CAVEATS

PUT UP OR SHUT UP ORDERS

DEALING WITH / REMOVINGPROBLEM EXECUTORS

CAVEATS

Effect of a Caveat

A caveat is an entry that no grant is to be sealed in the estate of the deceased named, without notice being given to the caveator. The importance of a caveat is that if the registry is aware of it, no grant can be sealed. The exceptions are grants *ad colligenda bona* or pending suit or grants sealed on the day that the caveat is entered.

Entering a Caveat

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

i. Who may apply for a grant of probate.
ii. Whether a Will is valid.
iii. Whether a Will is in existence.

By virtue of the Non-Contentious Probate Rules 1987 (NCPR 1987) r 44 the registrar will not allow any grant to be sealed.

A caveat against a grant of probate can be entered in the Principal Registry or any district registry – Section 108(1) Senior Courts Act 1981. Any person wishing to enter a caveat (may do so by any of the following means: completing Form 3 in the appropriate book at the registry or sub-registry or by sending a notice in Form 3 to any registry or sub-registry; making an application online; or by completing Form PA8A and sending it to HMCTS.

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 for directions is issued, the caveat 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).

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 rule 44(5).

The warning is filed at the Probate Registry 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 at the appropriate registry and 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 in the same period a summons returnable before a registrar.

The caveator must then enter an 'appearance' giving particulars of any contrary interest in the estate or withdraw the caveat. If he or she does not have a contrary interest to the person warning but wishes to show cause against the sealing of a grant to that person he or she should issue a summons for directions, as to which see NCPR 1987, r 44(6).

The appearance must be entered within 8 calendar days as opposed to business days. Once an appearance has been entered the question can only be resolved through proceedings in the Chancery Division, or, if agreement is reached between the parties before proceedings are issued, before the district probate registrar.

If a caveator does not take steps within 8 days of service of the warning, 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).

Withdrawal of a Caveat

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.

When to lodge a caveat

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

A caveat may be lodge to afford the opportunity of make representations as to who should take out the grant. This scenario applies when beneficiary has good reason to believe that an executor named in the will would be unsuitable to take out the grant.

When not to lodge a Caveat

A caveat should not be lodged where the caveator has no real interest in the estate.

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

PUT UP OR SHUT UP PRDERS

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, will intimate an intention to bring a claim seeking to challenge the validity of a Will and enter a caveat. Thereafter, having entered the caveat, they fail to issue a claim, the consequence of which is that the estate is not administered because a Grant of Probate cannot be extracted. The consequence is that unless the caveator can be persuaded to remove the caveat or terms of settlement are arrived at, the parties are doomed to pursue contentious probate proceedings and either the party wanting the Will to be admitted to probate or the party objecting, will have to issue a claim.

Non-Contentious Probate Rules 1987 The Non-Contentious Probate Rules 1987 governs caveats. Rule 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. Ordinarily this is quicker and more cost effective than having to issue contentious probate proceedings, as addressed below.

Caveator shows no real intention of issuing proceedings

Where a caveator does have a contrary interest, to the extent that they would benefit under an earlier Will or on intestacy, but they have failed to progress their claim, a summons could be issued. 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 representative's 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 whether the caveator asserts information has not been provided to him.

If successful the court may order that the caveator bear the costs of the summons, in the event, that he fails to issue proceedings, but that the costs of the summons will be costs in the main validity proceedings if he does issue a claim.

This can be appropriate where a caveat has been entered but little has happened since that point to progress a contentious probate claim and it appears that the caveator has no real intention of bringing such a claim. It would be advisable to put the caveator on notice that a summons for an unless order will be issued, if they do not provide a fully detailed letter of claim or issue proceedings (as the case may be) within a certain time frame. Continued inactivity by the caveator would strengthen the argument that the caveator should be liable for the costs of the summons.

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. This procedure does not therefore give the same certainty as issuing contentious probate proceedings and seeking a trial on the written evidence or summary judgment.

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.

If a defence is filed, consideration can be given to applying for summary judgment pursuant to CPR 24 instead of the summons procedure. 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. A rare example of a successful application is found in ***King v King [2014] EWHC 2827 (Ch).***

Cobden-Ramsay Orders

Despite the notice of an intended claim, beneficiaries often request the 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 Section 27(1) of the Administration of Estates Act 1925. To enable executors to proceed with the administration of the estate they frequently apply for what lawyers colloquially call a "*put up or shut up*" order.

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 of the probate claim be directed to issue a claim within a specified time period, otherwise personal representatives may distribute the estate.

In ***Sherman v Fitzhugh Gates (a firm) [2003] EWCA Civ 886*** Carnwath LJ held:

> *56. In principle, that seems to me to have been an entirely reasonable course for her to take. The judge does not in terms indicate how otherwise Mrs Perkins could have resolved the dilemma. In theory, she could have simply proceeded on the basis of the probate, which was conclusive until set aside (see Williams, Mortimer and Sunnucks, 14th Ed 41-04). However, one can see why, in the face of Claudia's threats, this might have seemed a risky course. Miss Lonsdale, as I understood her, suggested that Mrs Perkins should herself have started a probate action for proof in solemn form. She relies on the fact that, in Re Jolley [1964] P 262, [1964] 1 All ER 596, it seems to have been assumed that it was open to executors to take that course "for their own*

convenience", notwithstanding a previous grant in common form (see p 275, per Danckwerts LJ). However, the case makes clear that there is no obligation on the executor to do so. Where, as here, the executrix, on the information and advice available to her, had no reason to doubt the validity of the will, it is hard to see why she should have been expected to incur the costs of a fully-fledged probate action. The beneficiaries under the 1993 will might have had reason to complain, if she had done so.

57. The textbooks do not appear to offer an easy solution in such circumstances. 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 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."

Subsequently, ***Sherman v Fitzhugh Gates (a firm)*** was applied in ***Cobden-Ramsay v Sutton*** **[2009] WTLR 1303.** In this case, 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. However, the defendant refused to bring a claim to revoke the grant of probate, and insisted that the claimant bring a claim to prove the codicil's validity. Having considered the merits of the application, the court made an order directing that if the deceased's child did not issue his claim within a defined time period, the executors would be free to distribute the estate according to the terms of the (Will and) codicil – a so-called "*put up or shut up*" order.

The case law suggests that applications for ***Cobden-Ramsey*** orders are made by personal representatives who have obtained a Grant of Probate 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.

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 which 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. Such an 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.

REMOVING PERSONAL REPRESENTATIVES

The High Court may remove personal representatives under Section 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 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.

Section 50 provides that:

> *"(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."*

Section 50(4) AJA authorises the court to appoint a judicial trustee rather than a substituted representative.

> *"(4) Where an application relating to the estate of a deceased person is made to the court under subsection (1), the court may, if it thinks fit, proceed as if the application were, or included, an application for the appointment under the Judicial Trustees Act 1896 of a judicial trustee in relation to that estate."*

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."

Not every act, omission, mistake or neglect of a duty or inaccuracy of conduct will result in the removal of a personal representative. Lord Blackburn in ***Letterstedt*** 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 para 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***.

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.'*

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.'*

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. This is an appeal against the exercise of the Deputy Master's discretion. It seems to me that, in order to set aside the exercise of that discretion, I would need to find that there was no material on which he could properly have arrived at the decision which he did arrive at. I conclude that that submission fails."

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 (as he then was) gave guidance about the exercise of the Court's jurisdiction pursuant to section 50 of the Administration of Justice Act 1985 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]:

"The relevant principles for the purposes of this application may be summarised in the following way:

i. It is unnecessary for the court to find wrongdoing or fault on the part of the personal representatives. The guiding principle is whether the administration of the estate is being carried out properly. Put another way, when looking at the welfare of the beneficiaries, is it in their best interests to replace one or more of the personal representatives?

ii. If there is wrongdoing or fault and it is material such as to endanger the estate the court is very likely to exercise its powers under section 50. If, however, there may be some proper criticism of the personal representatives, but it is minor and will not affect the administration of the estate or its assets, it may well not be necessary to exercise the power.

iii. The wishes of the testator, as reflected in the will, concerning the identity of the personal representatives is a factor to take into account.

iv. The wishes of the beneficiaries may also be relevant. I would add, however, that the beneficiaries, or some of them, have no right to demand replacement and the court has to make a balanced judgment taking a broad view about what is in the interests of the beneficiaries as a whole. This is particularly important where, as here, there are competing points of view.

v. The court needs to consider whether, in the absence of significant wrongdoing or fault, it has become impossible or difficult for the personal representatives to complete the administration of the estate or administer the will trusts. The court must review what has been done to administer the estate and what remains to be done. A breakdown of the relationship between some or all of the beneficiaries and the personal representatives will not without more justify their replacement. If, however, the breakdown of relations makes the task of the personal representatives difficult or impossible, replacement may be the only option.

vi. The additional cost of replacing some or all of the personal representatives, particularly where it is proposed to appoint professional persons, is a material consideration. The size of estate and the scope and cost of the work which will be needed will have to be considered."

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

Section 116 Senior Courts Act 1981

The power to pass over prior claims to grant is conferred by S.116, which provides that:

> *(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.*

The Court's power under s.116 to pass over a person entitled to a grant is only exercisable where "*by reason of any special circumstances*" it appears to the court to be "*necessary or expedient*" to appoint someone other than the person otherwise entitled to a grant. It is clear, therefore, that having established who is entitled to a grant, the court must consider two questions: first, whether there are special circumstances which might justify passing over that person and, second, 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. Illustrates, are the person entitled to the grant:

i. Is deemed 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. Has been convicted of the Deceased's murder or manslaughter - *Re Crippen* [1911] P 108 and *Scotching v Birch* [2008] EWHC 844.

Distinction between Section 116 and Section 50

The distinction between s 116 of the SCA 1981 and s 50 of the AJA 1985 was highlighted by Sir Robin Jacob in ***Buist v Dobbs [2011] EWCA Civ 1146***:

'The whole of this language [ie the language of s 116(1)] is looking to the future about who is to be the administrator. Once the administrator has been appointed there is a separate provision for dealing with what happens if someone wishes to complain about how the estate is being administered. That is s 50 of the Administration of Justice Act 1985 … So the system is this: under s 116 you go to the court to stop the grant of probate or the appointment of an administrator, and then under s 50 there is a procedure for removing somebody who has been appointed.'

There is substantial overlap between S.116 and S. 50 – ***Re Goodman [2014] Ch 186.*** Mr Goodman's widow and daughter applied in the Chancery Division under s 50 asking the court to appoint a replacement independent administrator. Mr Goodman's 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 of the AJA 1985 may be made by an executor who has not yet obtained probate.

Procedure

Substitution or removal of personal representatives is governed by CPR 57.13.

Always refer to CPR PD 57 paragraphs 12-14 for the documents that must accompany the claim form. The claim form must:

i. be accompanied by 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 information so far as it is known to the claimant –

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

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

(c) the 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; and

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

iv. 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.

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 principles on which a court acts 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.