

Executors

This month's CPD will discuss the particulars of the appointment of executors and who is entitled to apply for a grant of probate. This paper will not aim to cover the appointment of administrators.

INTRODUCTION

When a person dies it is important to establish who has the authority to actually administer the deceased's estate. This person is known generally as the 'Personal Representative (PR)' and will be either an **executor** if appointed by the deceased's will, or an **administrator** where there is either no will or a will but no willing or able executor.

Authority

The executor's title and authority stem from his appointment in the deceased's will, and the deceased's estate vests in them from the date of death. Their ability to administer the estate derives from the issue of a grant of probate to them. This confirms their authority.

The administrator's authority and confirmation of the authority stems from the grant of representation.

APPOINTMENT

There are three main methods of appointing an executor, though in practice the appointment will most usually be by the first of the below methods:

1. By the testator in his will.

By far the most common method of appointing an executor is by an express appointment in the testator's will, though the appointment may also be implied.

An executor may be appointed expressly by a specific clause naming them as the executor, or as an executor to act in substitution of another. They may be appointed to act alone or with others.

The appointment of an executor may be conditional for example, '*I appoint my son AB to be my executor if he has attained the age of 21 at the date of my death*'. It may also be limited in some way so that they can only act in relation to a certain part of the estate such as business or literary assets. Where the executor's authority is limited they may apply only for a limited grant of probate.

Though it is best for an executor to be expressly named, an executor can also be impliedly appointed. An executor appointed this way is known as an 'executor according to the tenor of the will'. The appointment may be implied by the will directing a person to carry out a certain duty that only an executor would do, for example in the case of *In the Goods of Cook* [1902] P.115 where the clause 'I desire GH to pay all my just debts' was enough to appoint GH an executor according to tenor.

While the wording in the above case was enough to appoint an executor, similar wording in *Re Toomy's Goods* [1864] 3 Sw & Tr 562 was not because it directed the person to pay the estate's debts out of a particular fund and not the general estate.

If it is not possible to identify the correct executor from the will then the appointment will be void for uncertainty. Examples of this would be where the will tries to appoint an executor quite generally, such as 'one of my sisters' (*Re Blackwell's Goods* [1877] 2 PD 72).

2. Under a power conferred by the testator in his will.

A testator may include powers in his will to authorise another person to appoint executors of the will after the testator's death. This has previously been used to allow the beneficiaries to appoint two executors after the testator's death (*In the Goods of Cringan* [1828] 1 Hagg.Ecc.548). It has also been used to allow the surviving executor to appoint another executor to act with them (*In the Goods of Deichman* [1842] 3 Curt. 123).

In practice this power is rarely used now.

3. By the court.

The court has statutory powers to appoint executors. Under s50 Administration of Justice Act 1985 the court may appoint a substituted PR in place of any or all existing PRs on application by a PR of the deceased or by the beneficiaries.

When removing and appointing executors under s50 the courts main consideration is the welfare of the beneficiaries. While it's true that friction between executors and beneficiaries can cause delays in the administration of an estate, Newey J in the judgment for *Kershaw v Micklethwaite* [2010] EWHC 506 (Ch) stated that "friction or hostility between an executor and a beneficiary is not of itself, a reason for removing the executor."

The court may also appoint one or more additional executors if at any time during the minority of a beneficiary or the subsistence of a life interest there is only one executor, not being a trust corporation. This appointment lasts while the minority or life interest subsists or until the estate is fully administered. This power can be exercised on the application of any interested person or their guardian or deputy.

WHO CAN BE APPOINTED?

Any person can be named as an executor, but common sense should be exercised and only those capable and likely to be willing to take up the office should be named. A testator can name any person as his executor irrespective of their minority, incapacity, bankruptcy, criminal record, nationality or anything else. However, a person named as an executor should also be capable of taking out the grant of probate. The following may not have capacity to take out the grant:

- A minor
- A person lacking mental capacity
- A bankrupt or insolvent

- A prisoner
- A former spouse or civil partner of the deceased
- A company that is not a trust corporation

Minor

If the executor is under 18 when the deceased dies and does not reach 18 by the time the probate application is made they cannot apply for the grant.

If there is more than one executor appointed by the will who is over 18 then that executor may apply for probate. The adult's application for a grant is with power reserved to the minor. This means that the minor retains their right to a grant of probate so if the administration of the estate has not been completed by the time the minor reaches 18 they may apply for a grant themselves. The grant the minor may then apply for is known as a 'double grant of probate'.

Where the will only appoints the minor as the executor, a grant of letters of administration with will annexed "for the use and benefit" of the minor will need to be obtained. This is a grant issues to someone who can act on behalf of the minor. This may be obtained by:

- The person entitled to the residuary estate, if the minor doesn't have any entitlement to it (Rule 32(2), Non-Contentious Probate Rules [NCPR] 1987).
- The individual, agency or authority who has parental responsibility for the minor, if the minor has an entitlement to the residuary estate (Rule 32(1), NCPR 1987).

Lack of Mental Capacity

Where the executor is incapable similar rules to the above apply. If other executors are appointed along with the incapable one and they are capable of acting they may take out the grant with power reserved to the incapable executor. If the incapable executor recovers capacity while the administration is still ongoing they may apply for a grant of double probate.

If the incapable executor is the only named executor, then a grant of letters of administration with the will annexed for the use and benefit of the incapable executor may be applied for. In this case it is Rule 35 NCPR 1987 that applies. This may be obtained by:

- The incapable person's deputy, appointed by the Court of Protection.
- Their attorney acting under a registered power
- The person entitled to the residuary estate, if there is no attorney or deputy willing to act.

In the case of an attorney applying for a grant for the use and benefit of the incapable person notice must be given to the Court of Protection of their intention to apply and they may not continue until the court acknowledges this.

Companies

Where a company that is a non-trust corporation is appointed as executor, the appointment of executor does not take effect and the company may not obtain a grant of probate. A company is not empowered

to take out a grant in its own name. Letters of administration with the will annexed for the company's use and benefit may be granted to its nominee or attorney.

Where the company is appointed with other executors, it is entitled to a grant only if the other executors have died before the deceased or they have relinquished their right to probate.

Bankrupt, Insolvent or in Prison

In theory an executor who is either bankrupt, insolvent or in prison may apply for a grant. It is unwise for them to do so as it is impractical for them to act. A bankrupt will find themselves limited in what duties they can actually carry out, for example they will be unable to deal with the deceased's interests in land and will be unable to sell their property.

Under s116 of the Senior Courts Act 1981 the court has power to pass over on an executor and appoint some other suitable person as an administrator if it thinks it is expedient to do so 'by reason of any special circumstances'. In *In the Estate of S* [1968] P.302 the court passed over an executor who was serving a life sentence for the manslaughter of the testator.

More recently in the case of *Khan v Crossland* [2012] WTLR 841 the executor was a will writer and director of the will drafting company who had prepared the will which allowed him to charge for his administration services. After the testator's death the beneficiaries asked him to renounce as executor and he refused. The relationship between the executor and the beneficiaries broke down irreparably. The courts exercised their power to remove the executor and appointed one of the beneficiaries as administrator.

This appears to be an unusual case however, as previous cases have indicated that the courts would only pass over an executor in extreme cases where they were in prison, bankrupt, mentally incapable, or steadfastly refusing to perform their duties.

HOW MANY?

A testator may name as many executors as he wishes in his will. s144(1) of the Senior Courts Act 1981 provides that probate may only be granted to a maximum of four people at a time in respect of the same part of the deceased's estate.

Previously in this paper we have seen that executors may be appointed to deal with specific parts of a testator's estate, for example their business assets only. s144 SCA 1981 does not prevent probate being granted to four executors in respect of a specific part of the estate and a further four in respect of a different part.

If the will appoints more than four executors over the same part of the estate power can be reserved to those who didn't take out the grant originally. If a vacancy arises they may then apply for a grant of double probate and step in.

ACCEPTANCE AND RENUNCIATION

Acceptance

Acceptance of the office doesn't need to be formal and can be evidenced by them taking out the grant of probate.

Acceptance can also be done by acting in the testator's estate in a way that indicates an intention to take on the role of executor. A person who has taken up office by intermeddling in the estate is known as an executor *de son tort*. To show that a person has taken on the office by their actions it must be shown that the duties they have carried out have not been merely as the agent of another executor and are more than 'trivial administrative acts' (*James v Williams* [2000] Ch 1 (CA)). Examples of intermeddling have included taking possession of the deceased's assets, receiving or releasing debts due to the estate, and writing to request payment of money due under the testator's life insurance policy.

Renunciation

A person named as an executor does not have to accept the office. They are free to announce as long as they have not accepted the office.

The renunciation must be made in writing, signed by him and a disinterested witness, and filed in court. Once it has been filed it becomes binding and can only be retracted with the leave of the court.

An executor cannot renounce only in part, and once the renunciation has been made all of their rights in respect of the executorship cease completely.

Citation

If an executor neither accepts the office or renounces the court has power to summon any person named as an executor in the will to either prove or renounce probate of the will (s112 Senior Courts Act 1981).

This power is exercised at the request of a person who would themselves be entitled to apply for a grant of letters of administration if the executor renounced. The citation calls the executor to appear and either accept or refuse probate of the will. If they do not appear or they renounce, then their rights as an executor cease.

CHAIN OF REPRESENTATION

The chain of representation is the automatic transmission of an executor's office provided by s7 Administration of Estates Act (AOEA) 1925. The office of executor is automatically transferred when a sole or last surviving executor has died after obtaining probate of the deceased's estate, and their executor has in turn obtained probate of the deceased executor's estate.

The last executor in an unbroken chain of representation is the executor of every preceding executor.

The chain of representation is broken by:

- An intestacy
- The failure of a testator to appoint an executor
- The failure to obtain probate of a will.

The chain is not broken if a temporary grant of administration, for example a grant of administration *ad colligenda bona*, is issued as long as the executor next in the chain subsequently takes out the grant.

Section 7(4) AOE 1925 provides that every executor in the chain has the same rights in respect of the testator's estate as the original executor would have if he were alive. They also have the same accountability as an original executor in respect of the estate that was unadministered and has come to his hands.

An executor with power reserved may step back into the chain, and in doing so oust the executor in the chain. If the executor who previously has power reserved then dies before completing the administration, the chain carries on through his estate provided he left a will appointing an executor and that executor proves the will.

If the chain of representation is broken a particular type of grant called a *grant de bonis non administratis* must be issued in the original, incompletely administered estate. It will only be issued in relation to the unadministered part of the estate.

For such a grant to be issued there must have been a prior grant of representation issued to an executor who has died, and the chain of representation must not apply.

This grant is issued to the person who would have been entitled to a grant if the original executor had never obtained a grant. As there are no successive proving executors, the right to receive a *grant de bonis non* follows the order of priority set out in the NCP 1987.

Important Reminder:

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