THE REMOVAL OR SUBSTITUTION OF EXECUTORS PRACTICE & PROCEDURE:

QUESTION:

"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)?"

Introduction:

There are two main routes for the removal of executors:

[1] **Pre Grant Applications:**

- in the Family Division to '*pass over*' an executor or potential administrator under the ***Senior Courts Act 1981*** **s.116** before the grant of representation;
- under ***Administration of Justice Act 1985,*** **s.50**

[2] **Post Grant Applications:**

- ***Administration of Justice Act 1985,*** **s.50;**
- *Judicial Trustees Act 1896,* s.1: Court can appoint a trustee to act under direction of court, but this is a rarely used power. Thereafter the judicial trustee will be an officer of the court and the administration will be supervised by the court;
- *Trustee Act 1925, s.41*: Applies to personal representatives where, after administration, they hold as trustee on trusts imposed by statute, e.g. s.33 *Administration of Estates Act 1925,* or where an administrator has cleared the estate and holds property in trust for persons entitled on intestacy, the court can appoint new trustees in his place.

[NB: The Court has no inherent jurisdiction to remove a personal representative.[1]**]**

[1] *Re Ratcliff* [1898] 2 Ch 352 at 356.

PRE GRANT:

[1A] *Applications in the Family Division to 'pass over' a Personal Representative*

(i) Applications in the Family Division to '*pass over*' an executor or potential administrator are commenced under the **Senior Courts Act 1981 s.116**:

> *"(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."*

(ii) The dual tests laid down in this section are those of ***special circumstances*** and ***expediency*** or ***necessity***.

(iii) The application of the section was considered in November 2011 by HHJ Behrens, in the unreported case of *Khan v Crossland*.[2] The facts were relatively straightforward:

- The claimant sought orders for the removal of the defendants as executors under the will of his deceased step-father, and for his own appointment as administrator.
- The claimant and his sister were the beneficiaries of their step-father's estate under a will that had been drafted by the defendant's firm.
- The defendant was appointed executor under the terms of the will.
- The Claimant and his sister had agreed how they wanted the estate to be distributed between them.
- They requested that the executor step down, as he was not needed as a result of the agreement between the beneficiaries to administer the estate.
- The Claimant wished to administer the estate himself.
- **The Defendant refused to stand down**.

As a result the relationship between the parties broke down and the Claimant applied to the court.

(iv) 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:

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[2] Lawtel Document No. AC9601485.

- he and his co-beneficiary were adult beneficiaries;
- they were in agreement as to the disposal of the estate;
- they had lost all trust and confidence in the Defendant's ability to conduct the administration;
- the court's discretion to pass over an executor was a wide one and met by the above assertions.[3]

(v) The Defendant contended that that was not sufficient reason to displace the clear intention of the testator who, after all, appointed him as executor. The Defendant argued that:

- An executor had to have done something to disentitle himself from administering an estate if NCPR r.20, which granted probate to the executor first as a matter of right, was to be displaced;[4]
- Exercising the section 116 discretion merely to take account of the wishes of adult beneficiaries would have very serious consequences for the probate system generally; and
- The application should, in any event, be struck out as an abuse of process since it had been funded by a trade rival and pursued for an ulterior motive.

(vi) **In granting the application** HHJ Behrens noted the following:

- The court's discretion under section 116 was very wide;

- It was not necessary for an administrator to be discredited before an order for his removal could be made;

- The testator's choice of administrator was a relevant factor, it was not a decisive one;

- The testator's reason for appointing the Defendants was unknown and since he had spent limited time in giving instructions his choice carried less weight;

- The fact that beneficiaries were of full age, full mental capacity and united in their request for an executor to renounce its role could amount to special circumstances under s.116;

- It was plain that the relationship between the parties had broken down, and although not a conclusive reason, that was a matter to be taken into account;

- The balance had to be exercised in the beneficiaries' favour; there were special circumstances which made it expedient to appoint the Claimant as administrator;

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3 Citing the authorities of *Re Clore (Deceased) (No.1)* [1982] Fam. 113 and *Buchanan v Milton* [1999] 2 F.L.R. 844.

4 The Defendants cited the case of *AB v Dobbs* [2010] EWHC 497 (Fam), [2010] W.T.L.R. 931.

- On the evidence, there was no ulterior motive behind the proceedings; there was, accordingly, no reason to strike out the claim as an abuse of process.

NB:

(vii) Applications for grants under this section should, whatever the amount of the estate, be made to a district judge of the Principal Registry or the registrar of the district probate registry at which the application for the grant is to be made.

The district judge or registrar may direct that notice of the application be given to particular persons or that the application be made by summons.

[1B] *Applications under Administration of Justice Act 1985, s.50*

(i) In *Goodman v Goodman*[5] Mr Justice Newey considered an appeal from Master Bragge, who made an order to remove an executor, ***before grant***, under **section 50 Administration of Justice Act 1985.**

(ii) The argument deployed in Goodman was that *s.116 applies to an estate where there has not been a grant of probate*, so that *s.50 applies only after a grant*.

- Section 116 gives the Court the power to appoint a person as administrator of the estate in priority to the person who would otherwise be entitled under the probate rules if, '*by reason of any special circumstances*' it appears to the Court to '*be necessary or expedient*' to do so.

- Section 50 gives the court a discretion to '*appoint a person … to act as personal representative of the deceased in place of the existing personal representative*' or to terminate the appointment of one or more of the personal representatives.

(iii) Mr Justice Newey had little difficulty in concluding that Master Bragge was correct in his view that a non proving executor can properly be called '*a personal representative*'[6] within the meaning of s.50, and so the section can be employed in such circumstances.

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5 [2013] All ER 118

6 See for example the commentary in *Redwood Music Ltd v B Feldman & Co Ltd* [1979] RPC 1

POST GRANT:

[2] ***Applications under Administration of Justice Act 1985, s.50***

(i) By far the most common route for bringing an application is under *Administration of Justice Act 1985*, s.50.

(ii) Section 50(1) provides:

"(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."

(iii) The test for the removal of trustees is found in ***Letterstedt v Broers***[7]**:**
Trustees **should be removed if it is in the interests of the due administration of the trust.**
Lord Blackburn held:

> *"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."***

(iv) That test also applies to applications for the removal of executors under section 50 *Administration of Justice Act 1985*, where the test is modified, such that **the overriding considerations are the welfare of the beneficiaries**[8] **and whether the estate is being properly administered**.

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7 (1884) 9 App Cas 371 *per* Lord Blackburn.

8 *Letterstedt v Broers per* Lord Blackburn, adopted by Lewison J in *Thomas & Agnes Carvel Foundation v Carvel* [2008] Ch 395

(v) Prior to the decision of Lewison J in ***Thomas & Agnes Carvel Foundation v Carvel*** in 2008 there was very little judicial guidance on how applications under section 50 should be approached. This had been the case historically as well. Lord Blackburn himself in ***Letterstedt*** noted[9]:

> *"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..."*

(vi) However, in 2010, there were three decisions in this field within a matter of months. Those cases (in chronological order) were:

[A] ***Angus v Emmott***[10] *per* Mr Philip Snowden QC (sitting as a deputy High Court judge) on 3 February 2010.

- 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.

The judge held that there had been **no misconduct** on the part of the Emmotts, and he considered some of their objections had validity. However, he was of the view that a situation had been reached

'*....in which 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'.*

The Deputy Judge stressed that:

- **the removal of personal representatives under section 50 did not depend upon findings of active misconduct being made against them.**
- **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**.

It appears, however, that the threat to the estate must be fairly significant.

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9 At 385-7.

10 [2010] EWHC 154 (Ch).

[B] ***Kershaw v Micklethwaite***[11] *per* Newey J (handed down the day after the judgment in ***Angus v Emmott***).

- 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.

Like each of these three decisions, the case turned on its own peculiar facts, which meant that Newey J was prepared to accept each of the explanations given on behalf of the executors for their catalogue of failures.

The interesting part of the decision relates to the last criticism, namely that there has been a breakdown in the relations between the Claimant and the executors, meaning he lacked confidence in their competence so they should be removed.

The argument was rejected. Newey J held :

- '*…I can see no good reason for the court to apply a stricter test when considering whether to remove a trustee than it would apply with an executor. That an executor might not be expected to exercise discretion to the same extent as a trustee, and that an executor's role is likely to be more transient than a trustee's, suggest to me that, if anything, the court should remove a trustee more readily than an executor*'.[12]

- '*… 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* '[13]

- '*…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).*[14]

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11 [2010] EWHC 506 (Ch).

12 Ibid. para: 9.

13 Para.11.

14 Para. 22.

[C] ***Alkin v Raymond and Whelan***[15] *per* Mr A.G. Bompas QC (sitting as a deputy High Court judge) on 7 May 2010.

- The testator was a retired solicitor;
- He 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(!);

It was held that the majority 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.

[D] ***Turner v. Ford*** [16] Deputy District Judge Watkin (Manchester CJC) 17th July, 2019.

- 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.

DDJ immediately removed executor and ordered him to pay costs.

A decision that foreshadowed Chief Master Marsh's judgment in ***Gavriel v. Davis*** by 13-days.

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15 [2010] WTLR 1117.

16 Unreported: **PT-2019-MAN-00028**

[E] ***Gavriel v. Davis***[17]

- 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**;
- 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 (Claimant) and Acknowledgment of Service (Defendant) [see: CPR Parts 8.5 & 8.6]

He 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)

"*This is perhaps, more than anything else, a claim that involves a cautionary tale where an executor takes a grant in respect of a will, which does not have a charging clause, without having obtained a clear agreement in writing from all the beneficiaries that reasonable or fixed charges can be made*."

17 [2019] EWHC 2446 (Ch).

[4] ***Procedure under section 50:***

(i) Applications under section 50 are governed by the Civil Procedure Rules r.57.13 and PD57, paragraphs 12–14:

- Applications must be brought in the High Court;
- All applications will be assigned to the Chancery Division;
- Every personal representative of the estate shall be joined as a party;
- Under a part 8 Claim Form;
- The application must be supported by the following:
  - A certified sealed copy of the Grant of Probate or Letters of Administration;
  - A witness statement setting out:
    (i) the reasons why the removal or substitution of the Executor is sought (referring to his disqualification, incapacity or unsuitability as per above),
    (ii) particulars of the Deceased's assets and liabilities,
    (iii) the details of those who are in possession of documents relating to the estate;
    (iv) the names of beneficiaries and details of their interest; and
    (v) the proposed individual to substitute the executor;[18]
- Unless the proposed Administrator is the Official Solicitor, his signed or sealed consent to act;
- A witness statement of the proposed Executor's fitness to act in such capacity, if he is an individual;
- If the proposed administrator is a professional, the order should make provision confirming that he may charge his usual professional fees.

[5] **Conclusion:**

(a) Generally, save in cases of actual wrongdoing or fraud (such as in ***Alkin v Raymond***) the courts **are very reluctant** to remove personal representatives.

(b) 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.

[18] Civil Procedure Rules r.57.13 and PD57, paragraphs 12 –14.

(c) 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.

(d) **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.**

(e) **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.**

(f) **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.**

(g) **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.**

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

Julian Shaw, 1st October, 2019
St Johns Buildings;
Manchester; Liverpool; Chester & Sheffield.