IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 47 OF 2009

IN THE MATTER of Section 35 of the Succession, Probate and Administration, Act Cap 60.

AND

Section 73 of the Trustee Act Cap. 65

AND

IN THE MATTER OF ESTATE OF KAMAL SHAH son of Murad Shah late of Raviravi, Ba, Farmer, Deceased.

AND

IN THE ESTATE OF SHAHIDAN Daughter of Din Mohammed, late of Raviravi, Ba, Fiji, Domestic Duties, testate.

BETWEEN : **NIZAM** son of Kamal Shah of Raviravi, Ba, Farmer.

PLAINTIFF

AND : **JAMAL SHAH** son of Kamal Shah of Raviravi, Ba, Farmer as the Sole Trustee of the **ESTATE OF SAHIDAN** daughter of Din Mohammed of Raviravi, Ba, Domestic Duties, deceased and as the Sole Administrator of the **ESTATE OF KAMAL SHAH** son of Murad Shah of Raviravi, Ba, Farmer, Deceased and in His Personal Capacity.

DEFENDANT

RU L I NG

INTRODUCTION

[1]. This is a case involving two brothers squabbling over the assets of the separate estate of their deceased parents. Jamal Shah, who is the defendant, is the sole executor of both estates. The plaintiff, Nizam, is a beneficiary of the estate. Apparently, there are two other brothers. They are not involved in this litigation and it is not clear from the affidavits filed whether they are beneficiaries as well.

[2]. There is evidently, much hostility between Nizam and Jamal. As a matter of general observation, hostility between the beneficiary and the executor/administrator appears to be the order of the day in almost every contested estate matter in the Lautoka High Court.

THE ORIGINATING SUMMONS

[3]. The Originating Summons filed on 24 March 2009 seeks the following Orders:

(i) That Jamal Shah be removed and discharged as the Executor and Trustee in the Estate and Trustee of Shaidan daughter of Din Mohammed, deceased and also as the Administrator in the Estate of Kamal Shah son of Murad Shah, deceased and in lieu thereof the Plaintiff be appointed as the Trustee/Administrator of the said two estates.

(ii) That all cane proceeds of farm No. 8208 be paid unto the Plaintiff's solicitor's trust account until a further Order of this Honourable Court.

(iii) That the Defendant whether by himself, his servants or agents or howsoever be restrained from entering the Plaintiff's house until a further Order of this Honourable Court.

(iv) That in the alternative the estate properties be put up for sale and the net proceeds be distributed according to the shares of each beneficiaries in the estate.

(v) That the Defendant do pay costs of these proceedings on a solicitor/client indemnity basis.

[4]. The summons does not state which particular law and/or statute it relies on. The intituling however, makes reference to section 35 of the Succession, Probate & Administration Act (Cap 60) and to section 73 of the Trustee Act (Cap. 65).

[5]. A short 11-paragraph affidavit sworn on 21 March 2009 by Nizam is filed in[1] support of the Summons. Jamal did file an opposing affidavit on 28 October 2009. Like the plaintiff's, Jamal's affidavit is rather brief[2]. Nizam's response

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[1] The affidavit deposes as follows:

1. That I am the Plaintiff/Applicant herein.
2. That the Defendant is my elder brother and the sole surviving trustee in the Estate of my mother and my father. That I annex a copy of the Letters of Administration of my father's estate and a copy of Probate of my mother's estate and mark the same as annexures "A" and "B" respectively.
3. That the Defendant and I are the only ones in occupation and cultivation of the farm. Two other beneficiaries namely Alam Shah and Anwar Shah have not lived on the farm for the past twenty years.
4. **That the Defendant has from 1990 to-date delayed payment of my share of the cane proceeds. And this puts me in great difficulty as I have to support my family and children who go to school.**
5. That the Defendant regularly interferes with my visitors and stops them from coming to my home.
6. That the Defendant and I live in separate unconnected houses but the Defendant has forcefully taken over a room in my house and keeps his personal items there. That the access to the said room is through my main doors and the Defendant has threatened to break down the door if I lock my main door during my absence from home.
7. That I ask this Honourable Court for Orders that the Defendant does not enter my house.
8. That the Defendant has been barred from participating in our harvest gang.
9. That the Defendant has created problems with our harvesting gang and this causes disruption to our normal harvest.
10. **That the Defendant as Trustee is not administering our Estate in a just and fair manner**.
11. That in the circumstances, I ask for Orders in terms of our Summons.

[2] The defendant deposes as follows:

1. I have been referred to the Affidavit of Nizam Shah the Plaintiff (hereinafter referred to as the **"Said Affidavit"**) and in reply say:
2. **AS TO PARAGRAPH 2 – 3 INCLUSIVE OF THE SAID AFFIDAVIT** I admit the contents therein.
3. **AS TO PARAGRAPH 4 OF THE SAID AFFIDAVIT** I deny the contents therein and say that the **cane proceeds were distributed by one Mobin Ali** (Plaintiff's brother in – law) and were on time (my emphasis).
4. **AS TO PARAGRAPH 5 OF THE SAID AFFIDAVIT** I deny the contents therein.

filed on 05 November 2009 is even more brief[3]. Nizam wants Jamal to be removed as sole trustee and that he (Nizam) be appointed in lieu. In the alternative, Nizam wants the estate properties sold and the proceeds distributed. Nizam also appears to allege that Jamal is delaying the distribution of the estate.

S. 35 SUCCESSION PROBATE AND ADMINISTRATION ACT

[6]. Section 35 gives power to the Court to Order the removal of an executor and appoint an administrator in his place with will annexed, **for any reason which appears to** [the Court] **to be sufficient**.

> **35**. The court may for any reason which appears to it to be sufficient, either upon the application of any person interested in the estate of any deceased person or of its motion on the report of the Registrar and either before or after a grant of probate has been made-
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> (a) make an order removing any executor of the will of such deceased person from office as, such executor and revoking any grant of probate already made to him; and
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> (b) by the same or any subsequent order appoint an administrator with the will annexed of such estate; and
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> (c) make such other orders as it thinks fit for vesting the real and personal property of such estate in the administrator and for enabling the administrator to obtain possession or control thereof; and
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> (d) make such further or consequential orders as it may consider necessary in the circumstances.

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5. **AS TO PARAGRAPH 6 OF THE SAID AFFIDAVIT,** The said room which the Plaintiff claims is his belongs to my younger brother Alam Shah who has built the room at his own costs. The access of the said room is through the backdoor and not the main door. The Plaintiff has broken the back door of the house and is using the passage door as entrance.
6. **AS TO PARAGRAPH 7 OF THE SAID AFFIDAVIT** That I as the sole trustee of the said Estate have the right to check the condition of the house as enormous damage has already been done. In any event the Trustee Act Cap. 65 empowers me to exercise general powers to carry out my duties.
7. **AS TO PARAGRAPH 8 – 9 INCLUSIVE OF THE SAID AFFIDAVIT** I deny the contents therein and say I was the President of the said harvest gang and commenced to cultivate and look after the said farm and incurred substantial expenses.
8. **AS TO PARAGRAPH 10 OF THE SAID AFFIDAVIT** That the Plaintiff from the year 1994 till 2005 harvested only 50 tons of cane which was shared amongst four people. The Crown Land requested that our outstanding rent was $3000.00 and as such I cultivated more than 200 tons of cane. (Attached is a copy of record from Growers Fund and FSC marked as annexure "A".)
9. Furthermore, as my duties are as executor and trustee of the Estate which I look after and which means that I am living on the Estate property, if I were removed I would have no other place to stay and the cultivation of the cane farm would be unattended with no benefit or income to the Estate and ultimately to the beneficiaries. Contrary to what the Applicant states, I would never do any injustice in distributing the shares to the other beneficiaries including myself.

[3] The plaintiff responds as follows:

1. That I am the Plaintiff/Applicant.
2. That as regards paragraph 3 of the said affidavit I deny the allegation therein and I say that the cane payments were never distributed on time and the Defendant is holding approximately $2000.00 of the cane proceeds.
3. That I categorically deny the allegation in paragraph 5 of the said affidavit.
4. That as regards paragraph 6 of the said affidavit, the Defendant is always trespassing in my private passage without any reason.
5. That I take issue with paragraph 7 of the said affidavit.
6. That I categorically deny paragraph 8 of the said affidavit.
7. That in answer to paragraph 9 of the said affidavit I say that the Defendant has a separate three bedroom house with a large sitting room and other facilities about 50 metres from my house.
8. That in the circumstances, I ask for Orders in terms of my Summons.

[7]. The phrase *"for any reason which appears to [the Court] to be sufficient"* suggests that the Court is given a very wide discretion. What factors should the Court take into account in exercising this discretionary jurisdiction?

S. 73 OF THE TRUSTEE ACT CAP. 65

[8]. Section 73 gives power to the Court to appoint new trustee or new trustees **"whenever it is expedient"**.

> **73**.-(1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order for the appointment of 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 limiting the generality of the provisions of subsection (1), the Court may make an order appointing a new trustee in substitution for a trustee who-
> (a) desires to be discharged;
> (b) has been held by the Court to have misconducted himself in the administration of the trust;
> (c) is convicted of any misdemeanour involving dishonesty, or of any felony;
> (d) is a person of unsound mind;
> (e) is bankrupt; or
> (f) is a corporation that has ceased to carry on business, or is in liquidation, or has been dissolved.
> (3) An order under the provisions of this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any discharged, 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 contained shall confer power to appoint an executor or administrator.
> (5) Every trustee appointed by the Court shall have, before as well as after the trust property becomes by law or by assurance or otherwise vested in him, 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.

[9]. At this point, I observe that **section 51 of the Trustee Act 1956**[4] **of New Zealand** is an exact replica of Fiji's section 73.

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[4] Section 51 of the New Zealand Trustee Act 1956 states:

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, whether summarily or on indictment, 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

OBSERVATIONS ON S. 35 & S. 73

[10]. To reiterate, section 35 gives the Court a wide discretion to remove an executor ***"for any reason which appears to*** [the Court] ***to be sufficient"***. Section 73 gives the Court a similarly wide discretion to appoint a new trustee ***"whenever it is expedient"***. How different is the **"sufficient"** test under section 35 from the **"expedient"** test under section 73? This case may not be the occasion to consider this question in great depth. I say that having considered that section 73(4) operates to preclude the application of section 73 to cases which concern the appointment of an executor or administrator, such as the one now before me.

> (4) Nothing in this section contained shall confer power to appoint an executor or administrator

[11]. Accordingly, I will restrict my focus in this case to section 35(a) and (b). Section 35(b) gives power to this court to Order the appointment of a new trustee to replace one that the Court may have removed under section 35(a).

> (b) by the same or any subsequent order appoint an administrator with the will annexed of such estate; and

NATURE OF COURT'S JURISDICTION

[12]. Apart from the statutory jurisdiction under section 35 to remove an executor and appoint an administrator with Will annexed, the court also has an inherent jurisdiction to do the same base on principles of equity. As the New Zealand Court of Appeal said in **Georgina Kain & Ors v Hutton & Ors CA 246/01**:

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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.

> The jurisdiction to appoint and remove trustees is both inherent and statutory, the legislative authority being s 51(1) of the Trustee Act 1956 which provides as follows:
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> ……
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> The inherent jurisdiction is derived from the Court's general supervisory powers in equity relating to the supervision of trusts for the welfare of beneficiaries. The relevance of that objective is recognised in well-known cases such as *Letterstedt v Broers* (1884) 9 App Cas 371 and *Hunter v Hunter* [1938] NZLR 520.

[13]. The above applies equally in Fiji as it does across the common law world. Hence, as to the statutory discretion conferred under Fiji's section 35(a) and (b), in my view, the breadth and scope of these provisions must be contextualised against the Court's *"general supervisory powers in equity"*.

[14]. It is vital to note that the *"general supervisory powers"* that equity bestows upon this Court also imposes upon this Court a solemn duty to see that a trust or an estate is properly executed. In other words, the power of the Court to remove an executor and appoint an administrator with Will annexed, is ancillary to the Court's principal duty to see that a trust or an estate is properly executed.

[15]. This is trite throughout the common law world where the principles, as stated by Lord Blackburn in the Privy Council case of **Letterstedt v Broers [1884] 9 App Cas 371 at 385 to 38,** which is referred to in **Georgina Kain,** are settled.

WELFARE OF BENEFICIARIES – "LITMUS" TEST

[16]. For this Court, the primary consideration in whether or not to remove/appoint an executor under section 35 (or a trustee under section 73) is the welfare of the beneficiaries. In **Letterstedt**, Blackburn LJ said as follows at page 386:

> It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the

> trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

At page 387:

> In exercising so delicate a jurisdiction as that of removing trustees , their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependant on details often of great variety. But they proceed to look carefully into the circumstances of the case.

[17]. The same principles are resonated in **Snell's Principles of Equity (28th ed)** at pages 210 to 211 - that the welfare of the beneficiaries must be the court's guide in exercising both its inherent and statutory jurisdiction to remove a trustee (or executor) (my emphasis):

> Apart from statute, the court has an inherent jurisdiction to remove a trustee and to appoint a new one in his place. As the interests of the trust are of paramount importance to the court, this jurisdiction will be exercised whenever the welfare of the beneficiaries requires it, even if the trustees have been guilty of no misconduct. The welfare of the beneficiaries is also the court's guide in exercising its statutory powers of removal.

[18]. And the High Court of Australia (as per Dixon J) echoes the same sentiments in **Miller v Cameron** (1936) 54 CLR 372 (my emphasis):

> The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary.

[19]. And Latham CJ, in the same case, follows suit, by saying that the principal element, when considering the welfare of the beneficiaries, is the safety of the trust estate:

> It has long been settled that, in determining whether or not it is proper to remove a trustee, the Court will regard the welfare of the beneficiaries as the dominant consideration (*Letterstedt v. Broers*[1]). Perhaps the principal element in the welfare of the beneficiaries is to be found in the safety of the trust estate. Accordingly, even though he has been guilty of no misconduct, if a trustee is in a position so impecunious

> that he would be subject to a particularly strong temptation to misapply the trust funds, the Court may properly remove him from his office as trustee. No distinction in this connection can be drawn between a bankruptcy and an assignment for the benefit of creditors. A trustee who becomes bankrupt is removed almost as of course (*Bainbrigge v. Blair*[2]). There may be exceptions under special circumstances to this rule, but the rule is generally applied (*In re Barker's Trusts*[3]). If the bankruptcy is explained by financial misfortune without moral fault and the trustee has recovered from pecuniary distress he may be allowed to retain his office (*In re Adams' Trust*[4]).

[20]. Smith J of the New Zealand High Court, in **Hunter v Hunter [1937] NZLR 794**, when dealing with section 21 of the New Zealand Administration Act 1969 and section 51 of the New Zealand Trustee Act 1956, which both provide for an "expedient test" (see footnotes) , said at page 796:

> In determining whether the trustees should be removed, the Court has a discretion. The leading case is Letterstedt v Broers (1884) 9 App Cas 371. The Privy Council there held that there is a jurisdiction in Courts of Equity to remove old trustees and substitute new ones in cases requiring such a remedy, and that the main principle upon which the jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate.

[21]. Scott J said in **Chellaram v. Chellaram** (1985) 1 Ch.D 409 at p.428:

> The jurisdiction of the court to administer trusts to which the jurisdiction to remove trustees and appoint new ones is ancillary, is an in personam jurisdiction. In the exercise of it, the court will inquire what personal obligations are binding upon the trustees and will enforce those obligations... The trustees can be ordered to pay, to sell, to buy, to invest, whatever may be necessary to give effect to the rights of the beneficiaries, which are binding on them. If the court is satisfied that in order to give effect to or to protect the rights of the beneficiaries, trustees ought to be replaced by others, I can see no reason in principle why the court should not make in personam orders against the trustees requiring them to resign and to vest the trust assets in the new trustees .

HOSTILITY BETWEEN TRUSTEES & BENEFICIARIES

[22]. The plaintiff and the defendant in this case before me are brothers. Judging from the tone of their affidavits, there is clearly some hostility between them. Whether *"hostility"* between an executor and a beneficiary, in itself, is enough reason to remove the executor, is a niggling question for the courts.

[23]. In my view, hostility is not irrelevant in the exercise of the section 35 discretionary jurisdiction. However, at the end of the day, the Court still has

to be guided by its duty to see that a trust or an estate is properly executed and to protect the interests of the beneficiaries. The question simply is: whether there is any ground for concern that the trust and/or the welfare of the beneficiaries is at risk because of the hostility?

[24]. In **Crick v McIlraith [2012] NZHC 1290**, New Zealand Associate Judge Osborne said:

> …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*.

[25]. I think Fiji Courts should follow suit.

MISCONDUCT

[26]. Nizam hints in his affidavit that Jamal misconducts himself in administering the estate, although the allegations in the affidavit are rather broad and sweeping. I ask whether misconduct on the part of an executor is sufficient reason to remove an executor of a will? Undoubtedly, some types of misconduct will strike at the heart while others may not.

[27]. In **Miller v Cameron** (see above), the High Court of Australia cautions that a trustee is not to be removed unless circumstances exist **"to show that the welfare of the beneficiaries is opposed to his continued occupation of office"**.

> A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised. But in a case where enough appears to authorize the Court to act, the delicate question whether it should act and proceed to remove the trustee is one upon which the decision of a primary Judge is entitled to especial weight.

[28]. In contrast, the Privy Council in **Letterstedt** (see above) has said that allegations of misconduct against a trustee, even if not established, might still support an Order to remove the trustee, if to keep the trustee in office might still prevent the trust being properly executed.

> ...charges of misconduct were either not made out, or were grossly exaggerated, so that the trustee was justified in resisting them, ... yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed..
>
> But **in cases of positive misconduct**, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute their duties or a want of reasonable fidelity.

[29]. The lesson I draw from these cases and which I apply to guide me in applying section 35 is that misconduct may or may not be sufficient reason to remove an executor but that depends on whether or not the misconduct in question is a threat to the welfare of the beneficiaries or to the estate/trust in question.

RESPECTING THE TESTATOR'S CHOICE OF EXECUTOR

[30]. One of the reasons why the Courts will not lightly remove an executor/trustee is because of the need to respect the testator's (or settlor's) choice of executor/trustee.

[31]. I think this is good principle. In **Harsant v Menzies** [2012] NZHC 3390, the New Zealand High Court (as per Ellis J) said, *inter alia*, said at para [57]:

> [57] The intensely discretionary nature of the jurisdiction has been repeatedly recognised in the case law. The particular facts and circumstances of the particular case are all important. Other relevant guiding principles that are evident in the cases are that:
>
> (a) the starting point is the Court's duty to see estates properly administered and trusts properly executed;
> (b) the wishes of the testator/settlor (evidenced by the appointment of a particular executor or trustee) are to be given considerable weight;
> (c) the welfare of the beneficiaries is the "litmus" test; and
> (d) hostility as between administrators/trustees and beneficiaries is not by and of itself a reason for removal. Such hostility assumes relevance if and when it risks prejudicing the interests of the beneficiaries.

[32]. In the balancing exercise, the court should still give due weight to the testator's/settlor's wishes as evidenced by his choice of executor/trustee. However, at the end of the day, it is the interest of the trust and the

beneficiaries which is paramount. This is good law in my view and there is every reason for this court to follow suit when considering whether or not to remove and/or appoint an executor under section 35.

DELAY IN DISTRIBUTION

[33]. Any delay in distribution of the assets of the estate will be a very strong ground for raising a suspicion that the interests of the beneficiaries or the estate are being compromised. However, having said that, an executor may delay the sale of assets and the distribution of proceeds for good reason. For example, he or she may wish to await a favourable market to secure an optimum price.

CONCLUSION

[34]. While the welfare of the beneficiaries is paramount in any application under section 35, any beneficiary applying to remove an executor faces the initial hurdle of convincing the Court that the testator's choice must be disregarded. To be able to succeed, he must adduce clear evidence that the interests of the beneficiaries and of the estate will be compromised if the testator's choice of executor is to continue. Evidence of hostility, delay, and misconduct is relevant, but not necessarily conclusive. In each case, the question is whether these evidence demonstrate a clear threat to or a compromise of the interests of the estate and the beneficiaries. In the case before me, I find no such clear evidence. Accordingly, I dismiss the Originating Summons. Parties are to bear their own costs.

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Anare TUILEVUKA
JUDGE
28 March 2013