ST JOHNS BUILDINGS
BARRISTERS CHAMBERS

WHITE PAPER
WILLS & PROBATE SEMINAR

JULIAN SHAW
ST JOHNS BUILDINGS

4TH OCTOBER, 2019.

ST JOHNS BUILDINGS
BARRISTERS CHAMBERS

THE REMOVAL OR SUBSTITUTION OF EXECUTORS
PRACTICE & PROCEDURE:

"How far can you push a court when removing - or protecting - an executor from a s.116/s.50 application (in the context of preserving estate assets)?"

JULIAN SHAW

THE ROUTE TO REMOVAL:

There are two main routes to removal:

(i) Pre-Grant Applications:

- Family Division – application to '*pass over*'
- s.116 Senior Courts Act, 1981; or
- s.50 Administration of Justice Act, 1985.

(ii) Post-Grant Applications:

- s.50 Administration of Justice Act, 1985.

[• s.1 Judicial Trustees Act, 1896;

[• s.41 Trustee Act 1941]

NB: No inherent jurisdiction to remove a PR

PRE-GRANT APPLICATIONS (1):

s.116 Senior Courts Act 1981:

"(1) *If by reason of* ***any special circumstances*** *it appears to the High Court to be* ***necessary or expedient*** *to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.*

(2) Any grant of administration under this section may be limited in any way the court thinks fit."

KHAN V. CROSSLAND – HHJ BEHRENS:

Facts:

- Claimant sought to remove executors and to be appointed instead;
- Executors were solicitors who had drafted the Will;
- Claimant and his sisters agreed on how the Will should be distributed between them;
- They asked executor to step down as he was not needed;
- He refused and the relationship between the parties broke down.

KHAN V. CROSSLAND – HHJ BEHRENS (2):

The Claimant argued that it was appropriate to grant probate ***other than in the order of priority set out in the Non-Contentious Probate Rules 1987 r.20*** since, in accordance with section 116(1) of the Act, there were special circumstances which made it ***necessary or expedient*** to appoint him as executor instead:

- He and other beneficiaries were adult;
- They were in agreement;
- They had lost all trust and faith in the executor;
- The Court's discretion to pass over an executor was a wide one and met by the Claimant's assertions.

KHAN V. CROSSLAND – HHJ BEHRENS (3):

The Defendant contended that none of the Claimant's reasons were sufficient to displace the clear intention of the testator who had appointed him.

- He had done nothing wrong
- NCPR r.20 granted probate to the executor as a matter of right and should not be simply displaced;
- Invoking s.116 simply upon the wishes of adult beneficiaries would '*have very serious consequences for the probate system generally'*; and
- The application was an abuse because it was being pursued by a trade rival.

KHAN V. CROSSLAND – HHJ BEHRENS (JUDGMENT):

The Application was granted:

- Court's discretion under s.116 is very wide;
- It was not necessary for administrator to be discredited;
- Whilst relevant a testator's choice was not decisive;
- His reasons for appointing were unknown;
- The fact all beneficiaries were adult, of full capacity and in agreement ***could*** amount to special circumstances;
- The fact that relations had broken down was a matter to take into account;
- The balance had to be exercised in beneficiaries favour;
- There were special circumstances making it expedient to appoint the Claimant administrator.

PRE-GRANT APPLICATIONS (2):

s.50 Administration of Justice Act 1985:

"(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; or*

(b) if there are two or more existing personal representatives of the deceased, terminate the appointment of one or more, but not all, of those persons."

PRE-GRANT APPLICATIONS (3):

s.50 Administration of Justice Act 1985:

***Goodman v. Goodman* [2013] All ER 118**

Newey J considered an appeal from Master Bragge.

The argument was whether s.50 could be used to remove an executor before the grant was issued. Was a named executor (pre-grant) a personal representative of the deceased?

Whereas an administrator of an estate owes his title to the grant of letters of administration, an executor is appointed by the Will and can take many steps in the administration well before the grant.

[see: ***Redwood Music Ltd. v. Feldman & Co***]

THE TEST FOR REMOVAL:

***Letterstedt v Broers*:** (1884) 9 App Cas 371 *per* Lord Blackburn.

Adopted by Lewison J in

Thomas & Agnes Carvel Foundation v Carvel

[2008] Ch 395

- 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;
- Trustees should be removed if it is in the interests of the due administration of the trust; &
- The overriding considerations are the welfare of the beneficiaries and whether the estate is being properly administered.

THE TEST FOR REMOVAL (2):

There was the small matter of 124-years between the two leading decisions on how applications for removal should be considered (and not much prior to 1884 either).

"*The reasons why there is so little to be found in the books on this subject is... as soon as all questions of character are as 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.... **the trustee is advised by his own counsel to resign, and does so**....it is to be lamented that this case was not considered in this light by the parties in the court below...*"

Lord Blackburn in ***Letterstedt***

Recent Applications for Removal:

Angus v. Emmott [2010] EWHC 154 (Ch)

- **The Facts:**
- This case concerned the estate of Anthony Steel who had been wrongly convicted of murder and whose conviction had been quashed after he had spent nearly two decades in prison;
- His executors were his lover (Mrs Angus) and his sister and her husband (Mr and Mrs Emmott);
- Mr and Mrs Emmott were pecuniary legatees under Mr Steel's will and Mrs Angus took residue;
- The estate consisted principally of Mr Steel's claim for compensation from the Home Office for wrongful conviction.

ANGUS V. EMMOTT:

- The removal of personal representatives under section 50 did not depend upon findings of active misconduct being made against them (*none were made in this case*);

- Their removal could be justified where there was a breakdown in the relationship between either the personal representatives themselves or the personal representatives and the beneficiaries, such that ***the estate could not be properly or efficiently administered***.

- "*.... there is such a degree of animosity and distrust between the executors that the due administration of Mr Steel's estate is unlikely to be achieved expeditiously in the interests of the beneficiaries unless some change is made*."

KERSHAW V. MICKLETHWAITE:

The Facts:

This case involved the administration of Mrs Kershaw's estate by the executors (her two daughters Mrs Micklethwaite and Mrs Barlow and an accountant).

- One of the beneficiaries, the deceased's son Mr Kershaw, asked the court to remove all three executors on the basis that:
  - Executors had failed to value correctly the assets of the estate;
  - Executors had failed to update and inform C about the administration;
  - Executors had failed to identify the extent of the estate;
  - Mrs Micklethwaite and Mrs Barlow had conflicts of interest;
  - There was been a breakdown in the relations between the Claimant and the executors, meaning he lacked confidence in their competence.

KERSHAW V. MICKLETHWAITE (2):

The argument was rejected. Newey J held :

"*... I do not think that friction or hostility between an executor and a beneficiary will, of itself, be a good reason for removing the executor. On the other hand, a breakdown in relations between an executor and a beneficiary will be a factor to be taken into account, in the exercise of the court's discretion, if it is obstructing the administration of the estate, or even sometimes if it is capable of doing so*."

"*…Even if things could have been handled better in certain particular respects, there is, in my judgment, no scope for any substantial criticism. In any case, as Lord Blackburn said in* ***Letterstedt*** *at pages 385 to 386, "... it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees", which will induce Courts of Equity to remove a trustee (or, I would add, an executor)."*

Alkin v. Whelan [2010] WTLR 117:

- **The Facts:**
- The testator was a retired solicitor who died in October 2008;
- The Claimants were his widow and his daughter;
- The Defendant executors (Mr Raymond and Mr Whelan) were both former business associates and friends of the deceased;
- The Claimants sought the removal of the executors on a number of grounds:
  - very little income had been paid to Mrs Alkin in respect of her interest;
  - the executors had paid Mr Wheelan's company a substantial sum (over £100k) in respect of a suspicious invoice, backdated to Mr Alkin's lifetime, but rendered after his death;
  - the executors had dealt inappropriately with reporting lifetime gifts to HMRC;
  - the executors, and in particular Mr Whelan, had dealt with Mrs Price in an inappropriate and disrespectful manner by suggesting, among other things, that she should have cosmetic surgery and by sending her lingerie as a Christmas present.

Alkin v. Whelan (2):

Mr A G Bompas QC (sitting as a deputy High Court Judge):

- **Findings:**

- The majority of the allegations **would not** have been enough for the deputy judge to conclude that Mr Whelan and Mr Raymond should be removed.

- However, the fact that Mr Whelan **submitted a wholly unjustified** (and apparently unjustifiable and backdated) invoice in connection with the joint building venture he was engaged in with the testator that Mr Raymond was prepared to pay without scrutiny, was sufficient for the executors' removal.

Turner v. Ford (unreported) PT-2019-Man-00028:

Deputy District Judge Watkin – [Manchester CJC 17.08.19]

- The Claimant was the sole beneficiary in her partner's modest estate (c.£425k);
- The testator died on the 8th November, 2015;
- Solicitor executor;
- The Grant of Probate was not obtained until 23rd December, 2016;
- Part 8 Claim issued 8th April, 2019;
- In the meantime no administration; no draft estate accounts; no partial distribution; but
- An invoice for charges to September 2017 of **£26,940** &
- A very threadbare witness statement in response to Claimant's evidence.

GAVRIEL V. DAVIS [2019] EWHC 2446 (CH):

- **The Facts:**
- The deceased left his entire estate of **c.£1.3m** to his two sons in a '*simple will*';
- The Defendant was appointed his executor;
- The deceased died on the 25th May, 2016;
- Probate was obtained on 19th December, 2016;
- Part 8 Claim seeking directions under CPR Part 64 as there was an '*impasse*' because Defendant was claiming for fees for work undertaken in dealing with the estate;
- There was no provision for payment in the will; and
- The parties did not agree whether there was an oral agreement reached for the payment of executor's 'fees' or not;
- The amount sought was '*a relatively small sum*' of **£27,300**.

GAVRIEL V. DAVIS (2):

- The Defendant filed a '*relatively lengthy*' statement '*the tone of it appears to me to be excessively combative. There is expressed in it almost a sense of outrage and an assertion of entitlement, but, at the same time, there is a marked lack of particularity concerning the vital elements the Defendant wishes to establish*'.
- Parties appear to have agreed hearing should only deal with directions and provided for a 1½ day trial to be listed with both sides an opportunity of filing further witness evidence.
- The Chief Master's decision to approach the case along the lines of a Part 24 application is a salutary reminder of the provisions of Part 8 and the requirement for each side to file the '*evidence on which they intend to rely*' with the Claim Form and Acknowledgment of Service [see: CPR Parts 8.5 & 8.6]

GAVRIEL V. DAVIS (3):

Chief Master Marsh concluded on the filed evidence:

- The matter should proceed as directed as a disposal hearing on the evidence filed;
- There was '*something of a mystery about the Defendant*' [see: para. 18.1(3) PD 32 CPR];
- Her evidence was vague as to any agreement [see: para. 7.4 PD 16 CPR];
- There was no clear evidence of a contractual agreement being reached for the beneficiaries (the Claimants) to pay fees;
- The Defendant's evidence in that regard is fanciful [he stopped short of finding it dishonest]; and
- If this had been a Part 24 application the Court would have been entitled to enter judgment for the Claimant;
- This was not a case for exercising ***Boardman v.Phipps*** discretion (which is only to be used sparingly).

CONCLUSIONS:

- Generally, save in cases of actual wrongdoing or fraud (such as in ***Alkin v Raymond***) the courts **are very reluctant** to remove personal representatives;
- The court has a broad discretion and, in all but the most straightforward cases the result of applications will be difficult to predict with any certainty;
- In particular, and with an eye on costs, it is perfectly possible to be successful on other related matters (e.g. directions or an account) and yet fail to remove the personal representatives;
- **The overriding principle remains that the court will only remove an executor if it is in the interest of the proper administration of the estate and would promote the welfare of the beneficiaries, which will depend upon the peculiar facts of each case;**

CONCLUSIONS (2):

- **When acting for disgruntled beneficiaries (or personal representatives), given the reluctance of the courts to remove personal representatives, it is always advisable to set out in open correspondence a detailed account of what has gone on to date and what needs to be done to avert a claim.**
- **The errant personal representative should be invited to engage and take the required steps or set out his/her reasons for failing to do so.**
- **This letter should be seen as a precursor to the formal court process as the answers given will be considered by the Court and taken into account when determining whether or not the effective administration of the estate has been impeded.**
- **If proceedings are to be commenced, pay extra attention to ensuring that the Witness Statement filed in support is full, comprehensive, and coherent with all supporting evidence attached.**

CONCLUSIONS (3):

- **Be prepared to argue for summary disposal if the Defendant's response is desultory and/or in breach of the Rules.**

Julian Shaw,

St Johns Buildings;

Chester; Manchester; Liverpool & Sheffield.

1st October, 2019.

ST JOHNS BUILDINGS
BARRISTERS CHAMBERS