Trusts and estates cases: recent developments

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Abstract

This article explores recent trusts and estates cases, dealing with removal of executors, gifts in anticipation of death, dispute resolution, and 1975 Act claims.

Removal of executors

The year 2014 brought us the *Savile* case (*National Westminster Bank Plc v Lucas* [2014] EWCA Civ 1632) and a number of executor removal cases were reported in the year 2015.

Wilby v Rigby [2015] EWHC 2394—a decision of Judge Hodge QC

C and D, who were siblings, were appointed executors under their late mother's will and they were to share the estate equally as beneficiaries. C applied for D's removal and sought an account from him of rent received from a property which was the main asset of the estate. C had agreed that D could administer the estate on the basis that he kept her informed. D refused to involve solicitors in the administration, on the basis that that was what his mother had wanted. He allowed the grandson of his partner to live in the estate property and proposed to sell it to him. He did not respond to letters or a telephone call from C's solicitors, and he failed to comply with procedural directions within the proceedings. Judgment in default was obtained requiring D to account for the market rent of the property plus interest.

On the removal application, the Court concluded that it was clear that C and D were effectively strangers and could not get on with one another. There was a clash of personalities and a lack of confidence which had led to a standstill in the administration for three years. It was clearly appropriate to **remove them both** since neither had any confidence in the other and they could not work together—applying *Re Steel (Deceased)* [2012] EWHC 154. If C and D agreed then the Court would appoint C's son and D's partner as joint administrators. If not, a local independent probate solicitor (if necessary nominated by someone such as the Chief Executive of the Society of Trusts and Estate Practitioners) would have to be appointed.

Both executors were removed

D was ordered to pay the costs of the claim assessed on the standard basis.[1]

D was ordered to pay the costs

Harris v Earwicker [2015] EWHC 1915—a decision of Chief Master Marsh

Cs were the executors of the will: they were a solicitor (S), an accountant (A), and a friend of the Deceased (X). They brought Part 8 proceedings seeking

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1. This is recorded in the summary of the Judgment but does not appear in the full transcript.

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directions. The Deceased's wife (W) and his sons from an earlier marriage (all beneficiaries under the will) were defendants. The sons applied for the removal of all three executors.

The Deceased had provided in his will that the house in which he lived with W should be sold subject to W's right to live there during her lifetime and to have an alternative property bought for her as often as she requested. Specific bequests were made and a number of pecuniary legacies were given including to the International Bible Students Association (IBSA). From the residue an annuity was to be purchased for W and the remainder was to be divided between the IBSA and the sons.

There was ill-will between W and the sons. The house had been sold and a replacement property had been bought for W and she had obtained a declaration that she was entitled to a lump sum in lieu of the annuity. The sons criticized the actions of the executors and proposed that the former manager of the Deceased's business premises should be appointed in their place, together with his wife.

The Chief Master concluded that it was appropriate to order the removal of S, but not of A or X, because there had been such a complete breakdown of relations between S and the sons. While relations with A and X were strained, there was no advantage to be gained from removing them from office.

The jurisdiction to remove a PR under section 50 Administration of Justice Act 1985 was not to be exercised lightly and the party seeking change had to satisfy the Court that there were substantial grounds which made it necessary. There was no wrongdoing on the part of the executors. The starting point was to consider what was left for them to do. The estate was largely wound up, what work remained arose in the will trust. The property may need to be sold and replaced in future, perhaps more than once. Decisions would have to be made which would need careful thought. The residuary beneficiaries had an interest in the way the trust was run and the IBSA was against any change of trustee.

Little was known about the proposed replacement executor and his wife, and their ability to manage the estate and the will trust had not been properly explained. They would have to obtain legal advice about their duties and it would be inefficient at such a stage of the administration to appoint new solicitors. The position concerning evidence of fitness to act was said to be 'less than satisfactory'. Pro forma statements had been used with manuscript alterations and additions. In a number of respects, relevant information was missing. The Chief Master remarked that there was no independent witness statement confirming the replacements' fitness to act and that it would have been helpful if they had made a statement saying something about themselves, although it was not a requirement of the CPR that they should do so.

The Deceased had thought carefully about the persons he wanted to appoint and those wishes, while only one factor, carried real weight particularly where the residuary beneficiaries were equally divided about the need for change. It was also highly desirable for at least one of the PRs to be a professional person.

S took a realistic position in recognizing that it might not be helpful for him to continue because of the barrage of criticisms. It was in the best interests of the beneficiaries as a whole and the smooth running of the will trust that he should be removed. A and X would be able to perform the limited remaining role in winding up the estate and the more substantial role of dealing with the will trust without any great difficulty. It was highly desirable that they should continue to deal with the will trust to provide continuity of decision-making.

Jones v Longley [2015] EWHC 3362—a decision of Master Matthews

C (a solicitor) and D (son of the Deceased) were appointed executors of the will. C initially sought the removal of D as executor, but subsequently sought the removal of both C and D and their replacement by an independent third party. D's siblings, who were also beneficiaries, were given notice of the proceedings and joined. **They, and D, sought the removal of C as executor**.

The Court removed C and left D as sole executor, on the basis that that result was what was in the best interests of the beneficiaries of the estate in the circumstances as they had evolved by the time of the hearing. The judgment which is reported is on the issue of costs.

The Court removed C the professional executor

As each of C and D were parties to the proceedings in the capacity of personal representative, the general rule in CPR Part 46.3(2) and (3) applied—i.e. they were entitled to be paid the costs of the proceedings insofar as they were not recovered from or paid by any other person out of the estate and assessed on the indemnity basis. Under CPR PD46 paragraph 1, a personal representative is entitled to an indemnity out of the estate for costs properly incurred—and whether costs were properly incurred depends on all the circumstances including whether the personal representative (i) obtained directions from the Court before bringing or defending proceedings (relevant in third-party litigation); (ii) acted in the interests of the estate or in substance for a benefit other than that of the estate, including his own; or (iii) acted in some way unreasonably in bringing or defending or in the conduct of the proceedings.

The Court was satisfied that C was acting in the estate's best interests in bringing the claim. It did not matter that in the end the Court did not make the order that he had requested in the claim form. D was not acting in his own interest in resisting the claim and genuinely but misguidedly thought that the appropriate course was that the two executors should continue; but C was right to say that the administration could not proceed with both executors in post and D was wrong to say that it could.

The Court was satisfied that C was acting in the estate's best interests in bringing the claim

It was reasonable for C to bring the claim and he acted reasonably in adapting the claim to the circumstances as they altered. D did not act reasonably in his conduct of his defence.

To the extent that C could not recover his costs from elsewhere, he should recover them from the estate on the indemnity basis; but D could not do so.

Although costs would normally follow the event, and C had been unsuccessful in obtaining the removal of D, the idea underlying the claim had been vindicated. The executors could not be expected to work together and at least one of them had to go. D initially resisted the claim and only later suggested that the proper order was to remove C. C suggested that both should be removed from a genuine concern that the administration might not be safe in the hands of D. The reasons for preferring to remove C rather than D or both of them were exceptional and depended in large part on the fact that there were only three adult beneficiaries interested in the estate and that all were siblings and all wished D and not C to continue to act and were willing to accept any risk inherent in entrusting the administration to D alone.

To the extent that C could not recover his costs from elsewhere, he should recover them from the estate on the indemnity basis; but D could not do so

C had done the right thing in the interests of the estate and its beneficiaries in bringing the proceedings and that was conduct to be encouraged. The behaviour of D in conducting the litigation in an unreasonable way was not. **D was ordered to pay C's costs on the standard basis if not agreed. To the extent that those costs were not recovered from D they were to be recoverable from the estate on the indemnity basis.**

(Note that in *Savile* the Judge at first instance had decided that the trust (the residuary beneficiary, resisting the application to approve a scheme for personal injury claimants, and seeking removal of the executor) should pay 80 per cent of the executor's costs of the approval application and all of the

executor's and the PI claimants' costs of the removal application. The Court of Appeal upheld the Judge's findings on the substantive appeal but ruled that the Judge had erred in the costs orders, and held that the costs of the trust on the approval application should be paid out of the estate on the indemnity basis; and ordered the trust to pay the executor's costs of the failed application for removal on the indemnity basis, with no order made in respect of the costs of the PI claimants).

D was ordered to pay C's costs on the standard basis if not agreed. To the extent that those costs were not recovered from D they were to be recoverable from the estate on the indemnity basis

Following removal—obtaining a freezing order

If C has successfully sought his/her appointment as executor in place of D, and then seeks a freezing order against D and/or third parties who are alleged to have received estate property, then **C should seek a provision in the freezing order limiting the cross-undertaking in damages to the assets available to C as executor.**

This is what happened in *Chick v Allen* (unreported),[2] where D (executor who had been removed) and his son D3 had received estate assets. Norris J stated it would be unjust to require the cross-undertaking to extend beyond assets held by C qua executor.

C should seek a provision in a freezing order limiting the cross-undertaking in damages to the assets available to C as executor

What happens if a party dies during proceedings?

In *Chick v Allen*, D initially had capacity, and acknowledged service not contesting the claim seeking an account, which included a claim for a specific sum which had been received by D into a joint account with the Deceased and been paid away; and he filed no evidence. He was represented by Counsel at two inter-parties hearings of the freezing injunction application. At that time, before D3 had been added as a party to the proceedings, D3 was acting as his attorney. Once D3 had been joined as a party he disclaimed his position as D's attorney.

C issued an application for summary judgment against D and D3 and a CMC had been fixed, but was adjourned because by that time it seemed that D was likely to lack capacity. C obtained medical evidence to that effect, but sought no order to appoint a litigation friend as D's life expectancy was said to be very short. D then died, which terminated the procedural bar on steps in the proceedings imposed by CPR 21.3(3) but left D and his estate unrepresented in the proceedings.

D had appointed D2 as his executor and gave his residuary estate to be divided between D3 and to D's nephews by marriage (the Parsleys). D3 indicated that he wished to take up his role as executor; but that would have entailed a conflict of interest, and D3 had previously disclaimed his position as D's attorney for that reason; and it was not apparent how D3 could act in two different capacities as a defendant to the claim[3]. D, therefore, accepted that in all the circumstances he should stand aside and file a form of renunciation.

C applied for an order that proceedings be continued against the estate of D notwithstanding the absence of a person representing the estate.

2. A case in which Thomas Seymour of Wilberforce Chambers was Counsel—I am very grateful to him for providing the material for the discussion of *Chick v Allen* in this article.

3. Compare the former RSC O 15 r 7(3), which expressly provided that in that event the person appointed would cease to be a party in the capacity in which he was already a party.

CPR 19.8(1) which is the successor to RSC Order 15 Rule 15 provides that the Court may either order:

a. the claim to proceed in the absence of a person representing the estate of the deceased; or
b. a person to be appointed to represent the estate of the deceased.

Where such order has been made, any judgment or order made in the claim is binding on the estate by virtue of CPR 19.8(5).

C applied for an order that proceedings be continued against the estate of D notwithstanding the absence of a person representing the estate

This is an alternative to the need to apply under section 116 Supreme Court Act 1925 for a special grant of administration limited to defending the claim on behalf of the deceased. That procedure, requiring an oath, can be disproportionate and cause unnecessary delay and expense. That would particularly be so in the case of *Chick v Allen*, where D had not contested the claim and that estate appeared to be insolvent.

The Parsleys were notified of the application. One of them replied conforming that he did not wish to take on responsibilities as executor, and the other did not respond.

D3 contended that the Court should exercise its power to require a person to be appointed to represent the estate under CPR 19.8(1)(b), or else require C to make an entirely fresh application under section 116 SCA 1925 for an administrator ad litem and asserted that it was for C to make arrangements for the appointee, if a professional person, to be appropriately funded.

C invited the Court to exercise its power under CPR 19.8(1)(a). The claim had been uncontested by D during his lifetime and no evidence had been lodged in relation to the freezing order raising any potential defence. D's estate had a paucity of assets available to defend the claim and any suitable person appointed to represent the estate would only be willing to act if provided with a proper indemnity. None of the beneficiaries was willing to provide any such indemnity, which made D3's argument that a representative should be appointed unattractive.

The estate was likely to be insolvent given C's claim against it, and the interests of creditors should rank before those of beneficiaries. Were the Court to require a person to be appointed, C would in practice be the person to whom the appointee would have to look for any funding/indemnity. C as executor of the Deceased's estate held no funds. If the Court required representation of the estate and funding by C, it would thus impact on C's position in a capacity other than as executor of the Deceased's estate: ie by requiring recourse to his own personal assets. This would be most unfair. It would also be entirely at variance with the fair approach adopted by Norris J in limiting the cross-undertaking in damages to assets held by C as executor (see above).

The jurisdiction to order a claim to proceed in the absence of a personal representative would not have been granted to the Court had it not been contemplated that it should in an appropriate case be exercised in preference to the course of appointing a person to represent the estate. This was, par excellence, such a case.

Master Price agreed that it was a paradigm case for permitting the claim to proceed in the absence of a PR. He considered that the interests of justice would not be served best by requiring C to take out a grant when the Court Rules had long provided that a claim can proceed in the absence of any representation. The claim against D2 depended on establishing the liability of D1, and as D2 would be a party to the summary judgment application he could put forward any points which could be advanced in defence of D1.

King v Dubrey [2015] EWCA Civ 581, [2016] 2 WLR 1—Donatio mortis causa

At first instance, the Judge had found that an aunt had transferred her house to her nephew (N) by a donatio mortis causa. The alternative finding was

that N was entitled to recover £75,000 against the aunt's estate as reasonable financial provision under the Inheritance etc Act 1975.

In March 1998, the aunt had made a will, leaving a number of modest legacies to friends and relatives and leaving the bulk of her estate to the seven charities. By 2007, the aunt was frail and elderly and N went to live with her. Around November 2010, she presented the nephew with the title deeds to her house, saying: 'This will be yours when I go.' He claimed that her use of the words and the way she looked at him made it clear that she knew her health was failing and that her death was approaching. He took the deeds from her and put them in his wardrobe. The aunt died in April 2011.

During the six months before her death, she signed three separate documents, purporting to leave her property to N. None of the documents complied with the requirements of the Wills Act 1837 section 9. The will of 1998, therefore, took effect but the Court found the aunt had effected a donatio mortis causa.

On appeal the beneficiaries under the will submitted that (i) the case of *Vallee v Birchwood* [2013] EWHC 1449 (Ch), [2014] Ch 271 had been wrongly decided and there had been no effective donatio mortis causa; (ii) if there had been no donatio mortis causa, the Judge's award under the 1975 Act was excessive.

The Court of Appeal observed that the doctrine of donatio mortis causa in English law is an anomaly. It enabled a deceased to transfer property without complying with any of the formalities of the Wills Act or the Law of Property Act 1925 section 52. There was, therefore, a need for the strictest scrutiny of the factual evidence and the Courts should not allow the doctrine to be used as a device to validate ineffective wills. Considerable caution was required because what a person said to those who were ministering to him in the last hours of his life might be a less reliable expression of his wishes than a carefully drawn will, prepared with the assistance of a solicitor and in the absence of beneficiaries. There were no such safeguards during a deathbed conversation. **It was, therefore, important to keep donatio mortis causa within its proper bounds and resist the temptation to extend the doctrine to an ever wider range of situations.**

There are three requirements of a valid donatio mortis causa: (i) the donor has to contemplate his impending death; (ii) the donor has to make a gift which would take effect only when his contemplated death occurred; and (iii) the donor has to deliver dominion over the subject matter of the gift to the recipient.

It was, therefore, important to keep donatio mortis causa within its proper bounds and resist the temptation to extend the doctrine to an ever wider range of situations

The Court of Appeal overruled *Vallee v Birchwood* because the first requirement was not satisfied in that case. The donor, like many elderly people, was approaching the end of his natural life span, but he did not have a reason to anticipate death in the near future from a known cause.

When the aunt had the crucial conversation with her nephew, she was 81 years and it was obvious that most of her life was behind her, but there was no evidence that she was suffering from any specific illness. It could not be said that she was contemplating her imminent death at the relevant time. There was no reason why she should not have gone to her solicitors and made a new will. If she had taken that course, the solicitors would have ensured that she understood the consequences of the new will. Upholding the donatio mortis causa claim would bypass all of the safeguards provided by statute.

The second requirement was not satisfied either because the words used by the aunt were more consistent with a statement of testamentary intent than a gift which was conditional upon her death within a limited period of time. Further, the ineffective documents which the aunt signed indicated that she was trying to dispose of her assets by means of a will. They were inconsistent with the proposition that she had disposed of her assets by means of a donatio mortis causa.

In relation to N's claim for reasonable financial provision, the Judge had taken account of all of the relevant factors. Evaluation of those factors was a matter for the first instance court. The Judge had not made an error of law or arrived at a figure outside the permissible bracket.

1975 Act—dispute resolution

Seals v Williams [2015] EWHC 1829 (Ch)—decision of Norris J

This was a decision to undertake Early Neutral Evaluation on the invitation of the parties under the former CPR 3.1(m). **Note that as from 1 October 2015 that rule makes explicit that the Court may as part of its case management powers order an Early Neutral Evaluation with the aim of helping the parties settle the case.**

In *Seals*, a claim under the 1975 Act, the Court held that where parties ask for a judicial expression of provisional views on particular hypotheses or upon the Judge's overall view of the case so far, it is part of the judicial function to accede to the request. The Court made an order in agreed terms for an Early Neutral Evaluation so as to afford the Judge an opportunity to make non-binding recommendations as to the outcome and to state short reasons for those recommendations without in any sense attempting a provisional judgment.

Note that as from 1 October 2015 CPR Rule 3.1(m) makes explicit that the Court may as part of its case management powers order an Early Neutral Evaluation with the aim of helping the parties settle the case

There was a great deal of acrimony between the parties and they were said to be in danger of becoming entrenched. An attempt at mediation had stalled because of differing perceptions of the issues in dispute and of the strength of the respective arguments.

The Judge said that it was 'highly commendable' that the legal representatives for the parties had proposed Early Neutral Evaluation. The process was said to be particularly useful where the parties have very differing views of the prospect of success and perhaps an inadequate understanding of the risks of litigation itself.

The Financial Dispute Resolution process is familiar in the Family Courts.[4] Although Early Neutral Evaluation was endorsed in the Chancery Modernisation Review as a valuable tool (see paragraphs 5.23–5.30) and featured in the Guides both of the Commercial Court (see paragraph G.2.1–G.2.5 of the Commercial Court Guide) and the Technology and Construction Court (see paragraph 7.5 of the TCC Guide) its precise foundation was said by Norris J to be 'unclear'. (See now to the Chancery Guide paragraphs 18.7–18.15 which include a specimen draft order directing an Early Neutral Evaluation).

The expression of provisional views in the course of a hearing is not dependent in any way on the consent of the parties. It is simply part of the Judge's inherent jurisdiction to control proceedings before him or her. The expression of views about the ultimate outcome of a case at a hearing specially convened for that purpose is slightly different. If the parties ask a Judge to express provisional views on particular hypotheses or upon the Judge's overall impression of the case so far, then it is part of the judicial function for the Judge to accede to doing so—though plainly the Judge is not bound to do so whenever the parties request.

The proposed directions were said to have been carefully crafted so as to afford the settlement Judge the opportunity to make non-binding recommendations as to the outcome and to state short reasons for that recommendation without in any sense

4. See Family Procedure Rules 2010 r.9.17

attempting a provisional judgment; and he/she would not be further involved in the proceedings at all.

The Judge concluded, 'Both in the Birmingham District Registry and in this District Registry such neutral evaluations are being adopted and the move is warmly to be welcomed.'

See also *Fayus Inc v Flying Trade Group Plc* [2012] EWPCC 43 (Patents County Court) where the Judge gave a preliminary, non-binding opinion on the merits of a claim for passing off.

1975 Act—conduct

Re Waters Deceased; Wright v Waters [2014] EWHC 3614 (Ch)—decision of HHJ Behrens

A daughter failed in her claim against her late mother's estate under the 1975 Act. Because all of the section 3 factors in her favour were outweighed by her conduct, and it was objectively reasonable for her mother not to have made provision for her in her will.

The Deceased left the majority of her estate to her son and his family. The daughter was 64 years old, wheelchair bound and in poor health and financial difficulties. The son was 60 years old and he and his family had no particular needs. Relations between the parties had deteriorated to such an extent that the daughter disowned her mother and brother in 2001. She had no further contact with the mother, who died in 2010.

In considering section 3(1) of the 1975 Act, the factors in the daughter's favour were that she was the daughter of the Deceased, she had given some help in her parents' shop, she was in poor health, she was living in necessitous circumstances and no other beneficiary had demonstrated a need for the estate. However, all those factors were outweighed by her conduct. She had refused to return money that she had invested on the mother's behalf. The language of the letters she had sent disowning the mother and brother and wishing the mother dead could only be described as extreme. She had had plenty of opportunities to retract those statements but had chosen not to do so. Instead, she had had no further communication with the mother. On balance, it was objectively reasonable for the mother not to have made provision for the daughter in her will.

1975 Act—cohabitation

As claims by cohabitees may well increase if the Cohabitation Rights Bill is passed, here is a brief reminder of the current state of play in assessing whether a 1975 Act claimant qualifies as a cohabitee.

He/she must have been living in the same household as the Deceased 'as the husband or wife' of the Deceased during the whole of the period of two years ending immediately before death (section 1(1)(1A)).

The main test under the Cohabitation Rights Bill as presently drafted (ignoring provisions where the cohabitants have a child together) is living together 'as a couple' for a continuous period of two years or more.

In *Patel v Vigh* [2013] EQWHC 3403 (Ch), the Deputy Judge (David Halpern QC) remarked that the phrase 'living as the husband or wife of the Deceased' when applied to an unmarried couple was 'somewhat opaque' [paragraph 33].

The test is a flexible one. See *Re Watson* [1999] 3 FCR 595 at 601-2 per Neuberger J:

> The court should ask itself whether, in the opinion of a reasonable person with normal perceptions, it could be said that the two people in question were living together as husband and wife; but when considering that question, one should not ignore the multifarious nature of marital relationships.

Having a sexual relationship is not necessary in all cases, but the internal nature of the relationship (i.e. between the parties themselves, rather than in their dealings with the outside world) is the most important element to consider—although it appears also to be necessary to demonstrate a degree of public commitment (see *Baynes v Hedger* [2008] EWHC 1587 (Ch) and *Lindop v Angus* [2009] EWHC 1795

(Ch)). It is useful to consider cases decided in other contexts—eg *Nutting v Southern Housing Group Ltd* [2004] EWHC 2982 (Ch) and *Amicus Horizon Ltd v Estate of Mabbott (Deceased)* [2012] EWCA Civ 895 (both considering section 17 Housing Act 1988—living with the Deceased as if a spouse).

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