The Passing Over of Personal Representatives and the Removal of Personal Representatives from Office

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The removal of Personal Representatives prior to the taking of a grant: Passing Over

Introduction: the basis of the passing over jurisdiction

1. In an appropriate case, one can seek to remove either a named Executor or a principally-entitled Administrator[1] before they have taken a grant and been formally confirmed in their office. The relevant procedure is the 'passing over' application. The jurisdictional basis is found in s 116(1) of the Senior Courts Act 1981—

> 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. Although s 116 SCA 1981 provides the most obvious means of passing over an Executor or Administrator, an application might also be brought, in suitable circumstances, under r 27(6) N-CPR 1987—

> A dispute between persons entitled to a grant in the same degree shall be brought by summons before a district judge or registrar.

3. One potential Administrator could use this sub-rule to ask the Court to pass over another potential Administrator within the same priority group.

4. Some leading commentators have suggested that r 27(6) can only be used with regard to grants of administration, and that it cannot be used by one named Executor to have another named Executor passed over: see Williams, Mortimer & Sunnucks' *Executors Administrators and Probate* (19th ed., 2008), at para.26-17. Personal experience before some District Probate Registrars suggests that in fact they *are* prepared to pass over one Executor on the application of another which is founded on r 27(6). However, unless and until that power has been confirmed on appeal by the High Court, reliance on the sub-rule will be risky in the case of a dispute between Executors. Section 116 should be relied on instead.

[1] That is to say, a person who is primarily entitled to a grant of letters of administration of an intestate estate, in accordance with the order of priority set down in r 22 of the Non-Contentious Probate Rules 1987. The phrase is used here for convenience – it is not a term of art.

5. Although there is no authority directly on the point, the Court is likely to consider the same sorts of factors, whether the application is brought under s 116 or r 27(6). The Court is being asked to provide similar relief, whichever legislative basis is relied on, and one would therefore expect the Court to have regard to the same factors in either case. This being so, however, it may well be that the r 27(6) jurisdiction is a matter of largely theoretical interest. It is difficult to imagine a case where r 27(6) could be relied on but s 116 could not. To avoid jurisdictional disputes, it will be safer to rely on s 116 whenever possible.

Passing over under s 116 – the general principles

6. There are a limited number of authorities on s 116 SCA 1981, but the provision can be traced directly back, via s 162 of the Supreme Court of Judicature (Consolidation) Act 1925, to s 73 of the Court of Probate Act 1857. It appears to be accepted that the substantial number of reported authorities on those earlier statutory provisions can be used to guide the Court in exercising its discretion under s 116: see, for example, Williams Mortimer & Sunnucks' *Executors Administrators and Probate* (19th ed., 2008), at para.26-03.

7. The Court will take a broad view of "special circumstances" under s 116: see *In re Clore decd* [1982] Fam 113 (and on appeal as *IRC v Stype Investments (Jersey) Ltd* [1982] Ch 456) and *Buchanan v Milton* [1999] 2 FLR 844. In *Clore*, Ewbank J held thus, at [1982] Fam 113, 117—

> I would not impose any limitation on the words "special circumstances". I would say that the words "special circumstances" are not necessarily limited to circumstances in connection with the estate itself or its administration, but could extend to any other circumstances which the court thinks are relevant, which lead the court to think that it is necessary, or expedient, to pass over the executors.

8. In *Holtham v Arnold* (1986) 2 BMLR 123, Hoffmann J suggested that s 116 was "concerned with the proper and efficient administration of the estate". That will be true of many cases, but the decision – which was based on unusual facts – should not be read as restricting the applicability of s 116 to *only* those cases where the proper and efficient administration of the estate is in jeopardy.

9. Once the s 116 jurisdiction has been established, the Court has a "wide discretion" as to how it should be exercised: see *Watson v Perotti* [2003] EWHC 2533 (Ch) at para.20 (Park J).

10. In *A-B v Dobbs* [2010] WTLR 931, Coleridge J warned that the passing over of a Personal Representative was "not [to] be lightly undertaken". It is not enough that there

might be someone who is better able to carry out the task. Where a testator has taken the trouble to identify someone who is to administer his estate, his intentions should not be lightly set aside "unless the people he chooses by the time of his death, for one reason or another, have, more or less, disentitled themselves from carrying out the task" (para.20). While the reasoning would seem to apply only to Executors, there is nothing in the judgment to suggest that the Court will "lightly undertake" the passing over of either a named Executor *or* a principally-entitled Administrator.

11. On the other hand, Coleridge J's remarks should not be read as suggesting that passing over is to be treated as a particularly unusual and draconian step. Rather, he seems to have been stressing that good reasons need to be shown before a Personal Representative will be passed over.

12. By way of further clarification, in the recent decision of *Khan v Crossland* (25 November 2011, as yet only briefly reported on Westlaw), HH Judge Behrens (sitting as a Judge of the High Court) reiterated that the Court's discretion under s 116 was a wide one. A Personal Representative does not have to be actively discredited before an order passing him over can be made. The Court will of course have regard to the fact (where it exists) that the testator has specifically chosen a particular person to be his Personal Representative, but this will not *per se* prevent that person from being passed over in an appropriate case.

Specific examples of "special circumstances"

13. The Courts have been prepared to find "special circumstances", and to pass over Personal Representatives, in a wide range of factual situations. The following examples give some idea of the breadth of the jurisdiction—

    (i) A Personal Representative is likely to be passed over where they are proved to have killed the Deceased: see *Re Crippen* [1911] P 108 (Dr Crippen had himself been hanged, but administration of his late wife's estate was sought unsuccessfully by his mistress, who claimed as his Executrix). Note, however, that in *Scotching v Birch* [2008] EWHC 844 (Ch), Patten J appears not to have taken it for granted that an Administratrix would inevitably have been passed over even though she had admitted the unlawful killing of the Deceased – his Lordship merely observed, at para.19, that "had it been necessary for me to perform [the balancing] exercise under s 116 it might well have come down to deciding whether the fact that Mrs Birch killed her son should be the deciding factor";

(ii) A Personal Representative will be passed over where they are serving a sentence of imprisonment which means that it is not practically possible for them to take a grant and administer the estate: see *In the Estate of S, decd* [1968] P 302;

(iii) The Court will pass over a Personal Representative who has disappeared and cannot be traced, as happened in *In the Goods of Crawshay* [1893] P 108 and *Re Williams* [1918] P 122;

(iv) The Court will readily pass over a Personal Representative who is mentally unfit to conduct the administration of the estate: see *In the Goods of Atherton* [1892] P 104 and the observations of Coleridge J in *A-B v Dobbs* [2010] WTLR 931;

(v) It is not clear whether a Personal Representative's "drunken habits" would *per se* justify their being passed over, but they will certainly do so where they could realistically result in the mismanagement of the estate: see *Re Ardern* [1898] P 147;

(vi) Nowadays, the fact of a Personal Representative being "beyond the seas" is likely to cause significantly fewer problems than it did in Victorian times. Nevertheless, there may still be cases where a Personal Representative's residence abroad, perhaps combined with certain other factors, may persuade the Court to pass them over: see *In re Clore decd* [1982] Fam 113, where the named Executors were domiciled in France and Israel respectively (although the case for making the grant *ad colligenda bona* to an alternative Administrator was obviously strengthened by the fact of the Executors having agreed to £20 million of estate assets being moved out of the jurisdiction);

(vii) In some of the reported cases, undue delay in applying for probate has been at least one factor in the Court's decision to pass over the Personal Representatives: see, for example, *In the Goods of Ray* (1926) 96 LJP 37. In a case involving substantial and wholly unjustified delay, however, the fact of such delay would probably suffice by itself to justify a passing over;

(viii) A Personal Representative is likely to be passed over where they have set up interests which are adverse to those of the estate: see *Budd v Silver* (1813) 2 Phill 115 and *Re Paine decd* (1916) 115 LT 935;

(ix) In *Khan v Crossland* (25 November 2011), the named Executors were passed over where all the beneficiaries were *sui juris* adults who were unanimous in their

desire to have the Executors renounce their office, and where it was found that the relationship between Executors and beneficiaries had clearly broken down. In a case where there is a dispute between two Personal Representatives entitled in the same degree, it may be enough to justify the passing over of one that the other has the clear support of a majority of the residuary beneficiaries (see *In the Goods of Sarah Stainton* (1871) LR 2 P&D 212).

14. There are therefore no hard and fast rules governing when the Courts are likely to accede to an application to pass over a Personal Representative. The test for intervention set down in s 116(1) SCA 1981 is broadly worded and the Courts have largely resisted the temptation to put any gloss on that broad wording. It seems fair to say that a passing over application is likely to succeed where the appointment of the party impugned would be likely to jeopardise the proper administration of the estate, but these are not the only cases where the Courts will intervene.

The relevant procedure

15. An application under s 116 SCA 1981 is to be made to a District Judge in the Principal Registry or to a Probate Registrar, and must be supported by affidavit evidence setting out the grounds of the application (r 52 N-CPR 1987). The District Judge or Registrar can, however, require the application to be made by summons to a Judge (r 61(1) N-CPR 1987).

16. The application will initially be brought in the Family Division and will usually be dealt with in that Division. However, it is certainly not unheard of for a contentious application to be transferred to the Chancery Division (as happened, for instance, in *Watson v Perotti* [2003] EWHC 2533 (Ch)).

17. An *ex parte* application may be suitable in certain circumstances, but in many cases a passing over application is likely to be highly contentious – any such application should obviously be made on notice to the other side, who will no doubt wish to file affidavit evidence in response.

18. As appears from the decision in *A-B v Dobbs* [2010] WTLR 931 (and the permission to appeal application, reported as *Buist v Dobbs* [2011] EWCA Civ 1146), an unsuccessful s 116 applicant who genuinely wishes to pursue an appeal must remember to ask the Court to stay the grant of probate/letters of administration pending the outcome of the appeal – otherwise, the grant is likely to issue before the appeal can be heard and s 116 will cease to be of any further relevance.

The removal of Personal Representatives after the grant: s 50 AJA 1985

Introduction: the s 50 jurisdiction

19. Where a grant of probate or letters of administration has already been taken, the Personal Representative can no longer be passed over but must instead be removed by application under s 50 of the Administration of Justice Act 1985. The distinction between the two jurisdictions was highlighted by Sir Robin Jacob when refusing permission to appeal in the *A-B v Dobbs* case (see *Buist v Dobbs* [2011] EWCA Civ 1146, at para.6-7)—

> The whole of this language [i.e. 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.

20. Section 50(1) AJA 1985 provides thus—

> 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.

The status of the appointee(s)

21. Section 50(2) AJA 1985 deals with specific questions of status – will the Court's appointee be an Executor or an Administrator?

22. If the substitute is appointed by the Court to act along with an existing Executor or Executors, then he will himself be an Executor. However, he will only rank as an Executor from the date of his appointment (and not from the date of death). The statute explicitly provides that the substitute Executor will not, however, count as an Executor for the purposes of establishing any chain of representation: see s 50(2)(a).

23. In any other case, the substitute will be an Administrator. In keeping with the ordinary rule, he will rank as an Administrator only from the date of his appointment: see s 50(2)(b).

24. The Court of Appeal has held that s 50 appointments do not have any retrospective effect, with regard to either the substitute or the Personal Representative whom they replace: see *Collier v Calvert* (unreported, 22 July 1996).

25. To sum up briefly, therefore, s 50 AJA 1985 enables the High Court to do the following, in appropriate circumstances—

    (i) It can appoint a new Executor in place of an existing Executor, where the substitute is to act alongside one or more existing Executors;

    (ii) It can appoint a new Administrator in place of an existing Administrator;

    (iii) It can appoint a new Administrator in place of *all* existing Personal Representatives; and

    (iv) It can terminate the appointment of an existing Personal Representative without replacing them, provided that that leaves at least one existing Personal Representative in place.

The jurisdiction is vested only in the High Court

26. It is important to bear in mind that the s 50 jurisdiction is conferred only on the High Court and not the County Court. A s 50 application will often be made as one of a number of different claims within the same proceedings and if the estate is not particularly large the Master may well suggest transferring the matter to an appropriate County Court. That ought to be resisted in any case where s 50 relief is sought, as the relief simply cannot be given by the County Court.

Principles governing the exercise of the s 50 powers

27. Section 50 itself does not explain in what circumstances the Court should exercise its powers of substitution and removal. In the past couple of years, however, useful guidelines have been set down in a number of first instance decisions, including *Thomas and Agnes Carvel Foundation v Carvel* [2008] Ch 395 (Lewison J), *Dobson v Heyman*

[2010] WTLR 1151 (Evans-Lombe J), *Re Steel decd* [2010] WTLR 531 (Deputy Judge Snowden QC) and *Kershaw v Micklethwaite* [2011] WTLR 413 (Newey J). The following principles can be distilled from these authorities—

(i) The Court will apply the same principles under s 50 as it applies in exercising its inherent jurisdiction to remove trustees. These are still, in essence, the principles set down by the Privy Council in *Letterstedt v Broers* (1884) 9 App Cas 371. The Court's main concern will therefore be the welfare of the beneficiaries and the proper administration of the estate. If that is seriously jeopardised by a Personal Representative's conduct, then he can expect to be removed: see *Carvel*, *Dobson v Heyman* and *Re Steel*;

(ii) The Court does not have to find active misconduct by a Personal Representative in order to remove them. It will be enough if there has been a serious breakdown in the relationship between the Personal Representatives, or between the Personal Representatives and the beneficiaries, *provided that that breakdown jeopardises the proper administration of the estate*: see *Re Steel*. In *Kershaw v Micklethwaite*, however, Newey J stressed that the Court will need to be satisfied of a real and significant threat to the proper administration of the estate – it will not apparently be enough that there is hostility and ill feeling, even if that is likely to occasion *some* added costs or delays to the administration;

(iii) The Court will exercise its discretion pragmatically, and having regard to the views of the beneficiaries of the estate as a whole (although the beneficiaries' views will not be conclusive): see *Dobson v Heyman*;

(iv) In an appropriate case, the Court will lend weight to factors such as the careful and deliberate appointment of specific Executors and the costs to the estate (in both time and money) if new Personal Representatives are appointed: see *Kershaw v Micklethwaite*.

The relevant procedure

28. A s 50 claim must be made by or on behalf of a Personal Representative or a beneficiary.

29. The claim must be brought in the High Court and it will be assigned to the Chancery Division. All Personal Representatives must be joined as parties to the proceedings: see CPR 57.13.

30. Practice Direction 57 sets out the various detailed requirements that must be satisfied by any s 50 application. These include the following: (i) the claim form must be accompanied by a sealed or certified copy of the grant of probate or letters of administration (or, if the claim is made before the grant of probate has been issued, the original of the Will or a copy thereof if the original is not available); (ii) there must be written evidence in support of the claim, dealing with the various matters of fact specified in para.13.1(2); (iii) where the claim is for the appointment of a substituted personal representative, it must be accompanied by a consent to act (signed by the proposed substitute) and written evidence of the fitness of any proposed individual substitute to act in the administration. This is not an exhaustive list – the full list of the requirements can be found at para.12-14 of Practice Direction 57.

31. The application can be brought under Part 7 or Part 8, although Part 8 ought not to be used if there are likely to be substantial factual disputes (as per CPR r 8.1(2)(a)). If a s 50 claim is brought under Part 8 by one Personal Representative against another, and the Defendant wishes to make a counterclaim for the Claimant's own removal, he must obtain the Court's permission to bring that counterclaim under CPR r 8.7.

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