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KEY PRINCIPLES ON REMOVAL OF EXECUTORS/TRUSTEES AND COSTS

Fernandez v Fernandez [2025] EWHC 2373 (Ch)
Fernandez v Fernandez [2025] EWHC 2530 (Ch)

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Procedure

Applications to remove personal representatives under Section 50 of the Administration of Justice Act 1985 are usually be made by Part 8 claim form.

CPR PD 57 paragraph 13.1(2) provides:

"(2) 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."

Long v Rodman [2019] EWHC 753(Ch) and Schumacher v Clarke [2019] EWHC 1031 (Ch)), *suggest the application is set out in written evidence (rather than live evidence) and heard without a trial, thus without cross examine witnesses.*

Clear guidance is found in the White Book 2025 at 57.13.2.

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Oral Evidence

Whilst oral evidence on Section 50 applications is not the default position, evidence can be given when required.

In ***Long v Rodman [2019] EWHC 753 (Ch),*** Chief Master Marsh held at [20]:

"I would add that it will only rarely be necessary for an application under section 50 to result in a trial because it is usually not normally necessary to make findings in relation to disputed issues of fact for the purposes of dealing with the application."

In ***Schumacher v Clarke and others [2019] EWHC 1031 (Ch)*** Chief Mater Marsh suggests there can be live evidence at [34]. ***Perry v Neupert [2019] EWHC 52 (Ch)*** (which was decided after ***Harris v Earwicker) [2015] EWHC 1915 (Ch)*** received oral evidence on a Section 50 application.

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Need for adverse findings

In ***Schumacher v Clarke [2019] EWHC 1031 (Ch)*** Mater Marsh held at [28] that:

"The power of the court is not dependent on making adverse findings of fact, and it is not necessary for the claimant to prove wrongdoing. It will often suffice for the court to conclude that a party has made out a good arguable case about the issues that are raised".

Presumably if findings of fact are required you have to convince the judge of that at the outset and probably have it recorded on the order.

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Need for adverse findings

Letterstedt v Broers, Lord Blackburn held:

P385: *"It is not disputed that there is a jurisdiction "in cases requiring such a remedy," as is said in STORY'S EQUITY JURISPRUDENCE, s 1287, but there is very little to be found to guide us in saying what are the cases requiring such a remedy- so little that their Lordships are compelled to have recourse to general principles. STORY says, s 1289:"But in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty; or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But 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. "It seems to their Lordships that the jurisdiction which a court of equity has no difficulty in exercising under the circumstances indicated by STORY is merely ancillary to its principal duty - to see that the trusts are properly executed."*

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Need for adverse findings

P 387: *"In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case."*

p 389*: "It is quite true that 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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Developed principles

in Harris v Earwicker [2015] EWHC 1915 (Ch) Chief Master held 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.

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Developed principles

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."

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The appropriate test

In **Schumacher v Clarke [2019] EWHC 1031 (Ch)**, Chief Master March said at [18]:

"It is critical for present purposes that the core concern of the court is what is in the best interests of the beneficiaries looking at their interests as a whole. The power of the court is not dependent on making adverse findings of fact, and it is not necessary for the claimant to prove wrongdoing. It will often suffice for the court to conclude that a party has made out a good arguable case about the issues that are raised. If there is a good arguable case about the conduct of one or more of the executors or trustees, that may well be sufficient to engage the court's discretionary power under s.50, or the inherent jurisdiction, and make some change of administrator or trustee inevitable. The jurisdiction is quite unlike ordinary inter partes litigation in which one party, of necessity, seeks to prove the facts its cause of action against another party."

This passage was cited with approval in ***Fernandez v Fernandez [2025] EWHC 2373 (Ch) at [58].***

In relation to removal of trustees, guidance is provided in ***London Capital and Finance v Global Securities Ltd [2019] EWHC 3339 Ch).***

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Fernandez v Fernandez [2025] EWHC 2373 (Ch) – Removal

The appellant was removed as personal representative of the wills of both his parents, and as trustee of a trust settled in 2008. Permission to appeal the DJ's order for removal was given by Green J. The appeal was dismissed.

1. The case recites the leading authorities – so a useful reference tool.

2. Paragraphs 32-41 analyse the authorities on the principles of allowing an appeal. The same highlight the high hurdle to overcome.

3. Removal of executors – paragraphs [48] to [59]].

4. Firmly applied Master Marsh's guidance in *Harris v Earwicker* at paragraph 53.

5. Removal of trustees – paragraphs [60] to [65]

6. Removal of trustees or executors at [61] *"In each case the litmus test is the welfare of the beneficiaries as a whole."*

7. Conflicts of Interest /self-dealing – Fernandez paragraph [64] – [82]

8. Principles of costs – Fernandez paragraphs [83] – [94]

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Fernandez v Fernandez [2025] EWHC 2530 (Ch) - Costs

Green J had encouraged mediation and thereafter the parties had not been able to agree dates.

Refusal to mediate or to engage reasonably can lead to indemnity costs or adverse costs orders.

Fernandez emphasises the need for constructive engagement. Don't delay in giving dates.

Ordinary CPR cost principles apply: the unsuccessful party pays the successful party's costs. Appeals follow the same rule.

Findings of fact in relation to the litigation are not required to make an indemnity costs order.

Hosking v Apax Partners Ltd [2019] 1 WLR 3347 Hildyard set out actors to consider when making an indemnity basis of costs assessment at [43].

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Hanson v Coleman [2025] EWHC 116 (Ch)

Master Brightwell at [28] held *"A beneficiaries' dispute fell within the third Buckton category of ordinary hostile litigation*" and at [29] held that an unsuccessful defence to a removal application was not conduct outside the norm or unreasonable to high degree and that *"The mere fact that the opposition to a removal claim is unsuccessful is not a reason to order indemnity costs."* Instead costs were awarded on the standard basis against the opposing party.

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Executors Indemnity

Fernandez held that the Appellant should be deprived of his indemnity for the costs of hostile litigation, though not for the costs of his administration of the estates and the trust.

The Appellant's costs, and those of the respondents that he was ordered to pay were not properly incurred within section 31(1) of the Trustee Act 2000, and the Appellant was not entitled to an indemnity in respect of them - CPR PD 46 para 1.1(b).

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General Costs points

Late Costs Schedules – a frequent occurrence.

Macdonald v Taree Holdings Ltd [2001] 1 Costs LR 147 -Neuberger J:

"23. ... Where there is a failure to comply with the Practice Direction and a schedule of costs is not served more than 24 hours before the hearing, the court should take that into account but its reaction should be proportionate ...

26. I do not take the view ... that in a case of mere failure to comply, without more, it would be right to deprive a party, otherwise entitled to a summary assessment of his costs, of his costs altogether."

That decision was followed in ***Kingsley v Orban [2014] EWHC 2991 (Ch),*** and in ***Whittaker v Bertha UK Ltd [2023] EWHC 2554 (Ch).***

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General Costs points

Payment on account of costs

CPR rule 44.2(8) Courts may order immediate payments on account and interest on costs, and direct detailed assessment where parties cannot agree.

Interest on costs

CPR rule 44.2(6)(g) provides that the court may order *"interest on costs from or until a certain date, including a date before judgment".*

In ***Involnert Ltd v Aprilgrange Ltd [2015] EWHC 2834*** (Comm), [7], Leggatt J held:

"This power is now routinely exercised when an order for costs is made following a trial to award interest at a commercial rate from the dates when the costs were incurred until the date when interest becomes payable under the Judgments Act."

HHJ Matthews held "*Interest will be paid on the costs actually allowed on detailed assessment, not on those claimed in the costs schedule prepared for summary assessment. I will order interest at 2% above bank base rate .*"

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What is the actual test for removal?

1. The passages within the authorities are difficult to reconcile.

2. In ***Harris v Earwicker [2015] EWHC 1915 (Ch)*** Chief Master held at [39] that *"The jurisdiction and the s.50 is not to be exercised lightly and although there is no presumption against change, the party seeking change must satisfy the court that there are substantial grounds which we make a change necessary."*

3. The High Court's approach is increasingly pragmatic, focused on keeping estates moving and protecting beneficiaries – suggesting a lower test is applied.

4. The court may remove an executor or trustee where administration has become unworkable due to a breakdown in trust or communication. Proof of dishonesty is not required; incapacity or dysfunction suffices.

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What is the actual test for removal?

5. Removal is not a punishment but a practical measure to ensure proper administration for the beneficiaries' benefit.

6. Applications for removal should probably be narrowly framed. They concern replacement, not a trial of every dispute surrounding the trust or estate.

7. The court will often appoint an independent professional where relationships have irretrievably broken down.

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Implications of the Fernandez v Fernandez Decision

1. The case confirms the court's wide jurisdiction to remove a personal representative if it is in the best interests of the beneficiaries, even without proof of misconduct.

2. In practice the threshold for removal under S.50 is now far lower than older case law might suggest.

3. It serves as a warning that pursuing personal interests through hostile litigation can result in an executor being held personally liable for costs and being denied indemnity from the estate.

4. The case also found that an unreasonable refusal to mediate could lead to indemnity costs being awarded against a party. So don't delay in agreeing to mediate. And give clear dates.

5. Executors and trustees lose their right of indemnity where costs are incurred improperly, e.g. defending their own position rather than advancing the beneficiaries' interests.

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Practical Considerations

Executors / trustees should seek early advice and consider stepping aside if relations are irretrievable to avoid personal cost exposure.

Where relations have irretrievably broken down, voluntarily stepping down (or agreeing an interim professional appointee) may avoid loss of indemnity and heavy personal costs.

The proper scope of a removal counterclaim is relief to replace the executor/trustee and ancillary relief; it is not the forum for deciding all underlying factual disputes about the administration. Courts will not convert a replacement application into a full trial of all allegations.

Beware the costs consequences of unsuccessful litigation.

Beware personal information being published in court judgments.