In the line of fire

Solicitors will often find themselves stuck in the middle of complex estate disputes, trying to help their clients avoid the expense and upset of going to court. **Richard Roberts** explains how appointing an independent administrator can help

There can be few private client practitioners who never encounter an estate dispute. From my talks to practitioners nationwide, such disputes certainly seems to be on an exponential rise. They come in a whole variety of guises. They may be based on long-standing sibling or family rivalry, or result from the presence of a 'unsuitable' second spouse, or they may be legal claims brought against the estate.

Another common cause of disputes is where executors themselves fall out, either because one refuses to act, or to act promptly, or where their behaviour renders them unsuitable to be executors at all. The complications of dealing with disagreements and claims are exacerbated where one or more of the executors is also personally involved in the dispute as a beneficiary. It is also, if I may say so, becoming increasingly difficult for practitioners to appreciate the many and varied conflicts of interest which can arise, particularly where the firm may have acted for several members of the same family for a great many years.

There are many occasions where family disputes over a will end up in a long-running battle where legal costs continue to mount, and parties become even more polarised. This is often because no one has sought to grasp hold of the problems at an early stage. One matter referred to me had, in my view, escalated far beyond common sense, when it was clear at a very early stage that two siblings would never agree, even on basic principles, let alone the detailed administration of their parent's estate.

Court proceedings should only ever be instigated as a last resort. It is my view that, whenever practitioners feel that, no matter how hard they try, the estate in which they have become involved is becoming enmired in dispute, the first step must be to suggest to all parties that an independent administrator be appointed. Taking this step may be both highly effective and cost-beneficial.

THE REGULATORY CONTEXT

Appointing an independent administrator can also help to support solicitors in meeting their obligations under the SRA Code of Conduct, particularly chapters 3 and 4, covering, respectively, conflicts of interest and confidentiality and disclosure.

Conflicts of interest come in many guises, not all of them obvious. Where the validity of a will is being challenged and you or your firm prepared that will, you should, in my view, seriously consider standing aside in connection with any administration of the estate at an early stage. Where there is a breakdown of the relationship between the executors and the beneficiary / beneficiaries, it is also right and proper that you should consider standing aside in acting in the administration of the estate. There may be situations where you can continue to remain as an executor but instruct another firm of solicitors to advise, but there are subtle, and indeed grave, dangers in your personal judgement being called into question, and costs consequences may follow.

Now that we have outcomes-focused regulation, the issue is surely not whether there is a direct conflict, but how your position is being perceived by all parties in the estate administration.

Confidentiality under chapter 4 of the code is also very important. Professional executors have often acted for a variety of members of the same family, and if they now have materially adverse interests to each other and you hold, either in documentary form or within your own knowledge, confidential information which is material to either or both of them, then you should consider standing aside. Again, it is not necessarily the obvious disclosure issues which may arise, but the way in which the situation is perceived by all parties, particularly if some of those parties are not sophisticated users of legal services.

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WHEN AN INDEPENDENT ADMINISTRATOR CAN HELP

There are three main stages when appointing such an individual can help:

- when there is a breakdown of the relationship between the executors and the beneficiaries;
- when there is a breakdown in the relationship between the executors themselves; or
- when there are legal conflicts of interest or a family argument in which it is becoming impossible for the executor to be seen as impartial by all sides.

Solicitors should be mindful of such issues and try to identify them at an early stage, and then seek the views of all parties as to the appointment of an independent administrator. If a practitioner is faced with proceedings to remove or cite an executor, then again, the appointment of an independent administrator must be considered early.

The person appointed to this role necessarily has no beneficial

interest in the deceased's estate nor any issues arising from it, and acts on the impartial authority of the court. If the independent administrator is a well-respected and experienced probate practitioner with membership of the appropriate organisations such as the Private Client Section, Society of Trust and Estate Practitioners or, indeed, the Association of Contentious Trust and Probate Specialists, then just as with the appointment of a mediator, there should be no reason why their appointment should not be confirmed quickly. Indeed, an increasing part of my professional life is to be appointed to act in this role in disputed estates.

Of course, there may be situations where the estate is simply suffering a loss because there is no one to allow the general administrative process to progress, and even if the parties cannot agree to an independent administrator to deal with the whole of the estate administration, it is worth remembering that the court will appoint an administrator *ad col* to collect in and preserve assets of the estate pending the appointment of an administrator.

GRANTS *AD COL*

I am also increasingly seeing estates where inheritance tax (IHT) is not being paid, because no one is in authority to submit the relevant forms, with the result that interest and penalties are increasing. This is a sad state of affairs given that HM Revenue & Customs (HMRC) is highly cooperative in applications for grants *ad col*.

If the estate involves any form of real property and a mortgage, the ongoing liability of mortgage interest, plus the costs of running the property, ought in my view to be sufficient to warrant an application for a grant *ad col* so the property can be put on the market speedily, and the funds liquidated. A recent case of mine involved a property where the estate was haemorrhaging funds at the rate of £3,000 per month in mortgage payments, running costs and interest on unpaid IHT, and yet it had gone un-administered for some 15 months while the parties involved discussed matters. An early grant *ad col* could have resulted in the property being sold sooner and the estate funds actually being enhanced.

The application for such a grant is extremely straightforward: you simply need to submit a detailed statement of the estate administration, assets and liabilities, and why you wish to request the probate registrar to make an order appointing an administrator *ad col* to take specific steps. The application needs to be supported by full and detailed financial information, and you need to be extremely specific as to what powers you would wish the administrator *ad col* to have. If a sale of a property is required, ensure that this is referred to in the application, as there can, occasionally, be difficulties with purchasers' solicitors or Land Registry feeling that an ordinary *ad col* may be insufficient.

MAKING THE APPOINTMENT

Assuming that you have all parties' agreement to the appointment of an independent administrator, how is this achieved?

The most common application is before a grant has been issued and an administrator is appointed under section 116 of the Senior Courts Act 1981. An application here is appropriate in cases where no grant has been issued in any estate, but for some reason it is not appropriate for the person entitled to take out the grant to be appointed. Either the proposed personal representative (PR) must renounce, or, if they refuse, then an application should be made to the court to pass over the prior claim and appoint any other person. However, given that the whole thrust of this article is to encourage consensual estate administration, it is to be hoped that all parties who might be entitled to a grant will stand aside and allow an independent person to be appointed.

Where a purported executor is unreasonably delaying on the administration of the estate, then interested parties may, of course, make an application under section 116, on the basis that it is necessary or expedient to pass over the appointed PR.

The court has an extremely wide discretion under section 116, and it is possible to deploy this in a timely fashion to sidestep any problems that could arise.

Once appointed, a section 116 administrator has, of course, the same powers as an ordinary administrator, unless the court limits the grant (which it may, of course, wish to do).

If there are executors but you want to remove them, this is done under section 50(1) of the Administration of Justice Act 1985. This may be a useful step to take where a PR already appointed has become incapable of acting, or is failing to deal with the administration of the estate properly.

Throughout the process of the appointment of a section 116 administrator (or indeed, any other), one must ensure that the order contains the appropriate provision for the payment of the administrator's costs and, of course, the independent administrator must make it clear at the start of their office the basis upon which they propose to charge.

If the independent administrator is a well-respected and experienced probate practitioner, then just as with the appointment of a mediator, there should be no reason why their appointment should not be confirmed quickly

With applications under section 116 and section 117, it is important to remember that obtaining the order is only the first step to obtaining the grant. Once the order has been obtained, the administrator must then make the formal application to the Probate Registry, including submitting the appropriate IHT account, plus the administrator's oath and any court order. This procedure must be followed even if the executor or administrator who has been replaced has already submitted these forms. In my experience, though, the Capital Taxes Office / HMRC and my particular local probate registrar in Manchester are more than willing to assist in getting the procedure right.

With the increasing numbers of estate disputes, the role of the independent administrator is becoming more and more common, and I would urge all practitioners faced with an intransigent estate administration to consider such an appointment at a very early stage. Not to do so may be a very unwise decision. ■

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