

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CENTRAL DIVISION**  
**CIVIL (PROBATE) JURISDICTION**

**Civil Action No. HPP 09 of 2022**

**IN THE ESTATE OF** of **NARENDRA GOUNDAR** late  
of Lot 31 Mana Street, Narere, Nasinu, Electrician, Fiji,  
Deceased, Testate.

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**BETWEEN:**

**ESTATE OF NARENDRA GOUNDAR**

**PLAINTIFF**

**AND:**

**KESHWAN GOUNDAR** aka **KESHWAN GOUNDEN** of  
Lot 40 Fulaga Street, Samabula North, Suva, Fiji,  
Supervisor, **SUNIL CHAND** of 14 Maharaj Place,  
Tamavua, Suva, Fiji, Retired and **ABHILASH RAM**  
**LAKHAN** aka **ABILASH RAM LAKHAN** of 808/220  
Coward Street, Mascot, NSW 2020. Australia, Product  
Analyst being the Executors and Trustees of the  
**ESTATE OF NARENDRA GOUNDAR.**

**DEFENDANTS**

**Date of Hearing** : **22 April 2024**  
**For the Applicant** : **Mr Sharma. D and Mr Whally. S**  
**For the Respondent** : **Mr Prasad. A**  
**Date of Decision** : **17 July 2024**  
**Before** : **Waqainabete-Levaci, SLTT, Puisne Judge**

## JUDGEMENT

### PART A - BACKGROUND

1. By Originating Summons, the Applicant is seeking Orders for the removal of the Executors and Trustees of the Estate of Narendra Goundar, **Mr Keshwan Goundar aka Keshwan Gouden, Sunil Chand and Abhilash Ram Lakhan aka Abilash Rm Lakhan.**
2. The Executor and Trustees were appointed by a Will dated 8<sup>th</sup> August 2016. The Trustees and Executors obtained probate based on the Will.
3. The Application now, seeks to appoint Deepika Washni, mother of Aanvi Ananshi Goundar and divorcee of the Deceased as the new Trustee of the Estate of Narendra Goundar ('Deceased').
4. Aanvi Ananshi Goundar is the child of the Deceased and sole beneficiary. She is also a minor.
5. The Estate owns a property Crown Lease No. 602149 which contains some flats.
6. The Estate bequeathed the property to the Deceased mother, Almelu during her life time and the residue to his daughter Aanvi Ananshi Goundar.
7. The Applicant seeks to rely upon their Affidavit in support.
8. The Second Defendant, Sunil Chand does not contest the application and has filed a supplementary affidavit to that effect.
9. The First Defendant objects to the application as his son resides in one of the flats within the property and is adamant that his brother, the Deceased, had appointed him as Trustee and Executor until Aanvi reached 18 years.

### PART B: AFFIDAVITS

10. In her Affidavit, Deepika Washni alleges that the Defendants are incompetent and have not administered the Estate properly. There were no audited records or accounts provided to her despite the flats being occupied and rented and despite the sealed orders of the Master on the 31<sup>st</sup> day of October 2022 to the Defendant

to provide details of the rental collected from Crown Lease No. 602149 and provide details of any income obtained from any assets that were previously in the name of the Deceased and thereafter to deposit the monies received as income from the property of the Deceased in the Trust Account of the Applicants Counsel.

11. She deposes that as the mother of the child, she has the sole interest in the child in order to properly administer the Estate of the Deceased.
12. The Title to the property was annexed, and in the memorial there was a valid registered Caveat of the Applicant on the 12 of January 2018.
13. There was a valid Mortgage registered on 20 April 2007 against the property of the Deceased.
14. Both the Caveat and Mortgage have not been cancelled.
15. The First Defendant, Keshwan Goundar filed an Affidavit in Opposition on 28 July 2023 opposing the application by the Applicant. He admitted having attempted to make contact with the Applicant and the sole beneficiary and has been blocked from many form of contact even via social media.
16. He deposes the property has been administered properly with mortgage payments being made for the Estate including payments for ground rents, garbage fees, maintenance and repairs and upkeep of the Estate property. He annexed in the affidavit an income and expenditure statement of the flats and copies of receipts from the rental monies obtained from the tenants.
17. According to the First Defendant, the Deceased had appointed him to administer the property until the Deceased child, Aanvi reached the age of 18 years.
18. The Third Defendant failed to appear nor to respond to the application served to him.
19. The Second Defendant sort to resign from his position as Executor and Trustee approval the appointment of the Applicant to replace him.

### **PART C: SUBMISSIONS**

20. In their oral submissions, Counsel for Applicant alleges that the First Defendant is not properly looking after the property. He has given an income and expenditure

statement he prepared himself without any signature by the other Executors and Trustees. Despite there being submissions in the Income and Expenditure Statement of a profit no monies were released to the beneficiary. On the basis of this application, two Trustees have agreed to be removed as Executors and Trustees. Although the First Defendant admits paying mortgage with the profits, there is no documentation to prove this.

21. Pursuant to section 17 of the Succession, Probate and Administration Act, the Court has powers to allow for a personal representative to relinquish their office based on change of circumstances and substituted by a person appointed by Court.
22. Counsel for the Defendant opposes the application as the intending Executor is not a resident of Fiji in accordance with section 44 (1) of the Succession, Probate and Administration Act. The Applicant is residing in New Zealand.
23. Counsel for the Defendant argued that during the year 2020, when the country was in lockdown, the property was administered by the First Defendant alone arranging for and payment of all property expenses.
24. The First Defendant has performed his duties as an Executor and Trustee in compliance with the Testators appointment.
25. Despite the Applicant's interests, the Counsel argued that the Deceased opted to appoint the First Defendant.
26. In response, the Applicant submits that the provisions of section 44 (1) of the Succession, Probate and Administration Act allows for individuals residing overseas to become a Trustee. Secondly, Counsel argued that mortgages paid is dependent on rental revenue and not necessary from employment income. Thirdly, although the Will does not stipulate when the minor can obtain ownership of the property, according to law, she will have to await until she is 18 years.
27. When questioned on whether there needs to be a Trust for the Child separately, the Applicant submitted that the appointment of the Deepika as the sole Trustee will enable the property to be administered properly until the minor reaches 18 years.
28. The First Defendant submitted that any income generated from the property required payments of fix expenses prior to net profits being deposited in the Trust Account.

## **PART D: LAW**

29. The powers of the Court to remove or appoint an Executor and/or Administrator is provided for in section 35 of the Succession, Probate and Administration Act which provides:

“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-

(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

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

(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

(d) make such further or consequential orders as it may consider necessary in the circumstances.”

30. The basis for which the Court exercises its discretion to remove or to appoint an Executor and Trustee of a Probate is when the Court finds it sufficient to do so in accordance with the law.

31. Not only is there a statutory provision empowering the Court to exercise its discretion, there is also an inherent jurisdiction derived from the early English Courts of Equity as was correctly identified in Letterstedt -v- Broers and Another (1884) 9 J.C (HL) 371 – 391) a Privy Council case, where Lord Blackburn, Sir Robert P. Collier, Sir Richard Couch and Sir Arthur Hobhouse stated:

“...the whole case has been argued here, and, as so far as their Lordships can perceive, in the Court below, as depending on the principles which should guide an English Court of Equity when called upon to remove old trustees and substitute new ones. It is not disputed that there is a jurisdiction ‘in cases requiring a remedy’ as is said in Sory’s Equity Jurisprudence, s 1287, but there is very little to be found to guide us in saying what are the cases requiring such a remedy; so

little that their Lordships are compelled to have recourse to general principles.”

Sory says, s. 1289, “*But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove the trustee 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 shew a want of honesty, or want of proper capacity to execute the duties, or want of reasonable fidelity.*”

It seems their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Sory 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 matters.’

(under-lining my emphasis).

32. The pre-dominant factor in considering the removal of the Trustee is the welfare of the beneficiary, even if there is no misconduct on the part of the Trustee as was stated in Letterstedt -v- Broers (1884) (Supra) p.g. 387 by the Privy Council:

‘In exercising the delicate jurisdiction (*inherent jurisdiction derived from the previous Court of Equity*) 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....But they proceed to look carefully into the circumstances of the case.”

33. Chief Justice Latham, in the High Court of Australia in the case of Miller -v- Cameron [1936] 54 CLR 572 – 582, p 575 observed that:

“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 dominant consideration (Letterstedt -v- Broers (1884) (Supra). Perhaps the principal element in the welfare of the beneficiaries is to be found in the safety of a 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 particular strong temptation to misapply the trust funds, the Court may properly remove him from his office as a trustee.”

34. Thus it can be said that the inherent jurisdiction exercised by the Court of Equity derived by this Court, was in fact so effective, even in non-contentious probate matters, where the remedy of removing of trustees was readily available.
35. The Court opines that the discretion to exercise these powers was varied and broad in spectrum.
36. This was also observed by Lord Justice Dixons in Miller -v- Cameron (Supra) where he said:

“In deciding to remove a Trustee, the Court forms a judgment based upon consideration, 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. A trustee must not 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.”

37. Section 35 of the Succession, Probate and Administration Act statutorily empowered the Court, based on these inherent jurisdictions, with the requirement that the discretion be exercised where it was ‘sufficient’ to do so.
38. The Court hence must consider the ambit in which the exercise these powers and if so, in what circumstances should the Court exercise these powers.
39. The Court can draw, as a starting point, some form of basis for which the removal of trustees were effected in the Court of Equity as discussed in the case of Letterstedt -v- Broers (1884) (Supra) p 386 where it was held that:

“as soon as all questions of character are so far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his counsel to resign, and does so. If, without reasonable ground, he refused to do so, it seems their Lordships that the Court might think it proper to

remove him; but case involving necessity of deciding this, if they ever arise, do so without being reported.”

40. Some of the factors considered when exercising discretion to remove a Trustee is as follows –
  - (i) Appears that the continuance of the trustee would be detrimental to the execution of the trusts; and
  - (ii) Prevents the beneficiary from working in harmony with the trustee.
41. These factors are not exclusive and do not intend to limit the ambit of the discretion of the Court. It merely provides guidelines.
42. In the case of Millers -v- Cameron (Supra) p 579 CJ Latham added on an additional factor to consider by saying:

“In this case the trustee was asked to resign his office by every person interested in the execution of the trust. In my opinion his refusal to resign in all the circumstance of the case has resulted in the legal proceedings which ought to have been avoided. The defendant would have acted wisely and properly in resigning as soon as he was asked. In defending this action and in prosecuting this appeal the defendant has been representing and supporting his own interests and not of the trust estate. He has failed to show that his interests coincides with the interests of the trust estate. In such as case, I consider it quite proper that he should pay the plaintiffs’ costs of the action and of the appeal to this Court.”

## **PART E: ANALYSIS**

43. In this case, the First Defendant has opposed the application and filed income and expenditure statements for the years 2020 – 2021. The Statements refer to the value of the property and income and expenditure arising from the property. Appended also were receipts received from the revenue derived from rents. The income from rental was approximately \$5000 at the end of 2021.
44. The issue by the Applicant is that these documents were never made known as the Applicant as the sole parent of the beneficiary and alleges that the First Defendant has a vested interest in the property having occupied some of the flats. Only when Court Orders were sort did the First Defendant file the documents.



45. Furthermore there were advances given to relatives, for which the Applicant was unaware of.
46. First Defendant denies occupation of all the flats and only one of them, by his son. He also admits that the monies received were used to pay for mortgage repayments owing, land rents and incidental expenses of running a property e.g. compound cleaning.
47. The income and expenditure statement shows very minimum reduction of any liabilities owing between 2020 and 2021. Clearly from these two years, there is evidence that there was no attempt to pay for the mortgage, which was a huge debt owing to the Estate from 2007, 17 years later.' Having said that, the Court is mindful that there has not been any drastic measures taken by the mortgagor to foreclose therefore indicating that there were attempts to reduce the loan and keep it active and valid. These attempts were not properly reflected so that the reduction can be clearly traced.
48. The receipts of the rental income came from one source, Madhavan Goundar. Which meant that there was no other tenant paying for rent properly recorded for despite rental income increasing tremendously from 2020 to 2021.
49. The Second Defendant has acquiesce to being removed. In fact he had no say in the manner in which the Income and Expenditure Statement was prepared although he had benefitted personally to some extent by obtaining advances from the income derived from the property.
50. When considering the factors highlighted above, it is clear that the First Defendant, as Executor and Trustee had failed to properly acquit for the Trust bestowed unto him.
51. He also gave out advances to family members, without extending this assistance to the sole beneficiary, who was in need of such.
52. The First Defendant has not been found guilty or charged for misconduct or found bankrupt.
53. He has also admitted giving accommodation from one of the flats to his son. There are receipts from the rental income, the amounts being very less given the location of the property and the optimum value available. The receipts tendered are limited only to 2 years.

54. Although First Defendant feels that his brother would not have appointed him if the Applicant was capable to look after the Estate, he is adamant his appointment is an indication that the brother entrusted to him the Estate and the property in a manner which was beneficial to the minor, the Deceased daughter.
55. His failure is his omission to properly account for the property as the Executor. He has also failed in communicating with the beneficiary's parent, according to law, the income derived and the interests as well as payments made.
56. The beneficiary is a minor and her intentions are reflected through her parent, the Applicant. The Applicant seeks to remove the First Defendant as Executor and to replace him with her as sole Executor and Trustee of the Estate.
57. Are these circumstances sufficient to remove the Executor?
58. I find they are not. The Executor has benefited personally but his interests remain aligned to the interests of the Estate for the benefit of the beneficiary.
59. He has not acted in a manner or placed the Estate in a precarious position where the beneficiary would not properly benefit from the Estate or the Estate would eventually dissipate.
60. He will still need to properly account to the beneficiary and her mother of the year end expenditures and rental income, something he had refused to do at the beginning.
61. The importance of being accountable for the Estate is nothing alien to an individual holding an important position of trust. It must be part and parcel of his character to instill honest and good values, this transcend into the principles of accountability.
62. The Court will therefore impose orders to remove by consent, Mr Sunil Chand and Mr Abhilash Ram Lakhan aka Abhilash Ram. Both have not assisted the First Defendant in any way regarding the Estate and have benefited from the Estate personally.
63. I understand that the Applicant is concerned that even with three Executors, the First Defendant has administered the property without knowledge or consent of the other two Executors.

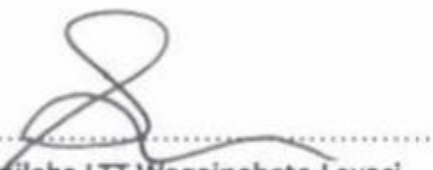
64. Furthermore she is also not in good terms with the First Defendant as a divorcee of the Deceased.
65. However, for the benefit of the beneficiary, it is obvious that both her and the First Defendant will act with the common purpose, to ensure that the paramount consideration is the welfare of the beneficiary, the minor who is not only the Applicants and Deceased daughter, but also the First Defendants niece.
66. I will therefore grant the order for the substitution of Mr Sunil Chand, the Executor with Deepika Washni, the Applicant, as the parent of the beneficiary.
67. There is no substitution for the Executor Mr Abhilash Ram Lakhan aka Mr Abhilash Ram.

**Orders of the Court:**

The Court orders as follows:

- (a) That the Application for removal of the First Defendant, Mr Keshwa Goundar aka Keshwan Gounden is dismissed;***
- (b) That the Application for removal of the Second and Third Defendants and Executors, Sunil Chand and Abhilash Ram Lakhan aka Abhilash Ram is granted;***
- (c) That the Court appoints the Applicant Deepika Washni as Executor in substitution of Sunil Chand;***
- (d) Costs bourne by both parties.***



  
Ms Senileba LTT Waqainabete-Levaci  
Puisne Judge