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DEALING WITH PROBLEM EXECUTORS

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Entering a Caveat

- If a person interested in a deceased's estate, wish wishes to prevent a grant of probate or letters of administration being issued, he or she can do so by entering a caveat – NCPR r44(1). A caveat is issued if there is a dispute, about:

i. Who may apply for a grant of probate.

ii. The validity of a Will.

iii. Whether a Will is in existence.

- By virtue of NCPR 1987 r 44 (1) the registrar will not allow any grant to be sealed.
- A caveat can be entered in the Principal Registry or any district registry – S 108(1) Senior Courts Act 1981.

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Duration and Renewal

- A caveat is normally effective for 6 months unless a registrar directs otherwise – NCPR rule 44(3).
- It can be extended on an ongoing basis for 6 months at a time by application in writing made during the last month before it is due to expire – NCPR r44(3).
- If a caveat is in place when a summons is issued for directions, it will remain in force, until the summons is disposed of, unless a judge directs that it should cease to have effect - NCPR r 44(7) and (8).

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Warning and Appearance

- Any person claiming to have an interest in the estate may cause a warning to be issued in respect of the caveat – NCPR r 44(5).

- The warning is filed and served on the caveator stating the interest of the person warning and requiring the caveator within 8 days of service (including the date of service) to enter an 'appearance'. The warning sets out the interest of the person warning and states that the caveator has 14 days (starting with the date of service) in which:

(i) to enter an appearance setting out what interest the caveator has in the estate contrary to the interest of the person issuing the warning; or

(ii) if the caveator has no contrary interest but wishes to show cause against the sealing of a grant, to issue and serve within 14 days a summons returnable before a registrar – NCPR r 44 (6).

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Inactivity & Withdrawal

- If a caveator does not take steps then the application for a grant may proceed upon the applicant filing an affidavit, showing that the warning has been served and that he has not received a summons for directions. The caveat then ceases to have effect provided there is no pending summons – NCPR r4 (12).
- A caveat can be withdrawn at any time before entering an appearance to the warning – NCPR r 44(1). Withdrawal is by writing to the Probate Registry at which the caveat was entered.

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When to lodge a caveat

- When a caveator has some doubt about whether the Deceased's Will is valid and wishes to make enquiries to establish its validity or otherwise –
  I. compliance with Section 9 of the Wills Act 1837,
  II. lack of testamentary capacity,
  III. undue influence

- A caveat may be lodged to enable representations to be made as to who should take out the grant.

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When **NOT** to lodge a Caveat

- A caveat should not be lodged:

I. where the caveator has no real interest in the estate.

II. where the caveator intends to issue a claim against the estate under the Inheritance (Provision for Family and Dependants) Act 1975

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PUT UP OR SHUT UP ORDERS

The effect of a Caveat

- It is often the case that beneficiaries under a Will or those disappointed at not being provided for in the deceased's Will intimate an intention to bring a claim seeking to challenge the validity of a Will and enter a caveat.
- Having entered the caveat, they fail to issue a claim.
- Consequently the estate is not administered because a grant cannot be extracted.

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Non-Contentious Probate Rules 1987

- NCPR r 44(13) provides that:

"(13) Unless a registrar of the Principal Registry by order made on summons otherwise directs, any caveat in respect of which an appearance to a warning has been entered shall remain in force until the commencement of a probate action."

- Where the caveator cannot hope to gain any benefit from a contentious probate dispute, a summons may be issued to bring the matter before a District Judge of the Principal Registry or a Probate Registrar requesting that the matter be dealt with summarily by applying to vacate the caution.

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Caveator shows no real intention of issuing proceedings

- The court may be prepared to make an “unless order” which will provide that unless the caveator issues proceedings within a certain period of time, the caveat will be vacated, and a common form Grant will be issued.

- The personal representatives may be directed to disclose information to the caveator to enable him to determine whether to issue, in the period before the caveat is removed. This may be important in cases where the caveator asserts information has not been provided to him.

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Caveator shows no real intention of issuing proceedings

- Even if a common form grant is made after an unless order, it is still open to the caveator to issue contentious probate proceedings further down the line and to apply to revoke the Grant.

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Contentious Probate Proceedings

- If the caveator has a contrary interest, to the extent that they can show that they would benefit under an earlier Will or on intestacy, but the challenge is deemed weak, consideration may be given to issuing contentious probate proceedings to propound the disputed Will.
- **Elliott v Simmonds [2016] EWHC 732 (Ch)**, is an example of where the caveator after allowing her caveat to remain in place despite having all the documents which proved her will validity claim had no merit, and an adverse costs order was made against her.
- If the claim proceeds undefended, a trial on the written evidence of the claimant can be requested pursuant to CPR 57.10.

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Contentious Probate Proceedings

- If a defence is filed, consideration can be given to applying for summary judgment pursuant to CPR 24.
- Summary judgment is available if the Will challenge is so weak that it has no real prospect of success and there is no other compelling reason why it should be disposed of at trial.
- As a note of caution successful summary judgment applications are rare in contentious probate disputes - **King v King [2014] EWHC 2827 (Ch).**

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Cobden-Ramsay Orders

- Despite the notice of an intended claim, beneficiaries often request that personal representatives distribute the estate. In those circumstances, distribution may leave the executors exposed to an allegation that they had acted in bad faith, with the consequence that they may well not be afforded the usual protection under S. 27(1) of the Administration of Estates Act 1925.
- Thus a “put up or shut up” order can be applied for.
- Part 64 of the CPR governs proceedings in respect of estates, trusts, and charities. CPR 64.2(a)(i) allows the court to determine any question arising in the administration of an estate of a deceased person. Such provision includes seeking an order that the intended claimant be directed to issue a claim within a specified time period, otherwise the personal representatives may distribute the estate.

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Sherman v Fitzhugh Gates (a firm) [2003] EWCA Civ 886

Carnwath LJ held at [57]:

"There is no statutory time limit for proceedings to challenge the validity of a will. It seems that an action may be struck out if there has been an unreasonable delay, but the cases offer little guidance as to what this means in practice (see Williams op cit para.35–03; Re Flynn [1982] 1 W.L.R. 310), or as to what directions the court can give. This subject was not explored in detail in the submissions before us. The powers of the court to control abuse and delay have been strengthened by the new Civil Procedure Rules. However, even before those changes, the court's powers of direction under the old RSC Ord.85 (administration actions) were very wide. I see no reason why they could not have been used to impose a time limit on a potential challenge to the probate—in effect a direction to "put up or shut up"—following which the executor would be free to distribute under the will."

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Cobden-Ramsay v Sutton [2009] WTLR 1303

- One of the deceased's children contended that the codicil was invalid on the basis that the testator lacked testamentary capacity to execute the same.
- He was, however, reluctant to issue a claim and instead, insisted that the executors bring a claim to prove the validity of the codicil.
- The executors, who had no personal interest in the estate, wished to distribute two pecuniary legacies provided for by the codicil. The executors had made available to the defendant all material that was believed to be relevant to the issue of capacity.
- The defendant refused to bring a claim to revoke the grant and insisted that the claimant bring a claim to prove the codicil's validity.
- The court made an order directing that if the claim was not issued within a defined time period, the executors would be free to distribute the estate according to the terms of the (Will and) codicil – a "put up or shut up" order.

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Overview 1

- The case law suggests that applications for **Cobden-Ramsey** orders are made by personal representatives who have obtained a Grant and require the court's guidance on whether to distribute the estate.

- The commentary in Williams, Mortimer & Sunnucks on Executers, Administrators and Probate 22nd edition, refers to put up and shut up orders being made to enable personal representatives to make distribution. That is in contrast to being unable to extract Grant's because of the caveats in place; thus are unable to collect in the estate, let alone distribute the estate.

- The cautious approach of the courts was illustrated in **Parsons & Anor v Reid & Anor [2022] EWHC 755** in which Master Clarke considered whether the court has jurisdiction under CPR Pt 64 to make a "put up or shut up order" in respect of an intimated breach of trust claim.

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Overview 2

- In **Sherman v Fitzhugh Gates**, the Court of Appeal, when dealing with an executor who had a Grant, made the point that an executor ought not to have to issue expensive contested probate proceedings.
- Avoiding such expensive options would be consistent with an application by the personal representatives for solutions that are less expensive. It is arguable that the construction of CPR 64 is wide enough to enable the personal representatives to use it to try and secure a put up or shut up type order.
- The application could be coupled with the personal representatives seeking a Beddoe application, whereby in contemplating taking proceedings they can obtain advance protection from personal liability for costs.

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Removing Personal Representatives

- The High Court may remove personal representatives under S 50 of the Administration of Justice Act 1985 ("*AJA*"). This section confers the power to appoint a person (the "*substituted personal representative*") to act as a personal representative in place of one or all of the existing personal representative or, if there are two or more personal representatives, to terminate the appointment of one or more, but not all, of them.

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Leading cases

- In exercising its discretion, the court acts on the principles laid down by Lord Blackburn in **Letterstedt v Broers [1884] 9 App Cas 371**. In **Thomas and Agnes Carvel Foundation v Carvel [2008] Ch 395** Lewison J held at para 44 that.

- *"It is common ground that, in the case of removal of a trustee, the court should act on the principles laid down by Lord Blackburn in Letterstedt v Broers (1884) 9 App Cas 371, …, and that in the case of removing a personal representative similar principles should apply. Whether I am right in concluding that Pamela is a trustee; or whether she is no more than a personal representative, the principles are therefore the same."*

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The basic tests

- In **Letterstedt** Lord Blackburn held that *"the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."*
- In **Thomas and Agnes Carvel Foundation v Carvel** Lewison J held at [46] endorsed that approach, by adding that *"The overriding consideration is, therefore, whether the trusts are being properly executed; or, as he put it in a later passage, the main guide must be 'the welfare of the beneficiaries.'"* The reference being to the judgment of Lord Blackburne in **Letterstedt**.
- Thus not every act, omission, mistake, or neglect of a duty or inaccuracy of conduct will result in the removal of a personal representative.

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Hostility

- An executor will not be removed merely because of hostility between the executor and beneficiaries; however, hostility should be taken into account where it might obstruct the administration of the estate – **Letterstedt v Broers** and **Kershaw v Micklethwaite [2010] EWHC 506 (Ch).** In **Letterstedt** Lord Blackburn said at p389:

"friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded."

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Misconduct

- Misconduct is not necessary for personal representatives to be removed. Lord Blackburn said at p386:

"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."

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Reluctance to accept account

- In **Heyman v Dobson [2007] EWHC 3503 (Ch)**, the sole executor of a small estate was replaced when the beneficiaries were reluctant to accept his account of dealings with the estate. Evans-Lombe J held at paragraph 26:

"It seems to me that the fact that there is difficulty between the beneficiaries and a single sole executor in which the beneficiaries are reluctant to accept that executor's account of dealings with the estate of the deceased, is sufficient ground, applying the discretion which s 50 confers on the court in a pragmatic way, as recommended by Lawrence Collins J, and that there was before the Deputy Master sufficient material on which he could make the order that he did."

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Relevant considerations

- In deciding whether to remove the Executors the fact that the Deceased chose them may be relevant because she will have made that choice with full knowledge of the characteristics and personalities involved - **Kershaw v Micklethwaite [2010] EWHC 506 (Ch)3** and **Alkin v Raymond [2010] WTLR 1117.**

- Chief Master Marsh gave guidance about the exercise of the Court's jurisdiction pursuant to S 50 **in Long v Rodman [2019] EWHC 753 (Ch)** and **Schumacher v Clarke [2019] EWHC 1031 (Ch).** The Chief Master referred back to his earlier summary of the applicable principles in **Harris v Earwicker [2015] EWHC 1915 (Ch)** at [9].

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Section 116 v Section 50

- Unlike an application under S 116 of the Senior Courts Act 1981, there is no requirement in with an application under S 50, to show '*special circumstances*' or that it is '*necessary or expedient*' to appoint an independent administrator.

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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.

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Section 116

- The court must consider two questions:

I. Whether there are special circumstances which might justify passing over that person; and

II. Whether it is necessary or expedient by reason of those special circumstances that that person be passed over **- Buchanan v Milton [1999] 2 F.L.R. 844.**

- The courts have defined *'special circumstances'* broadly.

i. Unfit or inappropriate to act and the estate may be at risk, e.g. due to previous financial dealings or bankruptcy or mental ill-health - A-B v Dobbs [2010] WTLR 931.

ii. Convicted of the Deceased's murder or manslaughter - Re Crippen [1911] P 108 and Scotching v Birch [2008] EWHC 844.

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Overlap

- There is substantial overlap between S.116 and S. 50 – **Re Goodman [2014] Ch 186**. The widow and daughter applied in the Chancery Division under s 50 asking for the appointment of a replacement independent administrator. The sons argued that they were not entitled to do so because they had not yet obtained a grant and that the application, if any, should be made in the Family Division under S 116.
- Newey J on appeal upheld Master Bragge's decision that S 50 can apply to an executor who has not yet proved the will. The term "personal representative" in S 50 includes executors and administrators. The appointment of an executor derives from the will. An administrator derives title from the grant of letters of administration.
- Thus the ambit of S 50 is not confined to executors who have been granted probate accordingly an application under S 50 may be made by an executor who has not yet obtained probate.

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Substitution or removal is governed by CPR 57.13.

CPR PD 57 [12-14] prescribes documents that must accompany the claim form:

i. A sealed or certified copy of the grant of probate or letters of administration.

ii. Where the claim is to substitute or remove an executor and is made before a grant of probate has been issued, the original or, if the original is not available, a copy of the will.

iii. written evidence containing the grounds of the claim and the following –

(a) brief details of the property comprised in the estate - estimate of its capital value and any income that is received from it;

(b) brief details of the liabilities of the estate;

(c) names and addresses of the persons who are in possession of the documents relating to the estate;

(d) the names of the beneficiaries and their respective interests in the estate;

(e) the name, address and occupation of any proposed substituted personal representative

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Substitute personal representative

- If the claim is for the appointment of a substituted personal representative, the claim form must be accompanied by –

a) a signed or (in the case of the Public Trustee or a corporation) sealed consent to act; and

b) written evidence as to the fitness of the proposed substituted personal representative, if an individual, to act.

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Removal of trustees under the Trustee Act 1925 and inherent jurisdiction

- A dissatisfied beneficiary may invite the court to exercise the court's inherent jurisdiction over trustees and S 41 of the Trustee Act 1925. The court will not remove a trustee lightly unless it considers that the trust property will not be safe or that the trust will not be properly executed in the interests of the beneficiaries if the trustee remains in office.

- The applicable principles derive from **Letterstedt v Broers (1884) 9 App Cas 371**. In **Kershaw v Micklethwaite [2010] EWHC 506 (Ch)** Newey J set out the relevant factors to be considered, namely"

(a) whether or not the trustee's functions were "of a simple character";

(b) the relevance of any friction or hostility between an executor and a beneficiary;

(c) the relevance of the testator's choice of executors; and

(d) that not every breach of trust will justify the removal of an executor.