

**IN THE COUNTY COURT AT CENTRAL LONDON**  
**SITTING AT THE MAYOR'S & CITY OF LONDON COURT**

Claim No: D10CL697

Guildhall Buildings  
London EC2V 5AR

Date: 28 March 2019

**Before :**

**HIS HONOUR JUDGE MONTY QC**

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**Between :**

**VIVIEN PATRICIA KING**

**Claimant**

**- and -**

**(1) WILLIAM PETER HERBERT ELLIS**

**(2) JACQUELINE MARY SMITH**

**Defendants**

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**Mr Paul Dipré** (instructed by **William Bailey Solicitors**) for the **Claimant**  
**Mr George Mallet** (instructed by **Girlings Solicitors**) for the **First Defendant**  
**Mr Hugh Cumber** (instructed by **MW Solicitors**) for the **Second Defendant**

Hearing date: 25, 26 March 2019  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge Monty QC

## **HHJ Monty QC:**

### **Introduction**

1. This is the trial of a claim brought under the procedure in Part 8 of the Civil Procedure Rules to remove and replace the executor of the estate of the late Eileen Mary Ellis.
2. Mrs Ellis died on 9 June 2014. By her last will dated 25 October 1997, she appointed her husband as her executor, or if he should predecease her, her son William. In the event, her husband did predecease Mrs Ellis, and William was appointed. The residuary beneficiaries are Mrs Ellis's three children. Vivien is the Claimant in this action. William, the executor, is the First Defendant. Jacqueline, known as Jackie, is the Second Defendant. I shall refer to them by their first names in this judgment.
3. The principal asset of the estate was Mrs Ellis's home, 10 Bute Court, Surrey. There was also some cash in accounts with Lloyds Bank and Santander, and in an account with TSB, as well as policies with Prudential, M&G and Scottish Widows. There was a small amount of money invested in shares. The estate accounts show a modest net estate of just under £170,000 (although it is fair to note that this is net of some £32,000 of disputed items which are the focus of this claim).
4. Vivien was represented by Mr Dipré, William by Mr Mallet and Jackie by Mr Cumber. Each of them presented their written and oral arguments concisely and thoroughly.

### **This claim**

5. The Claim Form (issued in June 2017) states that the basis of the application is that William has shown himself to be hostile to Vivien, and has delayed in the administration of the estate by (i) failing to provide an estate account since 8 October 2014, (ii) by allowing the property to remain empty, unsold and not generating income until very recently, and (iii) by allowing Jackie to meddle with the estate and or by failing to collect in debts owed to the estate by Jackie. Those debts are said to be some £42,000 of which Jackie has accepted that £9,862 must be accounted for (hence my reference to £32,000 being in dispute: paragraph 3 above).
6. The application is opposed by William and Jackie.
7. The trial proceeded on the basis of the witness statements filed in this action and submissions by counsel. It was agreed that there was no need for oral evidence.

### **The legal framework**

8. The power to remove and replace an executor derives from section 50 of the Administration of Justice Act 1985, which provides so far as is relevant:

“(1) Where an application relating to the estate of a deceased person is made to the High Court under this subsection by or on behalf of a personal representative of the deceased or a beneficiary of the estate, the court may in its discretion –  
(a) appoint a person (in this section called a substituted personal representative) to act as personal representative of the deceased in place of the existing personal representative or representatives of the deceased or any of them;”
9. For completeness, I should note that this action was commenced in the Chancery Division of the High Court, and was transferred to the County Court, giving this Court the jurisdiction of the High Court: *National Westminster Bank v King* [2008] Ch 385.
10. The principles to be applied are those set down in *Letterstedt v Broers* (1884) 9 App Cas 371 as confirmed in *Thomas & Agnew Carvel Foundation* [2008] Ch 395 at [44-

- 47]. The court's principal duty is to see that the trusts are properly executed in the interests of the welfare of the beneficiaries. If the court is satisfied that the continuance of the executor in post would prevent that from happening, the trustee might be removed.
11. Those principles have been commented upon and applied in many cases since the 19<sup>th</sup> century, and are summarised in both Williams, Mortimer & Sunnucks – Executors, Administrators and Probate (21<sup>st</sup> Ed.) at 57-20 and Tristram and Coote's Probate Practice (31<sup>st</sup> Ed.) at 41.16.
  12. In summary:
    - (1) There is no need to find wrongdoing or fault on the part of the executor. The guiding principle is whether the administration of the estate is being carried out properly and whether it is in the best interests of the beneficiaries to replace the executor.
    - (2) If there is fault or wrongdoing on the part of the executor the court is likely to exercise its section 50 powers, but if the criticism is minor and does not affect the administration of the estate or its assets, it may well not be appropriate.
    - (3) The wishes of the testatrix are a factor to take into account, as well as the wishes of the beneficiaries. The court has to make a balanced judgment taking a broad view as to what is in the interests of the beneficiaries as a whole, particularly where there are competing points of view.
    - (4) If there is no fault or wrongdoing, the court will need to consider whether it has become impossible or difficult for the executor to complete the administration of the estate, reviewing what has been done and what remains to be done.
    - (5) A breakdown of relationship between some or all of the beneficiaries and the executor will not without more justify their replacement.
    - (6) The additional cost of replacing the executor as well as the size of the estate are also relevant factors.
  13. In the present case, Vivien seeks the removal of William as executor, and that she should be appointed in his place. The court also has the power to appoint a judicial trustee (see section 50(6) of the 1985 Act and section 1(7) of the Judicial Trustee Act).
  14. The burden of proof is on the person seeking the replacement, in this case the Claimant, Vivien. See for example *Harris v Earwicker* [2015] EWHC 1915 (Ch), a decision of Chief Master Marsh at [39]:

“The jurisdiction under section 50 is not to be exercised lightly and although there is no presumption against change, the party seeking change must satisfy the court that there are substantial grounds which make a change necessary.”
  15. Similarly, in *National Westminster Bank plc v Lucas and others* [2014] EWCA Civ 1632, a decision of the Court of Appeal, at [83]:

“... the direct intervention by the Court in the administration of a trust or an estate by the removal of the trustee or personal representative has, for the most part, to be justified by evidence that their continuation in office is likely to prove detrimental to the interests of the beneficiaries. A lack of confidence or feelings of mistrust are not therefore sufficient in themselves to justify removal unless the breakdown in relations is likely to jeopardise the proper administration of the

trust or estate. This is something which requires to be objectively demonstrated and considered on a case-to-case basis having regard to the particular circumstances.”

16. I therefore disagree with Mr Dibré’s submission that it is for Jackie to provide an adequate explanation of each item of expenditure. The submission is in part at least based on Jackie’s status as attorney under a power of attorney granted by Mrs Ellis, and the obligation of a fiduciary to account, but as I shall set out later in this judgment, it seems to me that cannot reverse what is in my view, on the authorities I have cited, clearly a burden on Vivien to prove her case. It ignores the fact that this claim is not about whether Jackie did or did not in fact properly account for the various transactions, or whether she actually stole money from Mrs Ellis as Vivien alleges, but whether in the context of an application to remove an executor, the executor had made proper enquiries and should have been more sceptical of the explanations given by Jackie. I am also not prepared to draw inferences (as Mr Dibré says I should on the evidence) that Jackie helped herself to more money than she has admitted. As Mr Cumber helpfully put it, the attempt to shift the burden of proof or to draw such inferences and turn them into findings of fact would be to convert this claim into something it is not, and it would make the court’s task an impossible one.

### **Chronology**

17. The factual background is as follows, as appears from the evidence and the documentation before me.
18. Following the death of Mrs Ellis in June 2014 and the subsequent grant of probate on 8 August 2014, it was realised that the main asset, the property, would have to be sold. It was tenanted. It was necessary to remove the tenant by bringing possession proceedings. This took until May 2015. The tenant paid rent during that period.
19. The property was leasehold with only 32 years remaining. It was decided by William to renew the lease. This decision was in accordance with the duty of trustees in such a situation: see Lewin on Trusts, at 34-055, which states that a trustee is “under a duty to seek a renewal of the lease if a renewal would be beneficial to the trust, whether the lease is renewable as of right or not.” William took professional advice and negotiations for a new lease commenced.
20. The property was marketed for sale with the benefit of the proposed new long lease, and a sale was agreed at £205,000 in September 2015; this fell through apparently because the proposed purchaser had difficulties in getting funds. By April 2016, William had obtained a further valuation of the property at £260,000 with the new lease and if it was redecorated, and so he arranged for that to happen, and it was remarketed following the redecoration in August 2016.
21. In the meantime, the negotiations for the new lease continued, and proceedings were issued, which were eventually compromised by agreement, with around £80,000 being paid for the new lease, which was completed in November 2016. The documentation shows that at one point a figure of £70,000 had been offered, but William had been advised that £60,000 was the right price and the offer was rejected. The property was sold in January 2017 for £250,000.
22. As to the money in the Lloyds and Santander accounts (there is no issue in relation to any of the other assets), William explained in his evidence that after obtaining probate, he made extensive enquiries into the estate. He was aware that during his late mother’s lifetime, she had advanced money to Jackie, so he obtained copies of the relevant bank

statements. The Santander account had a credit balance of £6,507.24, and that account was then closed. He then started to look at the Lloyds account.

23. Vivien said in her evidence that William was very angry to discover that there were many unexplained transactions which appeared to involve Jackie, and he was able to obtain statements going back to 2007. William agreed that he was initially angry about these entries. William said he spoke at length to Jackie.
24. A spreadsheet was prepared (William said it was prepared by Vivien's son, and Vivien says that William prepared it; nothing turns on this) setting out all of the entries on the Lloyds account, and Vivien marked it up with a number of transactions which she queried. Indeed, in her second statement, she said that Jackie had "swindled" Mrs Ellis. In her third statement she says that Jackie had stolen money from the account and had lied about what had happened.
25. William's investigations established that Jackie owed £9,862.00 to the estate, and he accepted Jackie's explanations about the remainder of the transactions.
26. The relationship between Vivien and William had been cordial and co-operative until December 2016, when an issue arose over whether William was going to use (or in Vivien's view, should have used) the services of a company called Will Drafters to assist with the administration. Vivien said that she would be contacting her lawyers. The present proceedings were commenced in June 2017.

### **The queried transactions**

27. The spreadsheet to which I have referred is the central document relied on by Vivien. It sets out all of the entries on the Lloyds Account from 31 December 2007 to 3 July 2014. Some of the entries are colour-coded, and these are the ones which Vivien asserts in this action that William failed properly to investigate, and which she says demonstrate (a) that Jackie had no proper explanation for them, and (b) that William had accepted Jackie's explanations when he should not have done.
28. Bearing in mind the principles relating to section 50 applications which I have set out above, my approach is to see whether on the evidence before me Vivien has proved, on balance of probabilities, that William failed to make a proper investigation of these transactions and if so, that is one of the factors I should take into account when deciding whether or not to exercise my discretion under section 50.
29. I agree with Mr Cumber (and I have already alluded to this point when dealing with the burden of proof) that I should also bear in mind that this is an administration claim, and not a money claim; the court is not being asked to make findings about misappropriation, only whether Vivien has established a failure on William's part to investigate, with proper rigour, any questionable transactions.
30. The colour-coded entries total some £42,000. In her first statement, Vivien says this:

"In order to complete the administration the estate needs to recover some £42,000 odd that my sister the 2<sup>nd</sup> Defendant took from my late mother's account before her death."

Of the £42,000, Jackie has agreed (following investigations carried out by William into the transactions) that £9,862 must be repaid. These sums were set out in a letter from William's solicitors, Girlings, dated 6 February 2017.

**(a) *Green entries: cheques totalling £13,284.49.***

31. William says that he asked Jackie about these. Jackie said in her evidence that William had all the information about the cheques; William said that he was satisfied that a number of these cheques were written by his late mother for small cash withdrawals, having looked at some cheque stubs, and that there was nothing untoward about those. The fact they bore consecutive cheque numbers but were cashed weeks or months apart would in my view be consistent perhaps with Mrs Ellis having written them out and given them to Jackie. There is email correspondence attached to William's witness statement which shows in my judgment that he pressed Jackie about the cheques and that Jackie accepted that some of them represented monies which should be repaid to the estate.
32. There was one cheque for £1,500 made out to "Mrs J A Pearce" which Jackie was initially not able to explain; William obtained a copy of the cheque, and compared the signature on that cheque to a known signature of his late mothers and was satisfied it bore her signature. There is in my view no basis for Vivien's assertion that it was forged. William knew a Mrs Jennifer Pearce and he made enquiries of her, but she could not explain it either, and in her witness statement Jackie said that knew nothing about it. However, in a letter from her solicitors dated 5 July 2018, shortly after the witness statement had been provided, it was said that Jackie had telephoned and spoken to William's wife and had given an explanation: she had said that she now recalled that the £1,500 was paid to Mrs Pearce because her daughter was buying a car from Mrs Pearce's son, and that Jackie accepted this had to be repaid to the estate. However, in a letter in response it was said by William's solicitor that Mrs Pearce confirmed that account and that she had repaid the £1,500 on 3 April 2009 to the Lloyds account.
33. Another query which arose under this head was in relation to a payment to Vivien of £5,000; Jackie explained at the time that payments were to make use of Mrs Ellis's gift allowance for tax purposes, and that each of the three children had received similar amounts. Vivien noted that the payment to her was marked "Mum's investment", and Mr Dipré pointed to the first paragraph of Jackie's statement which said that she had not invested any of her late mother's money. In my view, however, there was nothing odd going on here; it is not surprising that a decision was taken to distribute some of the cash during Mrs Ellis's lifetime in anticipation of her possibly needing to go into care, and in my view William was right to have accepted the explanation. Again, Vivien alleged that the cheque was forged. There was no basis on the evidence before me for this allegation.

**(b) *Orange entries: use of bankcard, totalling £1,261.50.***

34. Jackie's explanation for these payments was that they were repayments to her of payments she had made, on Mrs Ellis's behalf, for frozen meals purchased from Wiltshire Farm Foods, which Mrs Ellis used for her evening meals. William's evidence was that it was his understanding that the frozen meals arrangement was only for a period of two months, as his mother did not like the food. Vivien points to this inconsistency, and it is right that the periods of time are not consistent, and because William also says that the sums spent on the card were said by Jackie simply to be purchases for Mrs Ellis. William in any event concluded that the amounts were modest and consistent with Jackie's explanation, and he has not put in any evidence in response to Jackie's which says that they were all repayments for the frozen meals. It is right to note here that Jackie was her late mother's main carer, and she would be best placed to know the period in which the frozen meals were provided.

**(c) *Blue entries: ATM withdrawals totalling £9,260.00.***

35. Jackie's explanation for this was that she did use the card (I was told in oral submissions that Vivien believes that it was Jackie's husband who used it but I cannot find any evidence in the witness statements to that effect) at Mrs Ellis's request and the money was for Mrs Ellis. It is important to note that this sum, whilst substantial, is over a period of years. According to Jackie, most of the money (almost £8,000) was used to redecorate and refurbish the property, for Mrs Ellis's benefit, and the balance was made up of cash withdrawals over a 5-year period, also for her benefit. Some of the withdrawals form part of the £9,862 which Jackie has agreed to repay. In my view, there is no basis for Vivien to say that there has been no full investigation of these withdrawals.

**(d) *Yellow entries: a number of queried items, totalling £13,155.29.***

36. These were said by Jackie to have been expenditure for Mrs Ellis on clothes, toiletries, miscellaneous small items such as keys, and a washing machine and a vacuum cleaner. A large part of these yellow entries, however, represented sums which formed the £9,862 which Jackie accepted needed to be repaid. Some attention at the trial was focussed on the absence of receipts for these purchases, but it became apparent that for the washing machine a receipt had been found and I have to say that it is not surprising that there are no receipts for other items as it was all so long ago. In my judgment, William gave careful consideration to these yellow entries, and accepted that subject to the sums which Jackie agreed to repay, the payments were appropriate and there was nothing untoward about them.

**(e) *Red entries: payments for food totalling £4,392.40.***

37. Jackie explained to William that these were for Mrs Ellis's food shopping over the several years in question, and William accepted it. In my view, there was nothing unusual in the explanation or the amount which should have led William to doubt the explanation given.

**(f) *The Power of Attorney***

38. One further point which was made by Mr Dipré in relation to these payments was that both William and Jackie had a power of attorney given to them by Mrs Ellis in July 2007. No copy of that power of attorney has been disclosed. Mr Dipré says that although these payments were generally by Jackie, William as joint and several attorney with Jackie, owed a fiduciary duty akin to a trustee in relation to the exercise of that power; in particular, the bank account was in the name of William and Jackie "POA for Mrs Eileen Ellis". His submission was that William had done nothing, as attorney, to check on or restrain Jackie's use of the power of attorney, and that put him in a conflict of interest when acting as executor.

39. Not only is that not a pleaded reason for removing William as executor, I think that is with respect to misunderstand the difference between an attorney and a trustee; an attorney is not a trustee of the donor's estate and whilst as attorney William would have owed fiduciary duties had he himself exercised the power, there is no evidence that he did; all the transactions which have been investigated were Jackie's transactions, and so any point in relation to William and the power of attorney seems to me to fall away, and to say that Jackie owed fiduciary duties really adds nothing to Vivien's case.

### **Estate accounts**

40. Mr Dipré also said that there were significant problems with the estate accounts. It will be recalled that in the Claim Form the allegation was that there had been a failure to provide estate accounts, but that is not made out on the evidence before me. I accept William's evidence that draft estate accounts were provided on 10 May 2017 (before these proceedings were issued) and that revised estate accounts have been provided in July 2017. In the event, the only criticism of the estate accounts which Mr Dipré made was that the money withdrawn on the closure of the Santander account did not feature, but that was not correct as it was shown in the estate accounts, albeit under the entry "Abbey National" (which was the name of that bank in earlier years, as is well known). So, in my view there is nothing in the complaints about the estate accounts.

### **Will Drafters**

41. I have already referred to the issue involving Will Drafters which seems to have precipitated the falling out between Vivien and William. Will Drafters were employed in relation to the eviction proceedings but not in relation to other matters. Mr Dipré says that it is not clear that William understood his duty as an executor and was struggling; he should have used a third party such as Will Drafters to conduct an objective investigation into all of these transactions. I do not think that criticism is made out. William explains in his evidence, which I accept, that he did understand his duties clearly, and that he did investigate all of these transactions; he says that he did not use Will Drafters because of the likely cost to the estate (and in the event, solicitors charged less for the estate accounts than Will Drafters would have done).

### **Conclusions on William's investigations**

42. William says that he had carried out thorough investigations into all of these transactions, and has made relevant and reasonable enquiries to explain any discrepancies. He identified a number of misappropriations and obtained an agreement that they would be repaid by a set-off against distributed sums.
43. Having considered the evidence as a whole, I agree with Mr Mallet and Mr Cumber. In my judgment, Vivien has not made out a case for finding, on balance, that William had failed in his duty as executor to make proper and appropriate investigations into the various transactions. It seems to me that having been angry about what he discovered, and having launched a full-scale investigation of transactions over a 6½ year period, William would have been less and not more likely to have accepted spurious or improbable explanations from Jackie, which only goes to reinforce my view that he acted properly, sensibly and logically. He accepted Jackie's explanations where they seemed to accord with what he knew about how Jackie was looking after Mrs Ellis, properly investigated and came to appropriate conclusions in respect of the queried payments, and obtained Jackie's agreement in relation to the £9,862.

### **Allegation of hostility**

44. I also do not accept that there is any evidence of hostility between Vivien and William. As I have said, they were initially co-operating and the evidence shows that they were, initially until the falling out, united in a determination to get a proper explanation from Jackie and the return of any money which had been misappropriated. The falling out was precipitated by Vivien alone. I agree with Mr Mallet that the evidence in fact shows that William arbitrated between his sisters as best he could under extreme pressure. There is no evidence that hostility has hampered the administration of the estate; the evidence in fact is that any hostility is between Vivien and Jackie.



### **Allegation of delays**

45. In my judgment, there was no untoward delay here. Mr Dipré says that the chronology of events speaks for itself, but I agree with Mr Mallet that in fact it does not; the true history is that I have summarised at paragraphs 18 to 26 above, and any further delay in administering the estate was due to (a) William's investigations of the transactions, and (b) Vivien's refusal to accept Jackie's explanation, which led to this litigation.
46. In any event, I agree with Mr Cumber that section 44 of the Administration of Estates Act 1925 does not compel a distribution within a year if there is a valid reason for a delay, and here there plainly was such a reason.
47. Further, I note that the will itself gives the trustee the right, if they think fit and without liability for loss, to retain the estate or any part of it.
48. In my view, the allegation of delay is not made out.

### **Other relevant factors**

49. Other factors I take into account are these.
50. First, the administration of the estate is complete subject to distribution of the estate, which has been delayed because of this litigation.
51. Secondly, it was Mrs Ellis's clear wish that William be appointed (subject to Mr Ellis senior not surviving her), and in the circumstances which occurred, this seems to me to have been a prescient choice. As was said in *Kershaw v Micklethwaite* [2010] EWHC 506 (Ch) by Newey J as he then was at [14]:

“For my own part, I agree ... that a testator's choice of executors is capable of being of relevance, if on no other basis than because the testator may be expected to have had knowledge of the characters, attitudes and relationships involved which a court will lack.”

52. Thirdly, two out of three of the beneficiaries oppose this application and do not accept the criticisms made of William's investigation or of any delays. William and Jackie would like the estate to be distributed.
53. Fourthly, were there to be a replacement executor, there would have to be a fresh investigation of the disputed transactions. Mr Dipré confirmed that the only matters at the end of the day which Vivien was now wanted to query amount to some £32,000. I bear in mind the time this might take and the cost of any further investigation and litigation, and the fact that the sum involved, whilst representing a substantial part of the overall estate, is relatively modest and is subject to a three-way division under the will.
54. Fifthly, in my view for the reasons I have set out above, there is not even a prima facie case that William has breached his duty of care under the Trustee Act 2000.
55. Sixthly, the breakdown in relationships is not a strong factor in the present case, because (a) it is in any event without more not enough, and (b) the fact is that save for distribution, the administration is complete. Against this, of course, is the fact that Vivien's case is that there cannot be a distribution until the disputed items are resolved, but it seems to me that since there is no ground for challenging William's investigations, the breakdown in relationships is not sufficient. I would respectfully adopt what was said by Newey J in *Kershaw*, at [28]:

“As I have already said, however, I do not consider that friction or hostility between an executor and a beneficiary is of itself a reason for removing the executor. ... As I see it, the poor relations between the parties need not and should not either prevent or impede substantially the administration of the estate.”

56. Seventhly, the other minor disputes concerning jewellery, the wedding ring, and even the cause of Mrs Ellis’s death have in my view no bearing on the decision I have to make. It is accepted by Mr Dibré that there is in any event little if any documentary evidence in respect of these matters.
57. Eighthly, in my view Vivien would not be an appropriate executor. I deal with this in the next section of my judgment.

### **Would Vivien have been a proper appointee?**

58. In my view it would not be appropriate for Vivien to be executor in William’s place. The Claim Form seeks William’s replacement by Vivien, and there is no alternative suggestion (such as an independent trustee) put forward.
59. In my view, to appoint Vivien as executor, in circumstances where she has clearly made up her mind about Jackie having stolen money and having fallen out with William, is a recipe for disaster and would only lead to costly further litigation between the three siblings which is not only undesirable but would be out of all proportion to the sums involved. Mr Dibré says that Vivien can be an objective executor as she knows so much about all the relevant matters, but that seems to me to be a submission totally undermined by the attitude Vivien has taken in her evidence and in the pre-action correspondence, and the fact that even on Mr Dibré’s case what would be needed is an independent and forensic investigation. Mr Dibré says that a company such as Will Drafters could do it, on Vivien’s instructions, but that seems to me again would lead to yet more expense.
60. Mr Dibré I think rather tentatively suggested that the court could appoint a judicial trustee under the residual power I have outlined above, but I agree with him that this would be expensive and cumbersome, and so in my judgment that would not be appropriate taking into account all of the circumstances, even if I had found that it was appropriate to replace William.

### **Conclusions**

61. For all these reasons, I have concluded that there are no good reasons for me to exercise my discretion under section 50 and make an order replacing William as executor. It is not in the best interests of the estate or the beneficiaries for him to be removed.
62. Removing an executor is not a step which the court takes lightly and it should only be taken in a clear case. I am not persuaded that there is any case for removing William as executor and replacing him with Vivien. Indeed, I am of the view that Vivien would not have been an appropriate replacement executor and there is no basis for appointing a judicial trustee. The proper course, in my view, is for the estate assets now to be distributed between the beneficiaries.

*(End of judgment)*