setting them aside. Again, however, I am in no position to determine the validity of those transactions on this application. What the respondents' evidence will be concerning those transactions has little to do with their performance of their functions as executors. It seems to me, therefore, that it is incorrect to characterise these issues relating to their potential evidence as ones that create necessarily contradictory interests in the respondents as executors.

[11] Their primary role is to administer the estate by realising the deceased's assets, paying her debts and distributing what remains to those entitled under the will or pursuant to any order for further provision out of the estate made by the court. The fact that they may be witnesses whose evidence is relevant to the capacity of the deceased to make her will or to the circumstances in which she entered into the impugned share transactions does not seem to me to be particularly relevant to their ability to perform their roles as executors.

[12] No doubt the applicants apprehend that the respondents will give evidence relevant to the validity of the will and the share transfers that may be at odds with theirs but that does not, in my view, create a true conflict of interest and duty in the executors as executors. More accurately it creates the possibility that their evidence will conflict with that of the applicants in circumstances where the court will need to determine where the truth lies and where their duty will be to give truthful evidence.

[13] That obligation is distinct from rather than at odds with their duty to administer the estate properly and they have no personal interest conflicting with that duty other than the reputational interest relied on by the applicants.[3] Nothing I have seen leads me to conclude that they have done anything that warrants their removal simply because they have such a possible interest in defending any relevant previous conduct by them. It would also be dangerous to remove them simply on the grounds that their evidence is likely to be contrary to the evidence of those who wish to challenge the will.

[14] As MA Wilson J said in *Williams v Williams*:[4]

> "A Court will not lightly interfere with a testator's appointment of executors and trustees. Its ultimate concern must be with the due administration of the estate in the interests of creditors and beneficiaries."

[15] That respect for the testator's intention is a consistent theme of the cases in this area.[5] Even if there were a true conflict of interest and duty the situation here does not give rise to a "serious risk of mischief" warranting the removal of the executors from their roles.[6]

The executors' dealings with the applicants

[16] The correspondence in ex 2 provides some of the main evidence relevant to the dealings between the respondents and the applicants. It does not appear to me to provide a strong basis for removing the executors.

[17] They dealt with each other essentially through their solicitors. The executors' initial concern was that the applicants particularise their allegations that the will was not executed properly, that the deceased was not of full testamentary capacity when she executed it, that she was unduly influenced or coerced into approving it and that it

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3 Compare *Monty Financial Services Ltd v Delmo* [1996] 1 VR 65.

4 *Williams v Williams* [2005] 1 Qd R 105, 115 at [45].

5 *Baldwin v Greenland* [2007] 1 Qd R 117, 130 at [44].

6 See the discussion by in *Gowans v Watkins* (Supreme Court of Victoria, No. 6131 of 1995, Teague J, 21 February 1996, BC9601257, unreported) at pp 27-31. The situation in England appears to be different. *Williams, Mortimer and Sunnucks, Executors, Administrators and Probate* (19th ed, 2008) at p 937 para 60-14 says, without reference to authority, that: "In particular if the administration has come to a standstill because relations between the personal representatives have broken down, or relations between the representatives and the beneficiaries have broken down, the court will ordinarily remove the personal representatives, and appoint new ones to enable the administration to be completed. It is not necessary to establish wrongdoing or fault by the personal representative to obtain his removal. If, for whatever reason, (such as clash of personalities, or the lack of confidence in the personal representative by the beneficiaries, even if unjustified) it has become impossible or difficult for the administration to be completed by an existing personal representative, then an order for his removal will usually be made." Here the relations between the applicants and the respondents are difficult but that does not mean that the administration of the estate is impossible or difficult.

was made in suspicious circumstances. They also pointed out to the applicants that such allegations were inconsistent with their claim for better provision out of the estate created by that will because that application assumed the validity of the will.

[18] The applicants, on the other hand, were seeking further information about the assets of the estate and expressing dissatisfaction with what information had been provided to them on that topic and the circumstances relating to the execution of the will. The executors' solicitors provided a copy of their will file for the 2009 will with authorities for a doctor and the Townsville Hospital to provide information about the deceased's testamentary capacity. There was a contest about the provision of the solicitors' file in respect of an earlier will executed in 2007 and the terms on which the medical authorities had been provided and further debate about the level of voluntary, pre-proceeding disclosure by the respondents, including statements for the executors pointing out that their status and powers remained in doubt because of the applicants' caveat on the will and reiterating their complaints about the applicants' failure to particularise the allegations of the deceased's incapacity at the time the 2009 will was executed. There was also some relatively uncontentious communication about the payment of estate bills and the location of estate property.

[19] The executors had also applied for summary dismissal of the applicants' application for further provision out of the estate and refused a request for an adjournment. They also refused to commence proceedings to set aside the share transactions made between 1996 and 1998 on the basis that no particulars had been provided sufficient to ground such an action.

[20] They were also criticised for being unavailable to meet one of the applicants, Patrick Bolger, soon after the death of his mother. On the correspondence that appeared to be a simple problem of time-tabling rather than anything sinister. They were also criticised for not providing explanations of any advice given to the deceased about the share transactions. They were under no obligation to volunteer such evidence at that stage.

[21] Their attitude to the capacity of the deceased in respect of the 2009 will was also criticised because of an alleged failure to provide evidence of independent inquiries made by them in respect of that issue. They were criticised for allegedly having adopted the position that the will was valid until the applicants provided information to the contrary, perhaps an illegitimate criticism when one bears in mind the failure of the applicants to respond to the requests for particulars of their allegations of lack of capacity and undue influence. The executors had also received the letter from Dr Cairns about the deceased's mental state to which I referred earlier. They subsequently provided it and a report from the Townsville Hospital to the applicants.

[22] None of the correspondence seems to me to raise legitimate concerns about the executors' conduct such as to justify their removal. It was argumentative and sometimes strongly expressed, on both sides, but in a way that reflects differences of opinion between the applicants and the respondents and their solicitors rather than misconduct by the respondents.

[23] It is the executors' responsibility after all, on having accepted the position, to defend the will against challenges of the type brought by the applicants unless there is reliable evidence sufficient to justify the conclusion, for example, that the

deceased lacked capacity when she executed the will. In a contested case such as this, where the executors' evidence may be relevant to that issue, it is important not to characterise legitimate resistance to an attack on the validity of the will as an improper approach to the claims of the beneficiaries.

[24] In considering whether I should exercise my discretion whether to remove the executors it is also relevant, although not determinative in this case, that the estate would be put to further expense by the need for any replacement administrator to familiarise himself or herself with the matters relevant to the estate's administration.

Conclusion and order

[25] Therefore, where the overriding object of the power to remove executors is the due and proper administration of the estate[7], it has not been shown to my satisfaction that the respondents should be removed for fear or apprehension that, because of the evidence they may give or from any doubts about their ability to perform their role as executors effectively or impartially, they will administer the estate improperly.

[26] It is my view that the executors should not be removed and that the application should be dismissed. I shall hear the parties as to costs.

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[7] See *Baldwin v Greenland* [2007] 1 Qd R 117, 130 at [44].