

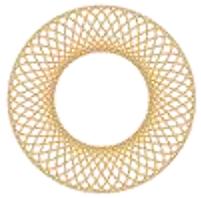
Outer Temple

White Paper Talk

Difficult Executors

What counts and will sway the court when seeking to remove difficult, disengaged or dodgy executors and trustees, and how can you do it swiftly and cost-effectively?

Wednesday 26th February 2025
David E. Grant KC



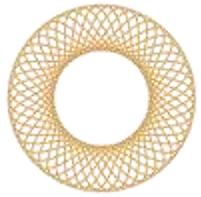
Perennial problem or change in the times?

PUNCH, OR THE LONDON CHARIVARI.—MARCH 2, 1861.



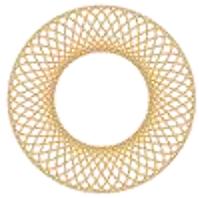
LOOKING INTO THE ACCOUNTS.

John Bull. "NOW, MY FRIEND, YOU TAKE A HOLIDAY FOR A SHORT TIME. I DON'T DOUBT YOUR HONESTY, BUT I WANT TO SEE HOW YOUR BOOKS STAND."



Summary of talk

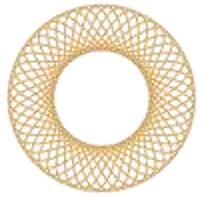
- Context – autonomy & increasing disregard by office holders
- Statutory Provisions & inherent jurisdiction
- Scope, stigma, applicable test
- Options for defendants – fight or flight
- Procedural considerations
- Final thoughts



Context

- Testators and settlors choose their personal representatives and trustees. Clearly relevant but ...
- ...Choice may be careful, without thought, overly optimistic, misguided, eccentric
- Increasing problem of executors (in particular) not distributing estates and "going rogue"
- Is this avarice, stubbornness, incompetence or complexity?

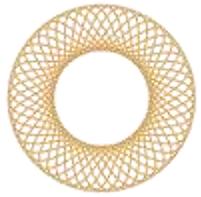
"it was extremely difficult...to make out what he owed, or what he had paid, or of what he died possessed."



the Oedipa complex situation/ the (sur)reality of autonomy

One summer afternoon Mrs. Oedipa Maas came home from a Tupperware party whose hostess had put perhaps too much kirsch in the fondue to find that she, Oedipa, had been named executor, or she supposed executrix, of the estate of one Pierce Inverarity, a California real estate mogul who had once lost two million dollars in his spare time but still had assets numerous and tangled enough to make the job of sorting it all out more than honorary.

The Crying of Lot 49, Thomas Pynchon



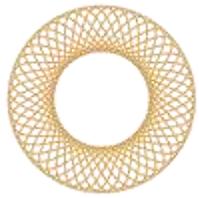
Provisions & criteria

Executors

- s.1 Judicial Trustees Act 1896
- s.116 Senior Courts Act 1981
- s.50 Administration of Justice Act

Trustees

- s.41 Trustee Act 1925
- s.58 Trustee Act 1925
- Inherent jurisdiction



s.1 Judicial Trustees Act 1896

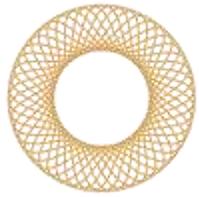
“Power of court on application to appoint judicial trustee.

(1) Where application is made to the court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the court may, in its discretion, appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees.

(2) The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act.

...

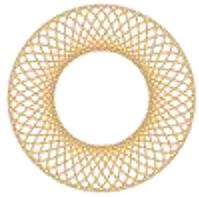
(7) Where an application relating to the estate of a deceased person is made to the court under this section, the court may, if it thinks fit, proceed as if the application were, or included, an application under section 50 of the Administration of Justice Act 1985 (power of High Court to appoint substitute for, or to remove, personal representative).”



s.116 Senior Courts Act 1981

“116 Power of court to pass over prior claims to grant.

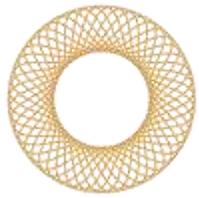
- (1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint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



s.50 Administration of Justice Act 1985

“50 Power of High Court to appoint substitute for, or to remove, personal representative.

- (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.”*

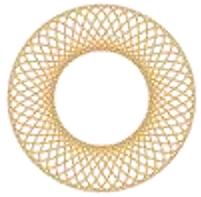


s.41 Trustee Act 1925

“Power of court to appoint new trustees.

(1)The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

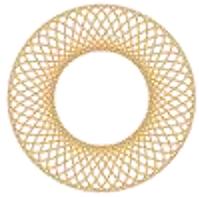
In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who lacks capacity to exercise his functions as trustee, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved.”



s.58 Trustee Act 1925

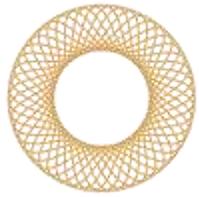
“Persons entitled to apply for orders.

(1) An order under this Act for the appointment of a new trustee or concerning any interest in land, stock, or thing in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.”



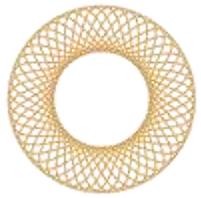
Inherent Jurisdiction

- Needed when application is by someone other than beneficiary or trustees e.g. administrators
- no additional threshold of exceptionality – *London Capital & Finance Plc*
- needed if just seeking to remove but not appoint someone given terms of s.41



Scope of the jurisdiction

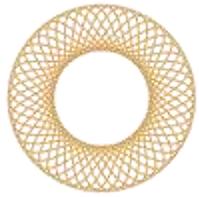
- s.50 provides a discretion without setting parameters or criteria
- No test is set down. Applicant does not have to prove X, Y or Z or make out a cause of action
- Court is not being asked to find for one party or the other – *Lane v Lane* – it is examining interests of the beneficiaries
- Jurisdiction is ancillary to court's duty to see that trusts are performed – *Letterstedt v Broers*
- Application can be made before grant – see *Goodman v Goodman*



Stigma of removal?

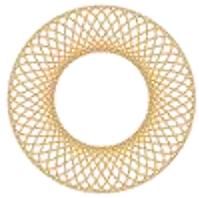
- Undermining testator's choice: intrinsic/instrumental value?
- Clearly, choice is "relevant" – see *Kershaw v Micklethwaite*
- Bold assertion to say otherwise
- Is removal a "*drastic step*"? See Park J in *Isaac v Isaac*
- Given that no wrongdoing required, no necessary stigma
- See Lord Blackburn in *Letterstedt*.

...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



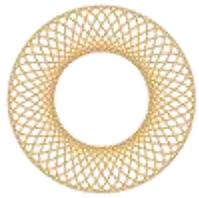
Test of welfare of beneficiaries / proper execution of trustees

- *Letterstedt v Broers*
- *Thomas & Agnes Carvel Foundation v Carvel* at [46]
"overriding consideration"
- Any difference as to whether the test is one of "welfare" as opposed to the "proper exercise/execution" of the will/trust?
- It's the welfare of beneficiaries qua beneficiaries, not in other capacity (such as shareholders) – see *Isaac v Isaac*



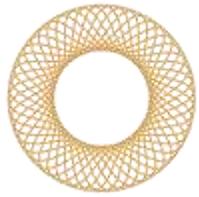
Misconduct is neither necessary nor sufficient

- *Angus v Emmott (re Steel)* – no wrongdoing alleged
- But in cases of positive misconduct, it will require good reason not to replace executors
- Specific allegations, e.g. individual became trustee improperly
- Pros and cons of alleging wrongdoing – raise the stakes / costs – often unnecessary
- Trials are rare and court may not resolve allegations
- Allegations may be “stale” and/or “unreasonable” and/or disproportionate to resolve



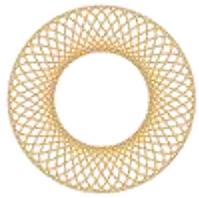
Friction and hostility between executors

- *Wilby v Rigby* - "complete breakdown between the two appointed executors"
- Need both executors be removed? No
- Look at the possible situations involving a professional executor
 - If sole executor
 - If co-executor with one lay executor
 - If co-executor with 2 family members, intended to resolve impasse
- No guarantee that professional executor will remain in post, even if not culpable in way family member is



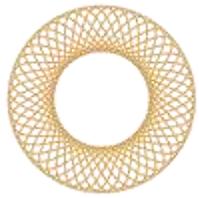
Relevant factors

- Newey J in *Kershaw v Micklethwaite* at [9] rejected the contention that courts should apply a stricter test in removing trustees than executors
- Size of (liquid) assets – see *Lane v Lane*
- Position of residuary/other beneficiaries
- What if trustee in question appointed by others – see *Isaac v Isaac*
- What if trustee subject to a conflict of interest – see *Isaac*



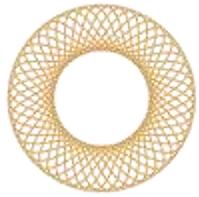
Outcome

- *Thomas & Agnes* – Pamela removed (replaced with solicitor)
- *Isaac v Isaac* – trustees agreed to be removed
- *Kershaw v Micklethwaite* – no one removed (2 sisters & trust accountant)
- *Alkin v Whelan* – wholly unjustified invoice sufficient for removal of executors
- *EA Scott* – Andrew removed, Martin remained
- *re Steel* – in the end, all executors removed
- *Lane v Lane* – executrix replaced by solicitor



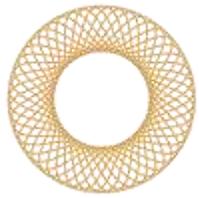
What is the best way of framing application?

- No need to make extensive (or indeed any) allegations of wrongdoing
- Highlight friction, breakdown in trust, non-performance etc
- Invite trustees/executors beforehand to resign
- If claimant is co-executor/co-trustee, consider whether want to stay in post or whether improves application to indicate willingness to resign too
- Possibility of making application in tandem with directions – see *re Steel* – dispute re compensation claim to be submitted to Home Secretary



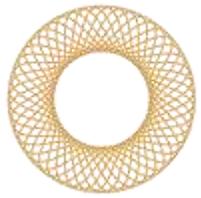
What should a trustee/executor do when facing application and allegations?

- Fight, citing testator's intentions and denying allegations/providing explanation
- Issue Part 20 claim against others
- See guidance of court under *Public Trustee v Cooper*
- Contend that application made prematurely because of ongoing discussions
- Deny allegations but indicate willingness to be removed (especially if exonerated)
- Propose alternative professional trustee
- Any merit in mediation? See below



Procedural considerations

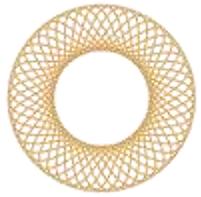
- Now removal applications are normally before a master
- Even if not, Part 8 claim, trial on written evidence and judge not asked to resolve disputes of fact – see *Lane v Lane* [7]
- While normally no trial, cannot rule out possibility – see *Schumacher v Clarke*. Is it ever necessary for determining welfare?
- Threaten recalcitrant executor with trial?
- In event of non-compliance, seek order compelling executor(s) to comply
- In cases of contempt, possibility of prison – *Totton v Totton*



Costs as lever and consequences of removal

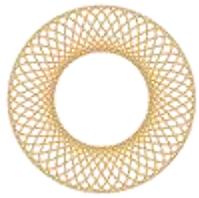
- Provisions of CPR. See starting point of CPR 46.3
- *Jones v Longley* – personal representative liable for costs to other party but can recoup them from the estate
- Applicant may succeed in having executor removed but does not recover costs
- See Williams, Mortimer & Sunnocks §53-20

The removal of a representative tends directly or indirectly to exonerate them



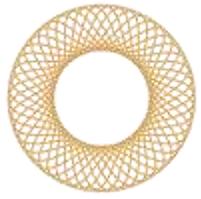
Mediation

- Will courts be willing to order mediation?
- Requirement/expectation advantage of mediation post *Churchill v Merthyr Tydfil*
- Binary outcome (unless more than one trustee/executor)
- Flexible costs position
- Courts do not like familial disputes



Summary

- No test/no cause of action
- Misconduct not necessary or sufficient
- Welfare of beneficiaries qua beneficiaries is the prime test
- Various options open to defendant to application – some can take sting out of tail
- Have regard to procedural and reputational consequences – costs, mediation



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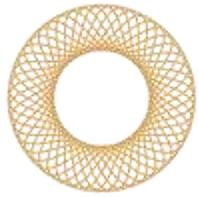
Thank you



David E. Grant KC

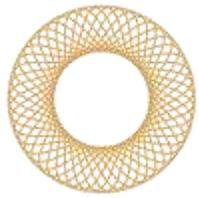
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Acknowledgements and further reading

- Matthew Marsh, then chief Master 2020 annual ACTAPS lecture "*Removal and replacement of Trustees and Personal Representatives*"
- *Lewin on Trusts*, 20th ed, §14-065 – §14-088 esp§14-076 re inherent jurisdiction
- *Williams Mortimer & Sunnucks* chapter 17 on s.116, chapter 53 on removal of representative



List of cases

- *Letterstedt v Broers* (1884) 9 App Cas 371.
- *Isaac v Isaac* [2004] EWHC 2765 (Ch); [2005] EWHC 435 (Ch)
- *Thomas & Agnes Carvel Foundation v Carvel* [2008] Ch 395
- *Angus v Emmott* (re Steel) [2010] EWHC 154 (Ch)
- *Kershaw v Micklethwaite* [2010] EWHC 506 (Ch)
- *Goodman v Goodman* [2013] EWHC 758 (Ch)
- *London Capital & Finance plc v Global Security Trustees Ltd* [2019] EWHC 339 (Ch)
- *Totton v Totton* [2022] EWHC 2304 (Ch) & [2022] EWHC 2345 (Ch)
- *Churchill v Merthyr Tydfil* [2023] EWCA Civ 1416
- *Lane v Lane* [2024] EWHC 275 (Ch)