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Case No: PT-2024-000154

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Property, Trusts and Probate List (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 October 202

Before :

MASTER PESTER

- -

In the matter of the estate of Josephine Connell, deceased
And section 50 of the Administration of Justice Act 1985

Between :

(1) MILES SEALY CONNELL	**Claimant**
(2) RUPERT CHARLES SEALY CONNELL	
- and -	
TIMOTHY JAMES BOYTON CONNELL	**Defendant**

- -
- -

Simon Redmayne (instructed by **Butcher Andrews LLP**) for the **Claimants**
The Defendant in person

Hearing dates: 4 September 2024

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APPROVED JUDGMENT

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2pm on Friday 18 October 2024.

MASTER PESTER:

Introduction

1. By a Part 8 claim form dated 21 February 2024, the Claimants seeks an order under section 50 of the Administration Justice Act 1985 and/or the inherent jurisdiction of the Court to remove the Defendant as executor of the estate of Josephine Connell deceased ("the Deceased"). The Deceased died on 14 July 2022.

2. The parties are all family members. The First Claimant ("Miles") was the husband of the Deceased. They were married for over 50 years (56 years in fact). Miles is 85. He was a former Lloyds insurance broker. The Second Claimant ("Rupert") is the eldest son of the marriage. Rupert is a self-employed property consultant.

3. The Defendant ("Timothy") is the younger son. He is employed in financial services compliance and is also qualified as a financial planner.

4. Given that the parties are all family members, I will refer to them in this judgment by their first names, to avoid confusion, without intending any disrespect to anyone.

5. Probate has not yet been granted. The Deceased's last will, dated 11 November 2018 ("the Will"), provides as follows:

   (1) The parties (together with George Connell, who has since renounced) are appointed executors and trustees;

   (2) A gift of personal chattels is made by way of clause 4;

   (3) By clause 5, the whole of the rest of the Estate is gifted into a flexible lifetime trust of which Miles is the life tenant, with Rupert and Timothy as remainers in equal shares, and with power of appointment in the meantime to any of the three

of them and any other of the "Discretionary Beneficiaries", being the remoter issue and any charity (however, the trustees are entitled to have regard solely to Miles's interests and to disregard the interests of the others);

(4) By clause 5(E) there is an exclusion of the self-dealing rule (except where Miles is sole trustee);

(5) By clause 6 it is directed that, upon the death of Miles (whereupon, under clause 5, any remaining fund is to be divided equally between Rupert and Timothy), Timothy shall bring into hotchpot the sum of £22,500 advanced to him during the joint lives of the Deceased and Miles. This is the hotchpot clause, which Timothy has complained about, ever since he first learned of it.

6. Draft estate accounts have been prepared. These show that the net value of the estate is approximately £465,000. According to the draft accounts, the two main assets of the estate are (a) the Deceased's half share in the property at 16 Front Street, South Creake, Norfolk NR21 9PE, registered at HM Land Registry under title no. NK28241 ("the Property") and (b) a stocks and shares ISA. The ISA has been valued by the firm of Allen Tomas & Co Financial Management Limited ("Allen Tomas"). Possessions have been valued at £6,190.

7. The other half share in the Property belongs to Miles. Miles and the Deceased occupied the Property as their home.

8. Timothy challenges the accuracy of the draft accounts, on a number of bases, to which I shall return.

9. This is a comparatively simple Will. It should be administered without undue difficulty. The Deceased died over two years ago now, and yet her estate remains

unadministered. The Claimants' position, in outline, is that the due administration of the Will has become difficult, if not impossible, due to Timothy's conduct and what are described as his various "fixations", which include (but are certainly not limited to) a claim which Timothy asserts ought to be pursued against his former wife, Bethan Seward-Case ("Bethan"), and the wrongfulness (as he sees it) of the hotchpot clause.

10. Over the course of the better part of a day, I heard Counsel on behalf of the Claimants. Timothy appeared before me in person.

Background

11. The background to the proceedings is derived from what is said in the witness statements filed by the parties (two each from Miles and Timothy), as well as the documents exhibited to those witness statements. The key points which emerge are as follows.

12. On 1 February 2012, Miles and the Deceased made a loan of £45,000 to Timothy and his then wife, Bethan. There is in evidence a copy of the Loan Agreement. This is a one page document. The Loan Agreement is signed by each of Miles, the Deceased, Timothy and Bethan.

13. By a letter dated 7 August 2018, headed "Without prejudice", and addressed to Miles and Rupert, Timothy informed his father and brother that he and Bethan were in the process of *"completing our financial disclosure forms as Beth has made an application to the Court to decide upon the financial settlement. It is clear one of the principal issues in the divorce is the loan that Pops and Mum made to us in 2012"*. The letter goes on to acknowledge that whilst "technically" responsibility for the loan

to Timothy and Bethan lies with both of them jointly and severally, "the beneficiaries of the capital can be very clearly established".

14. Timothy then goes on to propose that, in return for a notional sum of £1 in "full and final settlement", Timothy's "half share of the debt (£24,100)" would be "settled"; and the outstanding balance of £48,199 would be "Beth's sole responsibility and she will settle this with you direct".

15. Enclosed with the letter of 7 August 2018 was what might be described as letter of acceptance or rejection, with a space for signature from both Miles and Rupert, and space for that signature to be witnessed. The body of the letter states as follows:

> *"Further to your without prejudice offer regarding the interest only loan of £45,000 to you and Beth (plus interest arrears of £3,200), we confirm that we ACCEPT/REJECT [delete as applicable] your offer of £1 (one pound) in full and final settlement of your half share of the debt, with the balance of your half share of the total outstanding amount of £48,199 being offset against the equity £30,341.67) Beth has already received from your share of Almonds, less the benefit you received (£4,486.12) from Beth's Sainsbury loan, making a total of £25,855.64.*
>
> *Therefore, we further confirm that Beth IS/IS NOT [delete as applicable] liable for repayment of the full balance outstanding to us of £48,199, which she should settle with us direct."*

16. The letter was signed by, and witnessed on behalf of, both Miles and Rupert (Rupert was acting at this time under a power of attorney for the Deceased, who had been diagnosed with dementia in 2015), with the words "REJECT" and "IS NOT" having been crossed out.

17. It is not necessary for me to express a concluded view on the legal effect of that purported release for the purpose of these proceedings, save to say that I do not believe that it ever had the effect which Timothy hoped. Bethan was never a party to that agreement, so all the references and calculations setting out Timothy's view as to his true indebtedness for his "half share" of the loan would not bind her. A creditor

may release one of two joint and several debtors, and retain his rights against the other. However, in that case, the remaining debtor retains a right to claim an indemnity from the other.

18. In any event, the Deputy District Judge in the Family Court at Winchester took a similar view. In the ancillary relief proceedings between Bethan and Timothy, by order dated 20 November 2019, he ordered Timothy to indemnify Bethan "against all liability in relation to the £45,000.00 loan … by the respondent husband's parents …" The order also made provision for spousal periodic annual payments of £1. Permission to appeal was refused.

19. I am not going to set out in this judgment the lengthy correspondence passing between the parties relating to the repayment of the loan. In summary, it appears that Miles was willing to accept a payment of £22,500 from Bethan in full and final settlement. This appears to have incensed Timothy, who complains that this suggestion "compromised" his position, and was sent behind his back. Bethan's legal advisers made an offer of £10,000, which Miles did not accept. (In hindsight, it may have been better if Miles had accepted the £10,000 on offer, although I have little doubt that Timothy would still have complained). In the event, Miles and the Deceased did not take legal action against Bethan, a matter which clearly still angers Timothy. In his second witness statement, he refers in terms to *"the breakdown in relationship between me, my Father and Brother, as a result of them intermeddling in and fundamentally compromising my divorce proceedings"*.

20. In late 2019/early 2020 the Deceased's and Miles' ISA investments were transferred from the management of Charles Stanley & Co Ltd to Allen Tomas. This is another matter which obviously continues to anger Timothy. He complains that the initial Fact

Find, prepared by Ben Allen, contains a number of material errors "provided by my father". In summary, Timothy's position is the Deceased's ISA investments were transferred at a time when she had dementia, the transfer should not have occurred, and that Mr Allen's investment recommendations were entirely unsuitable. I will not quote from the (again) lengthy correspondence from Timothy regarding this transfer. Timothy filed reports about Mr Allen's conduct to both the Office of the Public Guardian and Action Fraud. Neither organisation took any action against Allen Tomas, or Mr Allen.

21. On 14 July 2022, the Deceased died, at the age of 87. Almost immediately, Timothy, as one of the named executors under the Will, objected to giving Knights plc, the solicitors with custody of the Will, authority to pass the documents to Wake Smith Solicitors.

22. On 8 August 2022 George Connell renounced as executor.

23. By email dated 1 September 2022, addressed to Miles and Rupert (as well as George Connell), Timothy sent a lengthy letter of complaints, divided into seven sections, headed Duties of Executors, the validity of a Will, the validity of Mum's Will dated 11th November 2018, the Hotchpot Clause, the Interest Only Loan of £45,000, the Implications of my Divorce on Mum's Probate and a final section headed "How should we move the administration of Mum's Estate forward?"

24. On 8 September 2022 Timothy entered a caveat in respect of the Will. In his own words, this was done to "stop any grant of representation". This was followed up by Timothy's letter dated 13 December 2022, in which he wrote that *"there is no evidence that [the Will] … is valid"*. In that letter, Timothy asserts that the Will is invalid on ground of lack of testamentary capacity and / or lack of knowledge and

approval, and that there is "evidence to suggest" that the Will could be challenged on the ground of undue influence and "possibly" fraudulent calumny.

25. This letter closes by making a series of specified demands, labelled (A), (B), (C) and (D). The first demand was for "full and transparent disclosure of all gifts made by my parents to my brother and me". The second, which is probably the least objectionable, was that an inventory be taken of all chattels of the Deceased. The third was a demand to "nullify" the hotchpot clause. The fourth was for Miles to renounce, to retire as trustee and for Miles to agree to move the ISA investments away from his and Mr Allen's "influence", as well as to commence "earnest attempts to recover the current total of £58,599 owed by my ex-wife" and "to pay redress" to the Estate in the amount of £28,799.50.

26. Timothy concludes by stating that once his four demands have *"all been carried out in full, an application for grant of representation can be filed, naming my brother and me as executor".* (emphasis in the original)

27. There then followed further correspondence between the parties. In a letter dated 15 March 2023, in something of a *volte face*, Timothy asserted that *"... it is not in the best interests of my late Mother's Estate, and/or all beneficiaries, for the validity of [the Will] ... to be formally challenged through contentious probate litigation ..."*

28. On 30 June 2023, the Claimants entered a warning against caveat. No appearance was entered by Timothy, resulting in the caveat being warned off.

29. Finally, by letter dated 17 October 2023, Miles wrote to Timothy, expressing the view that *"[T]hroughout all the correspondence you have written, at enormous length, as far as I can determine, never once have you expressed what you want to achieve and*

why you are determined to make my life and that of Rupert, a complete misery by stating why, in your opinion, probate cannot be granted …". The letter closes by warning Timothy that if his "disruptive manner" continues then Rupert and he will have no alternative than to seek legal advice and "move to settle this matter in court."

30. Finally, for the sake of completeness, I was shown a letter, dated 3 January 2024, from Timothy to Bethan (apparently sent only by email). It purports to deal with two matters. First, in a section headed "Spousal Periodic Payments", after stating that he had lost his cheque book, Timothy "took the precaution" of transferring the 2022 spousal periodic payment owed to Bethan to his father Miles, and that he had notified the Claimants' solicitors of this. Second, this time in a section headed "the Estate of the late Josephine Connell", he purports to write as executor to demand that Bethan "provide a current statement of the trust funds" which Timothy alleges that Bethan is holding for the estate. The letter appears designed to involve Bethan in Timothy's dispute with his father and brother about the Will. I say this because Bethan in her letter chasing the missing payment (which is attached to the letter from Timothy) provided her bank account details to Timothy, so he could and should have simply paid the outstanding periodic payment into her bank account, and not sought to involve his father in his dispute with his former spouse.

Procedure

31. Proceedings were issued on 21 February 2024.

32. Timothy filed an acknowledgment of service, dated 6 March 2024. In it, he ticked the box under Section B, headed "I intend to contest the claim". In the box head "Give brief details of any different remedy you are seeking" he indicated that he wanted an order removing the Claimants as executors and trustees of the estate of the Deceased

on grounds of unsuitability (in the case of both Claimants) and/or incompetence (in the case of Miles), costs, an order for the Claimants to render a full account of their dealings of the Deceased's finances during the period 15 July 2015 to 14 July 2022 "to facilitate a full audit of the Deceased's finances", directions in respect of the hotchpot clause and directions in relation to any of the Deceased's assets passing by survivorship. He also ticked the box under Section D, where he objected to the Claimants issuing under the Part 8 procedure.

33. The proceedings came before me for case management directions on 15 May 2024. At that hearing, Timothy assured me that he did not wish to challenge the validity of the Will. Having read the evidence which had been exchanged at that time, I encouraged the parties to conduct settlement negotiations, and also pointed out to them that in many cases where there were disputes and allegations and counter-allegations between the parties, the court might decide that it was in the best interests of the beneficiaries as a whole for all the executors to be removed, and for an independent executor to be appointed. I also directed that the claim be stayed for four weeks, expressly (as recited at paragraph 1 of my Order) for the parties to try to settle the dispute by alternative dispute resolution.

34. The parties thereupon exchanged various proposals and counter-proposals. The correspondence is marked "Without Prejudice save as to costs", but both sides agreed that I should read that correspondence in full.

35. From the correspondence, it appears that Miles and Rupert were willing to step down as executors, together with Timothy, and that an independent executor should be appointed. Timothy, however, adopted the position that an independent executor should be appointed to replace his father and brother, but that he should continue in

office. It is a great pity that the parties have been unable to resolve their dispute without the intervention of the Court.

The law

36. S. 50 of the Administration of Justice Act 1985 ("the AJA 1985") provides as follows:

"50. ***Power of High Court to appoint substitute for, or to remove, personal representative.***

(1) Where an application relating to the estate of a deceased person is made to the High Court under this subsection by or on behalf of a personal representative of the deceased or a beneficiary of the estate, the court may in its discretion—

(a) appoint a person (in this section called a substituted personal representative) to act as personal representative of the deceased in place of the existing personal representative or representatives of the deceased or any of them; or

(b) if there are two or more existing personal representatives of the deceased, terminate the appointment of one or more, but not all, of those persons."

37. The legal principles I am to apply are clear. They were set out recently and comprehensively by Chief Master Marsh in *Harris v Earwicker* [2015] EWHC 1915 (Ch), at [9] as follows:

(*1) The overriding consideration is whether the administration of the estate is being, or can be, carried out properly. The core concern of the Court is what is in the best interests of the beneficiaries looking at their interests as a whole.*

(2) The power of the Court to remove/replace an executor is not dependent on a finding of wrongdoing or fault. In this regard, exercise by the Court of its power of removal is not dependent on the making of adverse findings of fact – it will often suffice for the Court to conclude that a party has made out a good arguable case about the issues that are raised.

(3) The wishes of the testatrix, as reflected in the will, concerning the identity of the personal representatives is a factor to take into account.

(4) The wishes of the beneficiaries may also be relevant, but they have no right to demand replacement – the Court has to make a balanced judgment taking a broad view about what is in the interests of the beneficiaries as a whole

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

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

38. Furthermore, a person may be unfit to continue as executor, as demonstrated by their conduct as executor, by reason of their temperament, character and personal qualities. I was referred, by Counsel for the Claimants, to the case of *Re McDonald, deceased (Pegler v McDonald)* [2022] EWHC 2405 (Ch), at [61] and [62]:

"61. The defendant may (within the relevant law) do what he likes with his own beneficial property. But he should not, and cannot be permitted to, behave in this way in relation to assets held for the benefit of others. The defendant may have been an excellent corporate executive during his business career. I am no judge of that. But, on the material before me, including the many hundreds of pages of correspondence that I have read, my judgment is that he does not have the temperament, character or personal qualities needed to act as a personal representative under English law in relation to the estate of his own brother, in which both he and his children have beneficial interests. In this case the welfare of the beneficiaries as a whole will be best served if the defendant is not involved in the administration of that estate.

62. ...[were an order not being made under s.116 of the Senior Courts Act 1981] I would be satisfied that it was appropriate to remove [the defendant] as executor under section 50 of the 1985 Act, on the basis that it would be difficult, if not impossible, for the defendant to complete the administration of the estate or administer the will trusts in accordance with the law, and that the interests of the beneficiaries as a whole would be best served by such removal."

39. In addition, it will usually be appropriate to remove an executor who questions, or reserves the right to question, the validity of the will: see *Pegler v McDonald,* at [40] – [41]. Further, in cases where a conflict arises (going beyond the everyday inherent conflict of being both executor and beneficiary) between his interests and those of the

estate which the executor fails properly to recognise and/or properly to manage that too may be a ground for removal: *Pegler v McDonald*, at [21] – [37].

40. I note also that s.50 applications for removal/replacement should not be treated as an opportunity by the parties to ventilate matters which are ultimately irrelevant to the question to be decided by the Court. This is clear from the case-management decision of Chief Master Marsh in *Schumacher v Clarke* [2019] EWHC 1031 (Ch).

41. The burden of proof for removing or passing over a personal representative lies on the claimant.

Analysis and discussion

42. As is normal for applications under s. 50 of the AJA 1985, no oral evidence was heard at the disposal hearing. It is not necessary for me to express concluded views on all the issues raised by the parties.

43. The Claimants rely on the following bases for removal. First, they say that Timothy is preventing the administration of the Estate from being properly carried out; second, that Timothy has thrown doubt on the validity of the Will; third, that Timothy's conduct shows that he lacks the ability properly to carry out his executorship duties; and fourth, that it has become impossible for the administration to be completed.

44. I will consider the second ground first, namely that Timothy has thrown doubt on the validity of the Will. An executor can be removed who questions, or reserves the right to question, the validity of the will. Whilst it is true that he initially indicated that the Will was invalid (see letter dated 13 December 2022) he later wrote to say that he did not believe that it was cost effective to challenge the validity of the Will. He re-affirmed this position before me, at the directions hearing on 15 May 2024. It is also

true that in his second witness statement, dated 7 July 2024, Timothy accuses Rupert of "fraudulent calumny", as well as making allegations of undue influence which might be said to be only consistent with Timothy reserving his position, and wishing to challenge the validity of the Will at some point in the future. He is also challenging the validity of the hotchpot clause, which Counsel for the Claimants submitted could only be consistent with his challenging the Will as a whole. However, ultimately, I do not find that this particular ground for the removal is made out, the burden lying on the Claimants, in circumstances where Timothy has now made it clear that he does not intend to challenge the validity of the Will, and where he has allowed the caveat which he filed to lapse.

45. However, I do find that the three other grounds on which Timothy's removal as executor are sought are established. The key points seem to me as follows:

(1) The starting point is that Timothy has demonstrated hostility to both his father and brother, who are both beneficiaries under the Will. He has himself, in his own words in his witness statement, referred to the "breakdown" in relationship between himself and his father and brother, due to what he perceives as their culpable failure to bring proceedings against Bethan at the time of the divorce proceedings.

(2) Timothy has also complained about "gifts" which Miles and the Deceased made to Rupert. He complains, in both his evidence and his skeleton argument, about a failure to "verify gifts made to, and received by" Rupert. Timothy seems, for example, angry that his parents purchased a bassoon (for £5,000) and a cello (for £3,300) for Rupert's children, and also complains about Miles and the Deceased assisting with the payment of the school fees for Rupert's children. Whatever

moral claim Timothy may have to demand to be treated equally by his parents (as to which I make no comment) he has no legal obligation to require any sort of equalisation.

(3) What these complaints demonstrate, in my view, is that the relation between Timothy, Miles and Rupert has broken down. The law is perfectly clear. If the administration has come to a standstill because relations between the personal representatives have broken down, or relations between the representatives and the beneficiaries has broken down, the court ordinarily removes the personal representatives, and appoints new ones to enable the administration to be completed.

(4) In his letter of 13 December 2022, Timothy made four demands, headed (A), (B), (C) and (D). In effect, what Timothy was doing was to seek to leverage his position as executor into requiring his father and brother to do various things. That is unacceptable behaviour on the part of an executor, particularly where his demands are unjustified, as several of them clearly are, such as the demand that there be "full and transparent disclosure of all gifts made by my parents to my brother and me", the demand that the hotchpot clause be nullified, and for good measure that Miles renounce.

(5) Unlike his challenge to the validity of the Will, Timothy has persisted in his challenge to the validity of the hotchpot clause, insisting in a letter dated 24 July 2024 that there be equalisation under the hotchpot clause by way of a payment to him by Miles (in the sum of £38,012.250). There is no legal basis for challenging the hotchpot clause. Where a testator recites that a certain amount has been lent or advanced by him to a legatee and directs that amount to be accounted for against

the legacy, and the amount in question has not in fact been lent or advanced, the legatee is nevertheless bound by the recital and must bring that amount into account: see *Theobald on Wills* (19th ed., 2021), at 40-057, citing several authorities, including *Re Wood* (1886) 32 ChD 517. Timothy feels very strongly that the hotchpot clause does not reflect the true financial position, but what he cannot do (as he has sought) is to hold up the administration of the estate by demanding that the clause be, in his words, nullified.

(6) Timothy has also previously insisted that the Estate bring proceedings against his former spouse. This notwithstanding the point that, were the Estate to have brought proceedings against Bethan, she would be entitled to bring a claim for a contribution or indemnity against Timothy, as expressly ordered by the Deputy District Judge. In any event, Timothy now appears to accept that any claim that the Estate might have against Bethan is likely time barred. More recently, however, Timothy has indicated that the Estate must seek to recover the monies which he believes that Bethan should have paid either from Miles, or George Connell (the fourth executor who has renounced), or the solicitors acting for the Claimants, Butcher Andrews LLP ("Butcher Andrews"). These demands are disruptive to the proper administration of the Estate, unjustified and evidence of a misplaced fixation on the part of Timothy on the wrongs which he considers have been done to him.

(7) Timothy in his witness statement has sought to raise an allegation that his father is mentally unfit to carry out the role of executor. There is no evidence to support this allegation. There is evidence from Miles' general practitioner, dated 23 November 2023, that there are no concerns about Miles' cognitive function.

Legally, there is a presumption of capacity under the Mental Capacity Act 2006. I consider this allegation should never have been made.

(8) Equally, Timothy has made (without providing any proper particulars) a vague accusation of fraudulent calumny against Rupert. Again, such an allegation should not have been made.

(9) For good measure, Timothy has made various allegations against various professionals, including Mr Allen, George Connell and Butcher Andrews. He has also threatened Butcher Andrews with a wasted costs order: see letter dated 24 July 2024. This demonstrates that he has not the sufficient impartiality to act as an executor of the estate of his mother.

(10) Timothy asserts in his skeleton argument that the Claimants have failed to establish any valid cause of action against him. That is not the legal test I am applying when deciding whether Timothy should be removed as personal representative. The power of the Court to remove or replace is not dependent on a finding of wrongdoing or fault. The overriding consideration is whether the administration of the estate is being, or can be, carried out properly. I am satisfied that, if Timothy remains in office, it cannot be.

46. I also note in this context that, although the Claimants were willing to step aside and renounce as executors, Timothy has insisted that he continue in office, albeit with an independent executor acting alongside him: see his letters of 20 June and 24 July 2024. Moreover, he asserted his sole right to instruct the independent executor. This unwillingness to agree to step aside again shows his unsuitability to continue as executor, demonstrating his complete lack of independence and indeed, in my view, judgement, to be an executor of this particular estate.

47. I accept the central point made on behalf of the Claimants, which is that Timothy's pursuit of his own agenda has prevented the proper administration of the Estate. He has demonstrated hostility to the other personal representatives. He has made baseless and indeed improper allegations against them, in relation to his father's capacity and his brother's supposed fraudulent calumny. I have no doubt whatsoever that this justifies his removal as executor, and that it is in the best interests of the beneficiaries as a whole (of which he is of course one) that he be removed as executor and as trustee of any trusts created by the Will.

48. That, however, leaves open the separate question whether I should leave Miles and Rupert to continue in office as executors. I turn therefore to consider Timothy's complaints about his brother and father. In doing so, I remind myself that, in accordance with what was said in *Harris v Earwicker*, the power of the Court to remove or replace an executor is not dependent on a finding of wrongdoing or fault, and that the exercise of the power of removal is not dependent on making adverse findings of fact. The overriding consideration is what is in the best interests of the beneficiaries as a whole.

49. Timothy has made, in his letters and witness statements, a variety of complaints against Miles and, to a lesser degree, Rupert. These allegations, as set out in Timothy's skeleton argument, may be grouped into the following categories:

(1) Timothy's allegation that the hotchpot clause "represents a material error of fact";

(2) An accusation that the Claimants have deliberately under-valued the Deceased's estate;

(3) An accusation that Miles has mismanaged the Deceased's financial affairs, both pre and post death, *"by attempting to misappropriate those assets, for his personal benefit, mispresenting them as joint assets passing by survivorship"*;

(4) Finally, the suggestion that the Claimants "have proven themselves to be unsuitable to hold any fiduciary position" and that the Claimants' motivation for these proceedings is "potentially fraudulent".

50. As to these allegations, Timothy's view as to the validity of the hotchpot clause are legally irrelevant. It seems to me that the clause is valid and enforceable. In any event, Miles has indicated in correspondence that he is willing not to enforce it.

51. As to the allegations of under-value and misappropriation of assets, the Claimants have prepared draft estate accounts. Timothy's allegations of financial wrongdoing on the part of the Claimants consist of the following: (a) a missing bank account balance of £8,317.90, (b) a missing £950 refund from Bilney Hall Care Home ("Bilney Hall"); (c) a missing £23,616.40 transferred from the deceased's bank account; and (d) a missing ISA investment of £19,330, plus, (e) misappropriated Attendance Allowance (approximately £12,607); (f) misappropriated pension payments (£6,416.97) and in addition, (g) the "unauthorised gift of £30,000", plus interest, made by Miles to Timothy's former wife, Bethan. In aggregate, the allegedly missing amounts total £52,214.30. The allegedly misappropriated sums come to £19,023.97, leaving to one side for a moment the "unauthorised gift" to Bethan allegation.

52. Many of these complaints have been addressed. It is, for example, accepted that the missing bank account balance of £8,317.90 was, mistakenly, not included in the draft Estate Accounts. It is said that this was an oversight, and not evidence of wrongdoing.

Similarly, Miles accepts that there was a refund from Bilney Hall (in the amount of £1,900, and not £950, as it turns out) and that must be credited to the Estate.

53. As to the allegation of a missing ISA payment of £19,330, this has been addressed in Miles' second witness statement, at paragraphs 32 to 36. Simply put, there is no missing ISA payment. Timothy's complaint is based on a misunderstanding of what was said in a report from Allen Tomas. I am satisfied with the explanation that has been given.

54. Some of Timothy's complaints are clearly misguided, based on a wrong interpretation of either the facts or the law. Timothy has returned repeatedly to the failure on the part of Miles and Rupert to pursue a claim which he says the Estate undoubtedly had against Bethan. I do not find the decision not to issue proceedings against Bethan is a reason to remove the Claimants as executors. My reasons for reaching this conclusion are as follows:

(1) The decision has not caused any loss to Timothy, in his capacity as a person entitled to the residue. If proceedings had been started against Bethan, she would have the right to claim a contribution against Timothy. In any event, those proceedings might have been unsuccessful, as Bethan may have had a defence, based on waiver or acquiescence. Yet further, there is no evidence before me as to what Bethan's financial position is, and whether she would be a person worth suing.

(2) The decision not to pursue a claim against her was taken by Miles and the Deceased. It is more than arguable that the Estate never acquired a valid cause of action as against Bethan, as the liability to repay the loan advance was a joint

asset, which would probably have passed to Miles by survivorship (rather than vesting in the Estate).

(3) Even if I am wrong on that, whether it was worth bringing proceedings against Bethan is, ultimately, a judgement call. I do not need to find that the decision not to issue proceedings was necessarily the right decision; merely that the refusal to issue proceedings does not amount to sufficient grounds to remove the Claimants as executors.

55. Timothy has also complained that the draft estate accounts do not properly value certain assets. He asserts, for example, that a Red Book valuation should have been obtained for the Property. I disagree. It may be perfectly proper for a modest estate to obtain an informal estate agent's valuation, rather than incurring the expense of a full Red Book valuation. He also complains about the accuracy of the chattels valuation relied upon, from "Greenfinch Antiques". In particular, he has spent several paragraphs of his witness statement challenging the valuation of the silver and silver plates, and asserts (by reference to spot price for silver bullion) that the valuation is plainly not fit for purpose, valuing various items of silverware as no more than scrap value. The Court has no way of knowing whether Timothy's complaints are well-founded or not.

56. Some of Timothy's criticisms of the draft estate accounts are extremely petty. By way of illustration, the draft estate accounts include two sums for flowers, "funeral flowers" of £165 and "flowers for internment" for £30. Timothy has complained, citing "IHTM10372 – Funeral expenses (box 81): flowers", that reimbursements are being claimed for personal floral tributes, which are not an allowable expense, as opposed to reasonable expenditure by the estate on flowers for decorating the church

or coffin. It seems to me that Timothy has misunderstood the legal position. The fact that certain expenses, which were recognised as an expense in the estate accounts, may not be an allowable expense for IHT purposes does not mean, without more, that the executors are in any way in breach of their duties as executors in so allowing them.

57. What I am more troubled by is that Timothy is correct to point out that attorneys acting under an enduring power of attorney have an obligation to maintain accounts on behalf of the donor of the power. Miles did not do this. While it may be entirely understandable that an elderly husband caring for his wife did not keep accounts at the time, the legal position is otherwise. I did not understand Counsel for the Claimants to submit that there was no legal obligation to prepare such accounts, merely that the failure to do so in the circumstances was understandable, and excusable.

58. I have considered whether it would be best to remove Miles and Rupert as executors at the same time as removing Timothy, and replace all three executors with independent executor. I remind myself that before the final hearing, Miles and Rupert were prepared to consent to this course. As against that, I must balance the fact this is a comparatively modest estate, and the costs of any independent executor would no doubt be substantial, especially in circumstances where I have no doubt that Timothy would continue to write long and accusatory letters, which the executor would need to consider. I should also have regard to the Deceased's choice of who should be the executor.

59. Ultimately, I remind myself that not every mistake on the part of executors justify their removal. I am not persuaded, the burden being on Timothy, that either Miles (still less Rupert) are guilty of such wrongdoing to justify their removal (which was

Timothy's primary ground for demanding their removal); nor do I find it established that it is in the best interests of the beneficiaries as a whole that they be removed. I am prepared to allow Miles and Rupert to continue in office. However, this is subject to my direction that they draw up and prepare accounts in relation to any dealings with the Deceased's assets whilst she was alive using the power of attorney. I will also direct that they file revised estate accounts, showing the points where they have acknowledged that there are mistakes in the existing draft accounts, and verifying the same with a statement of truth.

60. Those two sets of accounts should then be filed at court, and served on Timothy. I will hear from Counsel as to the time frame by which those accounts should be filed, although I have in mind a period of perhaps 6 to 8 weeks.

61. Moreover, as I am ordering the removal of Timothy as executor, I have jurisdiction under s. 50 of the AJA 1985 to appoint another executor in his stead. Ultimately, I consider that this is justified, notwithstanding that it involves a further expenses to the Estate. The purpose of such appointment is, essentially, three-fold:

(1) there should be an independent person in office to review the two sets of accounts which I am directing the Claimants to prepare;

(2) once those accounts have been filed, the independent executor, in consultation with Miles and Rupert, must consider what further steps need to be taken (for example, the independent executor could decide whether any further valuations to support the accounts are required);

(3) Timothy remains a beneficiary, and there needs to be at least one independent executor who can have regard to his interests, when decisions are being taken on

behalf of the Estate.

62. The executors can also, should it prove necessary, apply to the Court for any further directions. I note also that clause 3 of the Will envisaged that there would be a professional executor. George Connell, a solicitor, was originally appointed to act together with the Claimants and Timothy, but he has (as mentioned above) renounced, following the death of the Deceased. I consider that it would be of use if a professional executor is appointed to act alongside the Claimants.

63. In correspondence, the Claimants (via their solicitors) put forward the names of three firms who could take the role of independent executor. Timothy rejected two of those firms, on the grounds that they were conflicted. The third firm (Hansells, Norwich), was again rejected by Timothy, this time on the ground that *"having read the biographies of the relevant people, I am insufficiently impressed to entrust any of them to be involved with the administration of my late Mother's Estate, particularly on the basis of any recommendation received from you"*. I do not know whether Hansells remain willing to act as executor, but I am prepared to consider the appointment of someone from Hansells to act as the replacement executor. I can hear further submissions from the parties on this point.

64. I will in any event require the Claimants to file a signed consent to act from any proposed independent executor, as well as written evidence as to the fitness of the proposed representative to act, in accordance with Practice Direction 57, para. 13.2. I will also require evidence as to their proposed charge out rate.

Conclusion

65. I will remove Timothy as executor under s. 50 of the AJA 1985 and as trustee of any trusts arising under the will. I will leave the Claimants as executors in office, but I order that a further independent professional executor be appointed to act alongside them, in Timothy's stead.

66. I will hear from the parties as to any further orders which are required following the formal hand-down of this judgment.