Dealing with the Problem Executor

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Executors who fail to properly carry out the duties of their office are one of the key sources of conflict in the administration of estates.

Delay, disagreement as to the steps to be taken in the administration of the estate, issues of the remuneration of executors, or a failure to properly account for their dealings with the estate are frequent sources of conflict.

Less frequently, it may be that you encounter serious wrongdoing such as negligently causing loss to the estate or misappropriating assets. Criminal and civil liability may arise in such circumstances and it may be necessary, if you suspect such serious misconduct, to seek urgent legal advice with a view to avoiding further loss and to stop assets from being dissipated.

The focus of this part of our discussion is on the more commonly encountered difficulties that can arise in the administration of estates and on what can be done to bring the wayward executor back into line and to progress the administration of the estate.

The court's toolbox

The court has a range of options at its disposal for dealing with difficult executors and issues that arise in the course of the administration of the estate.

Some of these procedures (citations, applications for a grant ad colligenda bona, passing over) take place in the probate registry. Very helpfully, if you are contemplating making some form of application to the probate registry (or the PRFD), the registry will usually permit you to make a pre-lodgement enquiry with the registry concerning any aspect of the proposed application – e.g. the form of the application or order, the documentation required or procedure, even whether or not the registrar is likely to entertain the application. You can even send the application in in draft form for the approval of the registrar prior to issue. The enquiry will usually be referred to the registrar (or district judge in the PRFD) before it is responded to.

The reluctant executor

The citation procedure is a very useful method for prompting an executor, who has delayed in applying for the grant, to take action. A reluctant executor may be chivvied into action by a citation to:

(a) to accept or refuse a grant; or
(b) take probate; or
(c) to propound the will

The procedure for issuing citations is set out in r46-50 of the Non-Contentious Probate Rule ("NCPR").

Citation to accept or refuse the grant

The citation procedure serves two purposes – it directs the person entitled to take probate to apply for the grant and, if that person fails to apply for the grant, it will enable them to be passed over so that the party issuing the citation can take the grant instead. It is a very useful procedure where an executor has delayed applying for a grant but is also refusing to renounce.

Note, however, that if it is feared that the person to be cited is in fact unsuitable to administer the estate and there is a real prospect of him responding to the citation by applying for the grant, an application to pass over the executor or to appoint a substitute (see below) should be considered in the alternative.

A citation to accept or refuse the grant can be issued by any person who would himself be entitled to take a grant of probate, if the person with the higher right renounced (NCPR 47(1)).

Rule 20 of the NCPR sets out the order of priority in which persons are entitled to a grant of probate, where a deceased person has left a will:

- Executor;
- Any residuary legatee or devisee holding in trust for another person;
- Any other residuary legatee or devisee;
- The personal representative of any residuary legatee or devisee (other than a life tenant or one holding in trust for someone);
- Any other legatee or devisee or a creditor of the deceased;
- The personal representative of any other legatee or devisee or of any creditor of the deceased.

The citor must have a direct beneficial interest in the deceased's estate and must be next entitled after the citee - so, a residuary beneficiary may cite the executor to take probate.

Alternatively, any person who would be entitled to take a grant, but for the presence of a person or persons with greater entitlement in the order of priority, may be cited to accept or refuse the grant. If there is more than one person with a higher entitlement to the grant than the citor, the citation must be issued to all of them if they have not renounced. If the persons cited fail to take any steps to progress the grant in response to the citation, the citor may then seek a grant.

Citation to take probate

An executor who has intermeddled in the testator's estate cannot renounce. Where an executor has intermeddled in the testator's estate but has taken no steps to prove the will within six months of the testator's death, he may be cited to show cause why he should not be ordered to take probate by the person or persons next entitled to the grant instead of being cited to accept or refuse the grant.

Such a citation may only be issued at least six months after the date of death and provided that there are no proceedings pending as to the validity of the will (NCPR 47(3)).

If the person cited fails to enter an appearance or, having entered an appearance, fails to then get on with applying for the grant, the citor may then apply to the registrar that issued the citation for an order that the person cited be required to take a grant of probate within a specified time (NCPR 47(5)(c)).

If the person cited continues to fail to comply, the citor can theoretically apply for him to be committed for contempt. However, the court has a discretion, in the alternative, to simply appoint another person as personal representative under section 116 Senior Courts Act 1981. This was the course taken in *Re Biggs*, dec'd [1966] 2 WLR 536, on the basis that the cited executor was possibly incapable of acting as executor due to infirmity and, in any case, was so hostile to the beneficiaries that he was unlikely to agree to act even under threat of committal. In most cases, the appointment of an alternative personal representative will be the preferable course of action. The reluctance of the named executor to take the grant, even in the face of an order requiring him to do so, is likely to amount to special circumstances that justify the appointment of an alternative personal representative.

Citation to propound the will

A person entitled under an earlier will or on intestacy may cite the executors and all persons interested under a later will to propound that document (i.e. to take the necessary steps to prove the document).

A citation to propound a will may be used where a party stands to benefit under a will, but it cannot be admitted to probate because there exists a possible later will, the status of which is unclear because nobody has attempted to prove it.

The citation forces the persons who stand to benefit under the later will to decide whether to propound it, at which point it can be contested. If they do not propound the will it will be assumed to be invalid.

A citation to propound a will must be issued to:

– all executors named in the will; and
– all persons interested under the will (NCPR 48).

The citation may be issued by any person with an interest contrary to the persons cited. This will include any person interested under an earlier will; and if there is no other will, any person who would stand to benefit on an intestacy.

In practice, citations to propound a will are uncommon and one or other side will instead issue contentious probate proceedings, or the parties will agree to an early mediation. However, the citation procedure may prove useful where there is very strong evidence that the later will is invalid and you believe that the executors and beneficiaries of the later will are seeking to use the delay to their advantage in pressing for a compromise, in circumstances where you suspect that they are unlikely to issue contentious probate proceedings.

Limited grants
Ordinarily, once a caveat has been lodged, a grant cannot be sealed until the caveat expires or is removed, or upon application by summons, or court order disposing of probate proceedings.

Administration pending suit
The court does have discretion to appoint an administrator pending the determination of the probate proceedings under Section 117 of the Supreme Court Act 1981. A grant under Section 117 enables the estate to be administered in the interim and assets collected in, and tax and debts to be paid. The leave of the court or the consent of the other parties will be required before distribution is made, however the administrator pending suit may also, with permission, make a partial distribution of the estate. Such an application will usually be made after contentious probate proceedings have been issued and should be made to the court dealing with the contentious probate proceedings (see CPR 57). If the order is made, it is then necessary to apply to the PRFD for the grant, as no grant can issue out of a district registry where contentious probate proceedings are pending.

It is not uncommon to find that the wills in dispute contain a number of specific legacies that are common to both wills and which will be effective whichever will is admitted to probate. If your charity is a beneficiary under both the earlier will and the later disputed will and will take whichever will is admitted to probate, it may be possible for the administrator pending suit to pay out the legacy before the proceedings are concluded. In circumstances where contentious probate proceedings may take 18-24 months to conclude, this procedure may allow your legacy to be paid out without further delay.

Administration ad colligenda bona
Where there is a dispute concerning the validity of a will and the delay in obtaining the grant is putting the preservation of the estate at risk, an application may be made to the district registry or PRFD for a limited grant of letters of administration ad colligenda bona which allows the administrator to call in the assets, pay the debts and tax and otherwise to hold the proceeds pending the resolution of the dispute. Such a course of action should be considered in particular where the estate consists of leasehold property and service charge arrears are accruing, or is mortgaged and in arrears, or there are other pressing debts to be paid. I have also used this procedure where there is some physical threat to the building – a risk of vandalism or Japanese Knot Weed.

The incompetent, hostile or unsuitable executor

The citation procedure is not appropriate in circumstances where you believe that the executor named in the will is not an appropriate person to administer the estate. Additionally, the citation procedure can only be utilised pre-grant and you may face circumstances where an executor has taken the grant but is failing in the duties.

Where there are serious grounds for considering that the deceased's choice of executor is an unsuitable person to administer the estate, there are two main routes to appointing an alternative executor.

Prior to the taking of a grant of probate, the court has a discretionary jurisdiction to pass over an executor pursuant to Section 116(1) of the Senior Courts Act 1981, which provides:
"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".

It has been held in *Buchanan v Milton* [1999] 2 FLR 844 that the court must consider two questions on a Section 116 application: (a) are there special circumstances which might justify passing over that person and (b) whether it is necessary and expedient by reason of those special circumstances that that person be passed over.

The special circumstances need not be circumstances connected with the estate or its administration, provided that they also make it necessary and expedient for the court to pass over the person otherwise entitled to a grant (*Re Clore (Deceased)* [1982] Fam. 113). There is comparatively little reported case law concerning the circumstances in which an executor may be passed over. At 26-05 of the 20th edition of Williams, Mortimer and Sunnucks, a variety of circumstances are noted as justifying passing over the named executor including: bad (criminal) character; attempts to avoid tax by removing assets from the jurisdiction; intermeddling but refusing to take a grant; absence abroad; imprisonment; ill health; lack of capacity. It is emphasised that it is only in extreme cases that the court will exercise its power to override the deceased's choice of executor.

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". 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).

There is recent authority suggesting that the courts may be prepared to take a more permissive approach where the beneficiaries agree that an executor should be passed over. In *Khan v Crossland* [2012] W.T.L.R. 841, the deceased had used the services of a professional Will firm and had nominated two members of the firm to act as executor. The beneficiaries, having reached agreement between themselves as to the distribution of the deceased's estate did not want the firm to take the grant and invited the court to exercise its discretion to appoint one of the beneficiaries instead. The named executors refused renounce and opposed the application. It was argued on behalf of the executors that (by analogy with the reported decisions concerning the similar provisions of Section 50 of the Administration of Justice Act 1985) the testator's choice of executor should not be lightly disregarded. It was further contended that the executors could not be passed over unless they had disentitled themselves in some way (which on the facts they had not). HHJ Behrens sitting as a Judge of the High Court emphasised that the court had a wide discretion under section 116 and that it was not necessary for a personal representative to be actively discredited before an order can be made passing him over. On the facts, in the absence of any information as to why the testator had chosen the two nominated executors and in circumstances

where there had been limited contact with the named executors, the testator's choice of executor, whilst relevant, carried less weight. The fact that beneficiaries were of full age, full mental capacity and united in their request for an executor to renounce its role could amount to special circumstances under Section 116.

Applications under Section 116 are made to the Principal Registry or to the district probate registry at which the application for the grant is to be made. The application must be supported by an affidavit providing details of:

- The deceased and any will (which should be exhibited);
- The persons entitled to the grant in priority under r20 NCPR;
- Why the person entitled cannot, will not, or ought not to apply for the grant and why his title should be passed over;
- Details of the enquiries which have been made to trace anyone else entitled to the grant whose whereabouts remain unknown;
- The gross and net values of the estate, in so far as is known;
- Any other relevant facts in support of the application.

If the district judge or registrar is satisfied on the evidence, they may direct letters of administration with the will annexed to issue to the parties proposed to take the grant. Alternatively, they may refuse the application or give directions for further evidence or require that the matter be brought before the court for hearing on summons.

Post-grant, Section 116 cannot be used to remove an executor. However, the court has the jurisdiction to remove an executor pursuant to section 50(1) Administration of Justice Act 1985 (the jurisdiction is also available pre-grant in the case of executors following *Goodman v Goodman* [2013] EWHC 758 (Ch)) which provides:
'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 provides no guidance as to the test to be applied. It has been held in *Thomas & Agnes Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch) that the approach to removing personal representatives should be the same as the approach taken to the removal of trustees, pursuant to the inherent jurisdiction of the court, set out in *Letterstedt v Broers and another* (1884) 9 App. Cas. 371. *Per* Lord Blackburn in *Letterstedt v Broers and another* (1884) 9 App. Cas. 371 at 385-386, citing with approval a passage in Story's Equity Jurisprudence, 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 shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

Lord Blackburn continued "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. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, 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."

The overriding consideration is whether or not it is necessary to remove the executor in the interest of the proper administration of the estate and to promote the welfare of the beneficiaries.

"… the jurisdiction under section 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 were substantial grounds which make a change necessary." *Per* Chief Master Marsh in *Harris v Earwicker* [2015] EWHC 1915 (CH).

Each case turns on its facts and the reported case law in this area is highly fact specific. The following points of principle can be discerned:

- It is not necessary for the court to find that there has been wrongdoing or fault on the part of the executors in order to justify their removal, although serious breaches of duty, particularly where the misconduct amounts to dishonesty or endangers the estate, will be likely to justify removal (*Letterstedt*; *Kershaw v Micklethwaite* [2010] EWHC 506).
- Where the fault on the part of the executors is minor or is unlikely to impact upon the conclusion of the administration of the estate, or the impasse between the parties can be resolved by giving directions to the executors, it may not be necessary to go so far as removing the executors (*Kershaw v Micklethwaite* [2010] EWHC 506).
- Friction or hostility between the beneficiaries and executors will not be enough, in and of itself, to justify removal. However, a breakdown in relations between beneficiaries and executors is a factor to be taken into account in the exercise of the court's jurisdiction and may justify removal where it is obstructing the administration of the estate, and potentially where it is capable of doing so (*Kershaw v Micklethwaite* [2010] EWHC 506). It is likely to be necessary to show that the administration of the estate has come to a standstill and that the friction or hostility between the parties is likely to make it impossible or difficult for the administration of the estate to be concluded by the existing personal representatives *Angus v Emmott* [2010] EWHC 154 (Ch) [108]).
- The guiding principle is "whether the administration of the estate is being carried out properly", which means whether it is in the best interests of the beneficiaries to replace an executor (*Harris*, above).
- The following factors will further be relevant considerations:
    - That the testator had chosen a particular person or persons to act as their executor(s), and may have possessed knowledge about them that the court lacked (*Kershaw v Micklethwaite* [2010] EWHC 506). *Per Khan*,

above, this may be expected to carry less weight where the testator had no particular connection with the executors and there is a lack of evidence as to why they were appointed.
    - How far along the administration of the estate has progressed and the nature of the work required to complete it.
    - The cost of appointing replacement personal representatives may be an important factor (*Harris*, above).
    - The wishes of the beneficiaries (*Khan, above*; *Jones v Longley* [2015] EWHC 3362 (Ch)).

The successful outcome of a removal application can rarely be guaranteed. In many instances, removal may not be the best course of action. For example, it may be that the estate has been substantially administered and that the costs of appointing an alternative, usually professional personal representative, are likely to be high or, alternatively, it may be the case that an impasse in the administration of the estate can be resolved by some lesser action, such as making an application to the court for directions.

Applications for the removal of an executor pursuant to Section 50 of the AJA 1985 proceed under the CPR (r 57.13 and PD57, paragraphs 12-14). They are made in the Chancery Division and proceed as a Part 8 claim. All personal representatives must be joined as parties.

A claim for the removal of an executor must be supported by a signed consent to act from the substitute personal representative and a witness statement confirming that the proposed replacement is a fit and proper person to act.

The witness statement of the claimant in support of an application for the removal of an Executor and/or for directions must deal with the following matters:

- 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;
- brief details of the liabilities of the estate;
- the names and addresses of the persons who are in possession of the documents relating to the estate;
- the names of the beneficiaries and their respective interests in the estate;
- the name, address and occupation of any proposed substituted executor (if substitution is sought);
- the claimant's factual case in respect of the matters warranting the removal of the executors or relevant to any matters upon which the court's direction is sought.
- A sealed copy of the grant must be exhibited.

The Part 8 claim will usually be listed for hearing or for directions. If it is listed for hearing, it is possible, in a straightforward case, that the master may deal with the matter on the basis of submissions and consideration of the written evidence.

Where there is factual dispute, it is likely that the matter will either be set down for a trial or the factual issues may be hived off for an enquiry (essentially a trial of the factual issues) before coming back for disposal once the facts have been found. These applications do have the potential to become very contentious and may potentially be

lengthy and expensive proceedings. I have recently had a case where, following a full day of argument before the master, the master decided that he was not in a position to decide whether or not to remove the executors there and then and directed that the matter should be set down for a week long enquiry as to the factual issues in dispute. Sensibly, when faced with this prospect, the parties were able to reach terms settling the issues in dispute, but not before the executors had incurred costs approaching £150,000 (which they conceded they would not be entitled to from the estate) and my client around £50,000.

The costs of removal applications will generally be treated as hostile proceedings and costs will follow the event (*Alsop Wilkinson (a firm) v Neary and others* [1995] 1 All ER 431). A successful applicant will ordinarily be entitled to their costs as against the unsuccessful personal representative, who will not be entitled to their costs from the estate. As with all civil litigation, the conduct of the parties may lead to an alternative order being made. Thus in *Jones v Longley* (above), the professional executor, Mr Jones, who made the application for the removal of his fellow lay executor, Mr Longley, in circumstances where an impasse had been reached in the administration of the estate successfully recovered his costs notwithstanding the fact that his application ultimately resulted in his own removal. It was held by Master Matthews that Mr Jones had acted reasonably in bringing the application, and had done so in the best interests of the estate and beneficiaries, and had also acted reasonably in his conduct as the executor of the estate. Mr Longley on the other hand had not acted reasonably. He had resisted the application and sought to insist that both he and Mr Jones should remain in office. He had further filed thousands of pages of material and voluminous pleadings that stated and restated his allegations against Mr Jones "in prolix, quasi-scientific and repetitive language". The decision to remove Mr Jones and to leave Mr Longley in office had been exceptional. It was clear that they could not continue to administer the estate together. The decision to retain Mr Longley over Mr Jones was largely due to the fact that there were only three adult beneficiaries interested in the estate, whom were all siblings of Mr Longley and wanted Mr Longley and not Mr Jones to continue to act, and that the beneficiaries were willing to accept any risk inherent in entrusting the administration to Mr Longley alone. Mr Longley was ordered to pay Mr Jones' costs, with Mr Jones being able to recover any balance of his costs them from the estate, on an indemnity basis. Mr Longley was not allowed to recover his own costs from the estate.

I should note that, theoretically, it is possible for an order to be made for the administration of the estate. It is quite commonplace for a claim for "administration of the estate, if and so far as is necessary" to be included in the claim form alongside claims for the removal of personal representatives or for directions to be given. An order for the administration of the estate means that the court will step into the shoes of the executors and administer the estate. It is almost never desirable to do this, except as a very last resort. It is an extremely cumbersome and costly process.

The indecisive or genuinely flummoxed executor

Not infrequently, estates run into difficulty where an issue arises over some aspect of the administration of the estate that the executors cannot resolve without the

assistance of the court. The personal representatives may be in doubt about the extent of their powers, faced with a difficult decision, or in circumstances where there is disagreement amongst the parties interested in the estate as to how the administration of the estate should proceed. In such circumstances, the executors, or alternatively a beneficiary or creditor of the estate, can make an application to the court for the court to give directions as to how the administration of the estate should proceed.

This can be an extremely useful procedure and the court's assistance can be obtained in resolving a wide range of issues, such as:

- Whether or not a person falls within the class of beneficiaries or whether the estate should be distributed on the footing that a beneficiary is dead (*Re Benjamin* [1902] 1 Ch 723];
- Issues relating to the rights of persons claiming to be creditors including whether or not doubtful debts should be met;
- Whether or not proceedings should be prosecuted or defended at the expense of the estate (*Re Beddoe* [1893] 1 Ch 547);
- Whether or not the fund should be distributed or retention made in respect of any contingent liabilities (*Re Yorke* [1997] 4 All ER 907).

The procedure for such applications is set out under CPR 64. The application proceeds by way of a Part 8 claim with supporting statement. Any defendant wishing to participate in the proceedings or to seek a different remedy must acknowledge service within 14 days of being served with the claim form and supporting evidence and must file any witness statement they wish to rely upon at the same time.

The application may be listed for a directions hearing at which it is likely that only case management directions will be given or, in a more straightforward matter, listed for a hearing at which the substantive issue will be resolved with consideration of the written evidence and submissions. As with removal applications, complex matters may very well necessitate the matter being set down for a lengthier trial with oral evidence from the parties or alternatively some particular issue being hived off for an enquiry as to some factual issue in dispute (e.g. whether or not a beneficiary was indebted to the deceased or whether or not the deceased had a beneficial interest in an asset that a party alleges should have been brought into the estate).

Costs are in the discretion of the court and the general rule, if the proceedings have had the character of ordinary hostile litigation, is that the unsuccessful party will pay the losing party's costs will apply (CPR 44.3(2)). The general rule is that trustees acting on behalf of the estate will be entitled to their costs on the indemnity basis from the estate, to the extent that they are not recoverable from some other party (CPR 48.4). It is not uncommon for the costs of all parties of proceedings for directions to be paid from the estate – in the case of the beneficiaries to be assessed on the standard basis and in the case of personal representatives on the indemnity basis. As a rule, it is more likely that proceedings issued by the personal representatives will be considered to be 'friendly' proceedings in respect of which all parties should have their costs from the estate, whereas proceedings issued by the beneficiaries may be more likely to be considered to be 'hostile' proceedings in which instance costs will follow the event. Much will turn upon whether or not the parties are considered to have acted reasonably in relation to the circumstances that have led the matter to be brought before the court and the stance they have taken in relation to the issues. If the court considers that the

personal representatives were at fault, or that they should have adopted a neutral stance in relation to an issue but have instead taken an improperly partisan position, it may order that they are not entitled to take their costs from the estate and the personal representatives may further be ordered to pay the successful beneficiary's costs (see e.g. *Breadner v Granville-Grossman* [2001] WTLR 377). Alternatively, the court may consider that beneficiaries who have properly brought an application in the interests of the estate as a whole should have their costs from the estate, but that the personal representatives, if they have not acted reasonably, should not.

The extravagantly remunerated or profligate executor

Executors and trustees must act without charge for their services, unless they are authorised to charge under a clause in the will or by statute.

Under section 31 of the Trustee Act 2000, personal representatives and trustees can always be reimbursed for reasonable expenses incurred in association with the administration of the estate. This will include the charges of other professionals they have engaged, such as solicitors.

Section 29 of the Trustee Act 2000 makes provision for a trust corporation (which is not a charitable trustee) to charge reasonable remuneration out of the estate, where the will does not contain an express charging clause. The charges should be reasonable and should not exceed what the corporation would charge in any normal business or profession. Where the executor acts in a professional capacity, but is not a trust corporation and is not acting as a charitable trustee, he can receive reasonable remuneration out of the fund provided that all other trustees agree in writing.

Section 28(1) of the Trustee Act 2000 has moderated rule that required charging clauses to be strictly construed against personal representatives or trustees. Personal representatives and trustees acting in a professional capacity can now be remunerated for their work even if it could have been carried out by a layperson.

'Acting in a professional capacity' means that the personal representative must be acting in a profession or business that consists of or includes the provision of services in connection with the management or administration of trusts (or estates) generally or a particular type of trust, or any particular aspect of the management or administration of trusts (or estates) generally, or a particular trust (section 28(5)).

Assessment of solicitors' costs

The Solicitors (Non-Contentious Buisiness) Remuneration Order 2009 states that solicitors' costs in connection with non-contentious business (which includes estate administration) must be fair and reasonable. The costs charged by solicitor executors or solicitors providing services to the estate can be challenged on assessment. Under section 71(1) of the Solicitors Act 1974, where costs are payable by a party who is not a client, that party also has the right to request assessment of the solicitors costs. This will include residuary beneficiaries where the costs will fall on the residuary estate.

In *Jemma Trust Co Ltd v Liptrott* [2004] 1 WLR 646 the Court of Appeal held that:

- it was open to solicitors to charge a scale fee based on a percentage of the value of the estate as well as for time spent on administration.
- Taking into account all the factors in the Remuneration Order, the question to be determined was whether the overall remuneration was fair and reasonable.
- The Court suggested the following guidelines be applied by solicitors:
    - it would be best practice for the solicitor to obtain the prior agreement as to basis of charges from the executors and beneficially entitled third party;
    - in complicated administrations solicitors should provide in the terms of retainer for interim bills to be rendered for payment on account but subject to reviewing the overall charge at the end of business to ensure that it is fair and reasonable;
    - charges may be based on value of the estate or the hourly rate or mixture of these two elements but it is important to ensure clarity to show how value is taken into account and it is not to be charged twice;
    - if charges are made by reference to value they should be on a regressive scale reducing as the size of the estate increases;
    - when a separate element of the charge is based on the value of the estate it would be helpful to specify the number of hours that it would notionally take to achieve that amount.

The first step where you are concerned that the professional charges for the administration of the estate are excessive will be to request a breakdown of the costs and an explanation as to how they have been incurred. It should be borne in mind that the costs of assessment can be more than the reduction that is achieved on assessment and, accordingly, efforts should be made to reduce the costs by way of negotiation. If that cannot be achieved, note that any proceedings for assessment must ordinarily be requested within 12 months from delivery of the bill or payment and before any judgment for payment of the costs is made. In *McIlwraith v McIlwraith* [2002] EWHC 1757 (Ch), [2004] 4 Costs LR 533 Rich J held that this time limit was not an absolute bar when the application for assessment was made by a beneficiary and not by a personal representative

Lay executors cannot charge for their services, although they have a right of indemnity, noted above, that will permit them to engage professionals to act in the administration of the estate on their behalf. The remuneration of non-solicitor professional personal representatives, such as accountants, will need to be challenged by an application for an account to be taken.

Claim to an account

It is a core part of the duties of executors that they must account to the beneficiaries for the administration of the estate. This includes keeping records and producing accounts that detail the assets and liabilities of the estate and the income and expenditure of the estate.

There are two key aspects to this duty that can be useful for tackling the wayward executor:

- Executors can be compelled to provide accounts as part of their duty to provide information about their dealings with the estate and the beneficiaries may also

obtain orders for the inspection of the underlying receipts (referred to as 'vouching' as the executor produces 'vouchers' for each item in the account);
- A formal account can be taken in court where there are issues of whether or not the executor has properly administered the estate in terms of bringing assets into the estate, the payment of debts, expenditure, remuneration and distributions.

Where an account is taken in common form, the accounting party accounts only for what has actually been received and disposed of by them. The trustee's potential liability to pay compensation is thus bounded by what has actually been received and paid out. Within that constraint, however, the beneficiaries can challenge the accounting party's account by asserting that more was received (in the old terminology, surcharging) or by asserting that less was disposed of (in the old terminology, falsifying).

An account can also be taken on the footing of 'willful default', where breach of duty is alleged. Under such an order the executor must account not only for what has actually been received, but also for what should have been received: that is, for what would have been received if the executor had properly discharged his or her duties. This is a roving enquiry into the management of the trust and can be expensive and therefore is not particularly common. At least one breach of duty must be established before an account can be ordered on the footing of willful default. However, this can be a useful procedure where it appears that there is prima facie evidence of a breach of duty causing loss to the estate but where it is difficult to particularise the losses, because the breaches are so numerous or the information provided by the executor too lacking and murky to properly particularise the losses caused by the executor. When an account is taken on the footing of willful default, the executor will have to pay out of their own pocket any sums that are found to be owing to the estate.

Laying the foundation of the application – general observations

If an application is to be made to the court, whether for removal or for the court to give directions to the executors or to resolve some point of dispute in the administration of the estate, or for the provision of accounts, it is key to a successful application (and to successfully recovering costs) that the foundation for making the application is properly laid.

It is helpful to be able to show that clear and proportionate requests have been made to the executor in relation to the issues that have arisen in the administration of the estate (e.g. requests for the provision of information and accounts) and that a reasonable time frame has been allowed for the executor to respond to the matters raised. Obviously, the Practice Direction on Pre-Action conduct should be complied with (in spirit even if you are dealing with proceedings to which the CPR do not directly apply) and a clear letter before action sent setting out what you consider has gone wrong to date in the administration of the estate, the relief that you will be requesting from the court and identifying the steps that you require the executor to take in order to avoid an application to the court. If you propose to seek a costs order personally against the executor, that should also be spelt out in pre-action correspondence.

In many cases, the exchange of correspondence between solicitors may be all that is required to get matters moving. Where the estate is being administered by a professional executor, a request to see the firm's complaint policy or a warning that a complaint will be made to the SRA may yield a change of tack.

In any case where the citation of a reluctant executor or the removal of an executor is contemplated, the question of whether or not the executor will renounce or voluntarily step down should be explored in correspondence. Sometimes an impasse can be broken by reaching agreement that the (usually lay) executor will step aside and a neutral professional executor be appointed in their stead or alternatively on the basis that the executor will give an undertaking to irrevocably instruct an agreed firm of solicitors to undertake the necessary work to conclude the administration of the estate. Proposals of this sort should be explored in pre-action correspondence.

It may further be helpful, in many cases, to solicit the view of other beneficiaries, if your charity is not the only beneficiary. The cases reveal that a consensus between beneficiaries, certainly in the case of who should administer the estate, can be a weighty factor in the exercise of the court's jurisdiction.

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What's in a name? The vexing problem of charity misdescription

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The misdescription of charities in wills is a problem that is not infrequently encountered by charities and executors. Even in professionally drawn wills, mistakes can be made in naming charities or in identifying registered charity numbers.

Occasionally, the description of the intended charity will be so vague or ambiguous that, in the absence of evidence that testator intended to benefit a particular charity in whose favour the gift may be construed or rectified, the gift may fail altogether as a gift to an individual institution, in which instance it will be necessary to consider whether or not the property can be applied *cy-près* to charitable purposes as close as possible to the testator's intention (a topic for another day, perhaps, but the question in the broadest possible terms is whether or not the testator has expressed a general charitable intention).

In every case, in the first instance, it will be necessary to consider whether or not the gift can be saved by construing or rectifying the will to give effect to the testator's true intention. The Charity Commission offers the following guidance when considering whether or not the true intended beneficiary can be identified or whether the gift must fail as a bequest to a specific charity:

- Is the misdescription a minor error which can be ignored?
- What can be done to identify the charity according to the description given?
- Are there instructions contained in the will that could help with identification?
- Is there any evidence of supporting the charity during the testator/testatrix's lifetime?
- Is the recipient charity one that has changed its name?
- Is the recipient charity known by more than one name?
- Can the recipient charity be found by location/purpose, for example "the cats' home in Cardiff"?
- Can the name provided be read as a description, for example, "Trust for Preservation of Our Ancient Churches" may mean The Historic Churches Preservation Trust?

Constrution

As a general observation, the courts have leaned towards a benevolent approach to both the construction and rectification of will so as to give effect to the intentions of the testator if at all possible. This is particularly so since the decision of the Supreme Court in Marley v Rawlings [2014] UKSC 2, which concerned circumstances in which a husband and wife executing their wills at the same time inadvertently executed each other's wills. Whilst the outcome of that case was resolved on the basis that the wills could be rectified, Lord Neuberger (with whom the remainder of the Supreme Court agreed) observed that the approach to interpreting wills should be the same as that adopted in relation to contracts, the aim being "to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context"; see paragraph 20. At paragraph 23 he stated that subject to any statutory provision to the contrary, the approach to the interpretation of contracts

which he had set out at paragraph 19 is just as appropriate for wills as other unilateral documents. The relevant part of paragraph 19 is as follows:

“When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions...”

Lord Neuberger referred further to the provisions of Section 21 of the Administration of Justice Act 1982, which permit extrinsic evidence, including evidence of the testator's intention, to be admitted to assist in the interpretation of a will in three situations, as follows:
“21 Interpretation of wills—general rules as to evidence.
(1) This section applies to a will—
(a) in so far as any part of it is meaningless;
(b) in so far as the language used in any part of it is ambiguous on the face of it;
(c) in so far as evidence, other than evidence of the testator’s intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator’s intention, may be admitted to assist in its interpretation.”

In relation to the provisions of section 21 of the Administration of Justice Act 1982, Lord Neuberger stated as follows:
“25. In my view, section 21(1) confirms that a will should be interpreted in the same way as a contract, a notice or a patent, namely as summarised in para 19 above. In particular, section 21(1)(c) shows that "evidence" is admissible when construing a will, and that that includes the "surrounding circumstances". However, section 21(2) goes rather further. It indicates that, if one or more of the three requirements set out in section 21(1) is satisfied, then direct evidence of the testator's intention is admissible, in order to interpret the will in question.
26. Accordingly, as I see it, save where section 21(1) applies, a will is to be interpreted in the same way as any other document, but, in addition, in relation to a will, or a provision in a will, to which section 21(1) applies, it is possible to assist its interpretation by reference to evidence of the testator's actual intention (eg by reference to what he told the drafter of the will, or another person, or by what was in any notes he made or earlier drafts of the will which he may have approved or caused to be prepared).”

Broadly speaking, in construing the will, the objective of the court will be to insert itself into the metaphorical ‘armchair of the testator’ and to consider all of the relevant facts as known to the testator and likely to have been considered by him or her in disposing of her estate. Accordingly, any special knowledge of the testator, colloquialisms or slang used by them to describe a person or property can be used by the court to construe the will.

Rectification

Alternatively, where there is an error in drafting that cannot be dealt with by way of construing the true intention of the will from the language as drafted, such mistakes may be corrected by the court upon a claim for the rectification of the will. Since the introduction of Section 20 of the Administration of Justice Act 1982, a will may be rectified where there has been a clerical error or a failure to understand the testator's instructions. Section 20 provides as follows:

(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—
    (a) of a clerical error; or
    (b) of a failure to understand his instructions,
    It may order that the will shall be rectified so as to carry out his intentions.

(2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.

(3) The provisions of this section shall not render the personal representatives of a deceased person liable for having distributed any part of the estate of the deceased, after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that they ought to have taken into account the possibility that the court might permit the making of an application for an order under this section after the end of that period; but this subsection shall not prejudice any power to recover, by reason of the making of an order under this section, any part of the estate so distributed.

Rectification is a discretionary remedy and is subject to an extendable time limit of six months. A claim for rectification can be made outside of the six month time limit with the permission of the court. In considering whether or not permission is to be granted, the principles established in *Re Salmon* [1980] Ch 167 (in relation to claims under the Inheritance (Provision for Family and Dependants) Act 1975) have been held to apply (*Chittock v Stevens* [2000] WTLR 643), which in summary provide as follows:

- The discretion is unfettered;
- The onus is on the claimant to establish grounds for disapplying limitation;
- Reasons for and length of the delay will be relevant;
- Timing of negotiations may be a relevant factor;
- Whether or not the estate has been distributed before notification of the claim will be considered;
- The court will consider whether or not a refusal of time will leave the claimant without redress against anybody.

Although the standard of proof required in a claim for rectification under sub-s (1) is that the court should be satisfied on the balance of probabilities, the probability that a will which a testator has executed in circumstances of some formality reflects his intentions is usually of such weight that convincing evidence to the contrary is necessary; see *Re Segelman* [1996] Ch 171 per Chadwick J at 184.

Rectification under Section 20 was the main focus of the Supreme Court's decision in *Marley v Rawlings*. At paragraph 71, Lord Neuberger approved the summary of the

effect of the previous cases decided on section 20(1)(a) given by Blackburne J in *Bell v Georgiou* [2002] WTLR 1105:
"The essence of the matter is that a clerical error occurs when someone, who may be the testator himself, or his solicitor, or a clerk or a typist, writes something which he did not intended to insert or omits something which he intended to insert ... The remedy is only available if it can be established not only that the will failed to carry out the testator's instructions but also what those instructions were."

Lord Neuberger (para. 72) observed that if, as a result of a slip of the pen or mis-typing, a solicitor (or a clerk or, indeed, the testator himself) inserted the wrong word, figure or name into a clause of a will, and it was clear what word, figure or name the testator had intended, that would undoubtedly be a clerical error which could be rectified under section 20 (1) (a). At paragraph 75, Lord Neuberger accepted that the expression "clerical error" could have a narrow meaning, which would be limited to mistakes involved in copying or writing out a document and would not include a mistake of the type that had occurred in *Marley v Rawlings*. However, the expression was not said to be one with a precise or well-established, let alone a technical, meaning. The expression also could carry a wider meaning, namely a mistake arising out of office work of a relatively routine nature, such as preparing, filing, sending, or organising the execution of a document (save possibly to the extent that the activity involved some special expertise). Those were activities which were properly to be described as "clerical"; and a mistake in connection with those activities, such as wrongly filing a document or putting the wrong document in an envelope, could properly be called a clerical error.

At paragraph 76, Lord Neuberger stated that, for present purposes, "clerical error" was an expression which had to be interpreted in its context, and, in particular, on the assumption that section 20 was intended to represent a rational and coherent basis for rectifying wills. Whilst he appreciated that there was an argument for saying that it did nothing to discourage carelessness, it seemed to Lord Neuberger that the expression "clerical error" in section 20 (1) (a) should be given a wide, rather than a narrow, meaning.

Two recent cases concerning gifts to charities

Re Harte [2015] EWHC 2351 (Ch). Florence Harte had instructed solicitors to draw up her will; regrettably, they did a strikingly poor job of it.

Her will directed her trustees to distribute her "residuary estate" but failed to define what was meant by "residuary estate". The will detailed ten gifts to named individuals and charitable organisations – six gifts were quantified as comprising "one tenth" of her residuary estate and the remaining four "one part". One residuary beneficiary had pre-deceased Mrs Harte but there was no accrual clause or gift over to deal with failed shares.

The charitable gifts were particularly problematic. One tenth was left to "Newbury Hospital of Rookes Way, Thatcham Berkshire RG18 3AS". No organisation named "Newbury Hospital" existed, although the address given was the address of the West Berkshire Community Hospital and there was evidence that this was known locally as the Newbury Hospital.

Three charities “Guide Dogs for the Blind”, “Guide Dogs for the Deaf” and the “Macmillian Cancer Fund” were misnamed and the registered charity numbers provided, respectively, for the “Guide Dogs for the Blind Association”, “Hearing Dogs for Deaf People” and “Macmillan Cancer Support”.

One tenth was left to the “West Berkshire Ambulance Hospital” but no address or charity number stated. The will draftsman’s notes, which had been taken when meeting Mrs Harte to take her instructions for the will, included the words "please add the Air Rescue" and then the words "West Berks area."

The executors applied for the construction and, in the alternative, the rectification of the will. Hodge, J applied the principles established in *Marley*, as stated above, so as to construe the Will and save the gifts. The gifts to “Guide Dogs for the Blind”, “Guide Dogs for the Deaf” and the “Macmillian Cancer Fund” were to be construed as being for the organisations corresponding to the stated addresses and charity numbers. The gift to Newbury Hospital should be construed as a gift to West Berkshire Community Hospital and paid over to the governing NHS Foundation Trust.

As to the intended gift to the “West Berkshire Ambulance Hospital”, Hodge J noted that this language was nonsensical, appearing to connote a hospital for ambulances! It was clear that Mrs Harte had intended to benefit an air rescue or air ambulance service operating in, and serving, the West Berks area. It was established on the evidence that the body that fits that description was the Thames Valley and Chiltern Air Ambulance Trust which, on the evidence, was the only air ambulance or air rescue entity operating in, and serving, the West Berkshire area. Due to the paucity of evidence as to how the error arose, it was not entirely clear whether, in including reference to the West Berkshire Ambulance Hospital, the draftsman of the will failed to understand the instructions being given to him by Mrs Harte, or was simply guilty of a clerical error in writing down the wrong description. In either event, Hodge J was satisfied that Mrs Harte’s intention had been to benefit the Thames Valley and Chiltern Air Ambulance Trust and that the will as drafted did not give effect to that intention due to a failure on the part of the draftsman to understand Mrs Harte’s instructions or a clerical error and accordingly, the gift would be rectified by substituting the reference to “West Berkshire Ambulance Hospital” with a reference to the “Thames Valley and Chiltern Air Ambulance Trust”.

Roberts v National Anti-Vivisection Society (2013, unreported)
Mrs Margaret Roberts died in October 2010 leaving a fairly substantial estate of just under £1,000,000 for probate purposes and a residuary estate of £300,000. She left her residuary estate in equal shares to Cancer Research UK and “the Anti-Vivisection League”. There was no organisation known as “the Anti-Vivisection League” in existence at the date of the will, as far as the executors could establish. There were two organisations in existence with names that suggested they might have been the intended beneficiaries: The National Anti-Vivisection Society (“NAVS”) and The British Union for the Abolition of Vivisection (“BUAV”). There were also a number of now defunct organisations that could have been the possible objects of the gift, including the British Anti-Vivisection Association (“BAVA”), which was a company limited by guarantee in existence at the date of the will but subsequently dissolved, following which an unincorporated association of the same name had been set up.

The questions for the court were whether it was possible to determine whether the testatrix intended to benefit:
An organisation called “the Anti-Vivisection League” which existed and still existed;
An organisation called “the Anti-Vivisection League” which had once existed but, which, unknown to Miss Roberts, had ceased to exist;
NAVS, BUAV or BAVA or some other organisation, the name of which she had simply got wrong;
Or, whether there was a partial intestacy as to a half share of residue.

Of the existing organisations identified as potential objects of the gift, only NAVS filed any evidence, although BUAV had assented in correspondence that it was the intended beneficiary. The contest came down to a dispute between NAVS and the intestacy beneficiaries.

There was no evidence of Miss Robert’s intention. She had given the name to her solicitor, who had sought to establish its address with the Charity Commission. The Commission had confirmed that it had no organisation of that name on its record, likely due to the political tone – following *National Anti-Vivisection Society v IRC* [1948] AC 31, campaigning for the abolition of vivisection is not charitable.

Miss Roberts was not a member of any anti-vivisection group and it did not appear that she had donated to them.

In construing the will, the court considered the rule of construction that, when a testator has executed a will in solemn form, you must assume that the testator did not intend “a solemn farce” that is, that he did not intend to die intestate having gone to the trouble of making a will (*Re Harrision* (1885) 30 ChD 390). The court will therefore seek to read the will, if possible, so as to avoid intestacy. In *Bernasconi v. Atkinson* 10 Hare 348, it was further held that, where a description in a will is not strictly applicable to any person or thing, there is a presumption that the testator intended to refer to some existing person or thing, and that, the court will endeavour to ascertain all the facts which were known to the testator at the time of the will to establish whether there exists any person or thing to which the description can reasonably and with sufficient certainly be applied.

The evidence filed by NAVS established that the various anti-vivisection ‘leagues’ had ceased to exist in the early to mid-twentieth century and it was therefore unlikely that Miss Roberts could have known about them. BAVA was such a small organisation that the Chief Executive of NAVS had only been reminded of its existence during the litigation, despite decades of involvement in the sector.

There was nothing to link Miss Roberts to NAVS. However, NAVS had once had branches in Miss Roberts part of Wales (but not since 1984). NAVS had appeared in the Powys County Times and the South Wales Evening Gazette around the time of the will but there was no evidence that Miss Roberts took either paper.

NAVS Chief Executive gave evidence that NAVS had been regularly misdescribed and referred to as a league, including citing examples of it being misdescribed in the media and in other contexts.

The judge held that NAVS was the intended beneficiary. He directed the costs of all parties to be paid out of the disputed share.

Case study for discussion

Mrs B's will made a new will following the death of her husband, 9 years ago. After payment of some small legacies to friends, she left the entirety of her estate to organisations that appear to be charitable. The gift of residue is left to 14 seemingly charitable organisations, the first 12 of which are:

1. The Royal Society for the Prevention of Cruelty to Animals;
2. The British Red Cross;
3. The National Society for the Prevention of Cruelty to Children;
4. The Royal Society for the Protection of Birds;
5. The Horse and Donkey Sanctuary, Southampton;
6. The Society for the Welfare of Donkeys in the Holy Land;
7. Feed the World;
8. The Gambian Educational Trust;
9. The Sussex Cat Protection Society;
10. The Oxford Society for the Protection of Hedgehogs;
11. The Cat Rescue League, Doncaster;
12. The Kent Kestrel and Owl Trust.

The correct name and charity number has been provided for each of the above organisations.

A dispute has arisen concerning the 13th share payable bequeathed to "*The Animal Welfare Society, Cromwell Road, London" (registered charity number 888888)*".

A second organisation based in Dorset, which also styles itself as "The Animal Welfare Society" has contacted the executors and claims that it was the intended beneficiary of the 13th share of residue. The Dorset based Animal Welfare Society is not a charity but is a campaigning animal rights organisation set up as a limited company 10 years ago. However, it has an associated charitable wing, established after the date of the will, named The Animal Welfare Trust, which runs an animal shelter in the Dorset area.

The Dorset organisation can demonstrate that Mrs B made a one off donation of £500 to the associated charity, the Animal Welfare Trust, three years before her death. They had periodically sent her mail shots, however the executors report that Mrs B received an overwhelming volume of correspondence from charities and campaigning organisations. They cannot be certain whether or not she had received correspondence directly from the London based Animal Welfare Society, however that organisation is a well known national organisation that provides free veterinary care and rehomes animals and which regularly places adverts in a number of national newspapers and periodicals.

A further uncertainty has arisen concerning the 14th share, left "on Trust for the Homeless Children of Southampton". The executors are not sure whether or not Mrs B had a specific organisation in mind or whether she was expressing a general charitable intention.

The will draftsman can offer only limited evidence. He has provided the executors with a copy of his notes. It is clear from his handwritten notes, which contain much crossing through and annotation, that Mrs B appears to have given the beneficiaries of her will much thought and to have changed her mind several times. The handwritten note simply states “residue to charity” and lists a number of organisations including “The Animal Welfare Society”. The draftsman had looked up the charity numbers of the organisations named by Mrs B upon his return to the office. There are also several drafts of the will in his file. Mrs B changed her mind about a number of the gifts and made careful annotations to the drafts before executing the final draft as her last will.

In relation to the share left “on Trust for the Homeless Children of Southampton”, this addition came about from annotations made by Mrs B by hand to an earlier draft of her will. She had written in the margins of an earlier draft “Insert the Trust for Homeless Children, Soton”. Mrs B at the date of her death resided in Southampton. The researches of the executors indicate that there is a charitable organisation named the Southampton Society for the Relief of Child Poverty that is active in the local area and which is the only organisation that could fit the description, if a specific organisation was intended. Ladies from the social club that Mrs B attended, including Mrs B, had donated knitted hats to the organisation at a time when it was fundraising to help homeless families.

Mrs B at the date of her death was donating to some of the residuary beneficiaries and made a number of one off donations in the last years of her life to other organisations that were not included in her will. She had standing orders set up in favour of the RSPCA, the RSPB and The Horse and Donkey Sanctuary, Southampton.

Mrs B had no known geographical connection with any of the other charities specifically named in her will, save for The Horse and Donkey Sanctuary. She did, however, live for a time in Dorset in her youth.

6 months have passed and the executors want to distribute the estate.

Some particular points to consider:

- The focus should be on what information Mrs B had at the date that she gave instructions for the will.
- What is the relevance of the fact that Mrs B had made annotations to earlier drafts of her will?
- Is there evidence that she has prioritised charities that she had a geographical tie to? How relevant is the Dorset connection?
- Have a look at the timeline here and how that might be used to clarify the intended object of the gift to the Animal Welfare Society.
- Can the executors distribute?
- Is this a case where the executors should make an application for rectification or construction in relation to the gift to the Animal Welfare Society? Where should the costs of this fall?
- What about the “Trust for the Homeless Children of Southampton”? Does it seem likely that Mrs B intended a general charitable intention necessitating an

application to the Charity Commission, or is it more likely that a specific organisation was intended?

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